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(Ed.)

Islam and Human Rights in the European Union

Islam et droits de l'homme dans l'Union européenne

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Impresión y encuadernación: COMARES

The organisers of the XXXIInd Annual Conference of the European Consortium for Church and State Research (September 2021) dedicate the present book to Charalampos Papastathis (1940-2012), Professor of Ecclesiastical Law at the Aristotle University of Thessaloniki, Greece, in honour of his active membership in the Consortium and his invaluable offer as teacher and researcher at his alma matter studiorum, which he served with excellence throughout his academic life.

* * *

Les organisateurs de la XXXIIe Conférence annuelle du Consortium européen pour la recherche sur l'Église et l'État (septembre 2021) dédient le présent livre à Charalampos Papastathis (1940-2012), professeur de droit ecclésiastique à l'Université Aristote de Thessalonique (Grèce), pour rendre hommage à sa qualité de membre actif au Consortium et son offre inestimable en sa qualité d'enseignant et chercheur en matière de son alma matter studiorum, qu'il a servi parfaitement pendant toute sa vie universitaire.

The European Consortium dedicates these Proceedings to Professor Salvatore Berlingò, Professor of Canon and Ecclesiastical Law, at the University of Messina, Italy, in honour of his active membership in the Consortium.

* * *

En hommage au Professeur Salvatore Berlingò, Professeur de Droit Canonique et Ecclésiastique, Université de Messine (Italie), à sa qualité de membre actif au Consortium.

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NOTE: This volume contains the *proceedings of the XXXII[nd] Annual Meeting of the European Consortium for Church and State Research,* held in Thessaloniki (Greece) during the days 23-25 September 2021, concerning the topic *'Islam and Human Rights in The European Union'.*

MESSAGE BY

His All-Holiness Ecumenical
Patriarch Bartholomew

Esteemed Professors,
Distinguished participants,
Dear friends,

It is with gladness that we accepted the kind invitation to deliver a message at this first open session of the International Conference "Islam and Human Rights in the European Union," co-organized by the European Consortium for Church and State Research and the Aristotle University of Thessaloniki. Despite the fact that we were unable to be physically present among you this morning, the means of modern technology have made it possible for us to virtually deliver this address, with the same joy and honor, we can assure you, as if we were in your midst.

We would like to take this opportunity to congratulate the organizers of this Conference, especially Professor Mark Hill QC, Acting President of the Consortium, and Associate Professor Lina Papadopoulou, Director of the Jean Monnet Centre of Excellence "European Constitutionalism and Religion(s)," with their colleagues, because in such a challenging year, they have shown us all a great example of how not to be downcast by our tribulations, but instead to take courage and find ways of turning them into opportunities for research creativity and academic productivity. We pray to the Father of Lights to illumine and guide the members of the Consortium, of this unique network of Europe's leading scholars in Church and State research, as they resume their significant work after the trial of the coronavirus. The ongoing pandemic has proved the vitality of the continuation of the Consortium's notable contribution in this particular field, as both States and Churches still cope with the health crisis and its ramifications.

For this reason, we find it most fitting that this first Conference of the Consortium in the Covid-19 era is dedicated to the memory of one of the Consortium's founding members and most prominent experts in Church-State relations, the late Professor Charalambos Papastathis. We had the privilege to know Professor Papastathis since our early post-doctoral years and to appreciate his thoroughness and thoughtfulness,

as well as his humility and generosity of heart. With Charalambos we shared not only the same age, nor just our love for Ecclesiastical and Canon Law, but above all our commitment to the defence and promotion of the canonically prescribed and sanctified through the centuries-old practice of the Church, responsibilities of the Ecumenical Throne, which Professor Papastathis safeguarded with an unwavering commitment not simply through his scholarship, especially in the field of Mount Athos law, but equally as Archon Nomophylax of the Holy Great Church of Christ. May God give rest to his soul with the righteous and may his memory be eternal before God! We are certain that his presence and scientific contribution shall be long-lasting not only because his extensive scholarship adorns the shelves of prominent legal libraries around the world, but also because the love, admiration and respect of his many students remain alive, as the organization of this Conference aptly testifies.

And despite the fact that Professor Papastathis was not a specialist in Islamic Law, we believe that he would rejoice with the general topic of this Conference, because the issue of the relation between Islam and human rights, or more broadly religion and human rights, goes to the heart of the question of the relationship between religion and law. We are cognizant of the critique often levied against religions, that despite their contribution to the modern human rights revolution, with many religious ideas to act as sources of inspiration for the "trinity" of "liberté, égalité, fraternité," their internal policies and external advocacy have often propagated fundamentalism, intolerance and violence, while their sacred texts know only the language of commandments and prohibitions, without highlighting the dimension of individual rights and freedoms.

We don't deny the reality that religion has a formidable force, capable of both good and evil. Nevertheless, the proper response to the atrocities that have been made in the name of religion should not be its ostracism to the private sphere, as a mere scaffolding that was used once for the erection of the edifice of the human rights and, since now has outlived its purpose, it should be demolished in order not to obstruct any longer the majestic view of these rights' enjoyment. To the contrary, religions should be invited to cultivate their virtues through a process of reengaging the regime of human rights, not as a Trojan horse bearing secular ideas imposed on them *from without*, but by being open *from within* to fresh methods of interpretation of their sacred texts that will allow them to reassume their traditional patronage of human rights. The goal will be not the creation of a religious construction of the human rights, but the reclaim from the religious communities of their legitimate contribution to the secular human rights dialogue in a non-monopolistic fashion and with a listening and prayerful heart that will simultaneously nurture and challenge the human rights regime.

Therefore, not only religions are in need of human rights, but the latter also need religions. First, the right to religion is considered as the mother of many other individual and associational rights. Please do not understand this phrase in a corporatist

sense, as if made by a trade union leader concerned about his members' benefits. The point here is that for both the religious individual and the religious association, from the right to religion flows a series of other depending rights. In no case believers should be forced to suppress a part of themselves —their faith— in order to enjoy these rights. Moreover, indeed, the religious sacred texts contain many obligations, but these obligations are those prophetic voices needed in order to prevent the rights from becoming mere libertarian claims of self-indulgence. Last but not least, as the recent economic crisis and the ongoing pandemic has shown, the state cannot serve as the sole guarantor of human rights. The various faith traditions can and should contribute to the development, deepening and realization of these rights.

In short, all of us, religious and civic communities are invited to perceive the relationship between human rights and religion or, if you prefer, more broadly, between law and religion, as two communicating vessels, συγκοινωνοῦντα δοχεῖα, with the one being in constant need of the other. We sincerely hope that the Conference proceedings will significantly contribute to the further clarification and elaboration of this relationship.

With these thoughts in mind, we wish you thoughtful deliberations and productive outcomes, which we look forward to reading in print, in continuation of the Consortium's praiseworthy practice of publishing the proceedings of the past conferences, with the goal of reaching the widest possible audience. May the grace and the rich mercies of the God of righteousness be with all of you!

Thank you very much for your kind attention.

PROLOGUE

Evaggelos Venizelos[1]

I have to apologize because extraordinary obligations deprived me of the joy of physical presence at the conference and the opportunity to welcome you in my city, Thessaloniki, and our University. I therefore ask for your understanding for the use of digital means.

Congratulations are in order for my dear colleague, my old student, Lina Papadopoulou, whom I watch with admiration, along with the other members of the Organizing Committee for the impeccable preparation of this relevant, crucial and ambitious conference.

Such a conference is the most appropriate, substantial and sensitive way to honor the memory of Professor Charalambos Papastathis, a dear friend and colleague at the Law School of the University and a founding member of the Consortium.

Charalambos Papastathis was an emblematic figure in ecclesiastical and canon law and in the history of Byzantine law. A dedicated and insightful researcher of rare ability for synthesis; a guardian of the Orthodox tradition, while remaining at the same time cosmopolitan and open to the new currents in international scientific discourse. He passionately served university teaching and research, as well as the Hellenic Republic in the critical field of the relationship between State and Church.

Professor Charalambos Papastathis was an authoritative defender of religious freedom, pluralism and tolerance. All these while displaying high-quality scientific discourse, courtesy, a British sense of humor and self-sarcasm, proof of his intellectual level and his great culture.

His son, Professor Konstantinos Papastathis, a member of the conference organizing committee, continues on some very interesting aspects of his father's work.

* * *

[1] Professor of Constitutional Law, Faculty of Law School, Aristotle University of Thessaloniki, former Vice-President and Minister of Foreign Affairs of the Greek Government.

The subject of the conference forces us to once more confront the historical foundations and the foundations of values of European constitutionalism, i.e. the foundations and durability of European democracy as one of the two most comprehensive versions of liberal democracy, the second being American liberal democracy.

The secular nature of European constitutional culture and the formation of European constitutional ethics different than Christian ethics, is the historical, regulatory, normative and jurisprudential result of a complex process full of conflicts and contradictions that has lasted for about two and a half centuries.

The question therefore is whether this acquis of European constitutionalism can suffer a setback and whether we can go back to much earlier stages of the relationship between constitutionalism and religion, in order to fully and unrestrictedly protect the religious freedom of Muslims, individuals and communities belonging to the legal orders of European constitutionalism, i.e. the national legal orders, the legal order of the EU and that of the ECHR.

The question concerns the institutional framework in which civil society is constituted and operates, the framework of European constitutionalism, with its internal pluralism, antinomies and conflicts, and the institutional framework in which the relationship between individuals and collective civil society entities with the state and international organizations or hybrid entities operates, such as the Council of Europe and the EU.

As you know, Greece possesses long experience of the special legal status of the Muslim minority in Thrace and the implementation of Sharia in the context of the Greek legal order, and therefore of the legal order of the EU and the legal order of the ECHR. Even with a delay, the Hellenic Republic has the obligation to fully comply with the case law of the ECtHR. As a former rapporteur of the Parliamentary Assembly of the Council of Europe on the implementation of the Court's judgments and as a former member of the Committee of Ministers, I express my satisfaction and hope that the Supreme Court of Civil and Criminal Justice, the Areios Pagos court, will not continue to resist.

Accepting the case law of the ECtHR and the CJEU is, after all, the simplest and safest way to safeguard the European constitutional acquis. The Greek Constitution is open to its interpretation in accordance with the ECHR and the EU Charter of Fundamental Rights, so that the "augmented Constitution" can be formed; the Constitution that provides the greatest protection of human rights.

The comparison between European constitutionalism and the so-called Islamic constitutionalism in the light of the latest developments in Afghanistan and in the light of the need to restructure the West as a strategic entity and as a mechanism for protecting democracy, the rule of law and human rights, highlights the stakes at hand.

European constitutional democracy is sensitive, flexible, pluralistic, liberal, inclusive, but it must also be self-protective. It must ensure the conditions for its survival.

This is especially true now in times of multiple and continuous crises (economic, health, climate and security crises) that are transformed into interpretative dilemmas for the normative texts of European constitutionalism.

A democratic and liberal legality that undermines liberal democracy itself as a culture and as an institutional acquis is reminiscent of the cry of the Bourbons "la légalité nous tue - legality kills us."

History solves the great dilemmas of constitutional theory, the interpretation of the Constitution and national and international judicial control. The history of the eve of World War I, as well as that of the interwar period, teaches us that sleepwalkers, both political and judicial ones, proved to be calamitous.

European constitutionalism respects and protects Islam as a religion and the religious freedom of Muslims, with the only prerequisite being that both Islam and the Muslims under the jurisdiction of the European legal order respect this European constitutionalism as a lesson and a historical acquis.

RESPECTER LES DROITS HUMAINS EN CONCILIANT LES DROITS DES COMMUNAUTÉS MUSULMANES ET LES POLITIQUES RELIGIEUSES DE L'ETAT

Francis Messner[1]

La religion musulmane est en raison de son institutionnalisation récente et de son fractionnement en communautés nationales difficile à intégrer dans les statuts des cultes des Etats européens. Ce déficit d'organisation qui facilite les dérives communautaristes n'est pas sans inquiéter les pouvoirs publics qui sont à la recherche de solutions adaptées.

I. Le contexte actuel

Les populations musulmanes des Etats européens[2] ne forment pas un ensemble homogène partageant les mêmes idées religieuses et les mêmes traditions culturelles. Elles sont au contraire divisées en différents courants, parfois doctrinalement antinomiques et dépendent parfois d'Etats étrangers. Les musulmans d'origine turque sont ainsi composés d'individus affiliés au DITIB, c'est-à-dire à l'Islam officiel qui est à la fois une administration de l'Etat turc mais également une autorité religieuse, du Milli Gurus proche des frères musulmans et des alévis proches du chiisme. En France, si l'islam maghrébin est majoritaire sur l'ensemble du territoire, l'islam turc l'emporte dans l'est de l'hexagone alors que dans le département de la Réunion prévaut un islam d'origine indienne[3]. De plus la population musulmane peut être importante en nombre ou au contraire infime et même quasi inexistante. En ce sens

[1] Francis Messner is a professor at the University of Strasbourg.

[2] Voir la base de données *EUREL pour les données sociologiques et juridiques sur l'islam* <https://www.eurel.info/>. Pour la France voir P. Portier and J.-P. Willaime, *La religion dans la France contemporaine. Entre sécularisation et recomposition* (Paris, Armand Colin, 2021).

[3] M. Arkoun, *Histoire de l'islam et des musulmans en France du Moyen Age à nos jours* (Paris, Albin Michel, 2006), p. 1220; H. Amod, 'Les statuts des imams à l'ile de la Réunion' in: Francis Messner (dir), *Le statut des ministres du culte musulman en France. Etudes comparatives et proposition de charte nationale* (Strasbourg, PUS, 2021), pp.153-64.

le modèle invoqué d'un islam communauté de croyants unie dans l'*Umma* reste dans les faits un objectif à atteindre.

Les problèmes liés à l'organisation et au statut de la religion musulmane qui agitent les Etats européens, ont été générés par cet éclatement cultivé par certains acteurs religieux et les Etats étrangers concernés. Ces difficultés trouvent leur origine dans la difficulté de mettre en place une représentation centralisée de la religion musulmane et de produire une constitution ou un règlement détaillant les différents éléments de son organisation et de son fonctionnement. Ainsi en l'absence d'un statut précis, la formation et le recrutement des cadres et ministres du culte musulman[4], s'imposent comme une difficulté dans la plupart des pays comportant des communautés musulmanes significatives.

L'argument de la « spécificité » du culte musulman a souvent été avancé pour justifier cette situation chaotique. Le « caractère propre », l'auto compréhension de l'islam et donc par voie de conséquence son droit à la liberté d'organisation ferait obstacle à son intégration dans les statuts des cultes nationaux. Les pouvoirs publics feraient dès lors violence à la religion musulmane pour la faire entrer dans un cadre unique et centralisé en s'adossant à des politiques religieuses maintenant dépassées comme le régalisme, le gallicanisme, le joséphisme du XIX^{e} siècle ou encore à des réflexes post coloniaux. Enfin en France des acteurs socio-politiques estiment qu'il n'y a pas lieu de disserter sur l'organisation du culte musulman et son intégration dans le régime des cultes français en raison de l'inexistence de ce dernier. La religion serait dans le cadre de la laïcité une affaire exclusivement privée.

Mais l'argument de la « spécificité » du culte musulman est mis à mal par la doctrine islamique, par le droit des cultes et par l'observation des pratiques administratives en vigueur dans les Etats européens[5] et dans ceux extra européens ou l'islam est la religion majoritaire. En effet si les textes fondateurs de la religion musulmane n'imposent pas de modèle d'organisation, ce qui est également le cas pour les textes fondateurs des Églises chrétiennes[6] et de la religion juive, ils ne s'opposent pas à une organisation structurée du culte musulman. Par ailleurs nombre de pays non européens dont l'islam est la religion d'État ou une forme de culte reconnu ont de manière au-

[4] Messner (dir), *Le statut des ministres du culte musulman en France;* F. Messner (éd), 'Quel statut pour les ministres du culte?' (2019) 8 *Revue du droit des religions*.

[5] M. Ventura (ed), *The Legal Status of Old and New Religious Minorities in the European Union – Le statut juridique des minorités religieuses anciennes et nouvelles dans l'Union européenne* (Granada, Comares, 2021); R. Potz and W. Wieshaider (eds), *Islam and the European Union* (Peeters, Leuven 2004).

[6] A. Faivre, *Naissance d'une hiérarchie. Les premières étapes du cursus clérical* (Paris, Beauchesne, Coll. Théologie historique, 40, 1977).

toritaire organisé cette religion dans le cadre de leur administration[7]. Ainsi le statut des ministres du culte est dans la plupart des cas fixé par les États musulmans[8] alors même qu'il est ignoré dans les traités de *fiqh*. Même l'Arabie Saoudite, qui s'oppose à la codification du droit musulman, a conféré un statut à l'imam. Enfin, des États européens ont relevé avec plus ou moins de succès, le défi d'une intégration de l'islam dans leurs statuts ou régime des cultes (Autriche, Belgique, Espagne)[9].

La relative désorganisation du culte musulman en Europe peut s'expliquer par différents facteurs. Cette religion ne bénéficie de la même antériorité et donc de la même expertise en droit des cultes/droit ecclésiastique que les religions historiques. Elles ont au cours des siècles négocié leur statut avec les pouvoirs publics. Elles bénéficient de plus de l'appui d'un solide réseau de juristes. Par ailleurs certains responsables musulmans ont voulu marqué leur distance par rapport au régime national des cultes pour affirmer leur différence religieuse et ainsi refuser ce qu'ils ressentaient comme une occidentalisation ou une *churchification* de l'islam. Mais surtout l'islam européen est composé de communautés d'origine nationale, notamment algérienne, marocaine, turque et pakistanaise pour lesquelles les représentations consulaires continuent de jouer un rôle prépondérant en pesant lourdement sur le fonctionnement des communautés. Seule la Société des frères musulmans a pris institutionnellement ses distances avec les États étrangers et privilégie avec une certaine habilité une transversalité des écoles juridiques sunnites.

Cette situation n'est satisfaisante ni pour les communautés musulmanes, ni pour les pouvoirs publics en Europe. L'émiettement institutionnel de l'islam ne facilite pas l'émergence d'un discours doctrinal considéré comme légitime, en capacité de s'imposer aux diverses communautés musulmanes confrontées à la démultiplication des discours fondamentalistes et radicaux diffusés par des individus et des groupements marginaux généralement par le biais des réseaux sociaux. Ce déficit d'un contre discours libéral adapté au contexte européen est sur un autre registre conforté par l'envoi d'imams fonctionnaires détachés notamment par l'Algérie, la Turquie et dans une moindre mesure le Maroc[10]. Ces agents cultuels ne maitrisent pas toujours la langue du pays d'accueil et ont une connaissance limitée de son contexte socio

[7] S. Akgönül, *Religions de Turquie, religions des Turcs: nouveaux acteurs dans l'Europe élargie* (Paris, L'Harmattan, 2005).

[8] Voir A. M. Ramadan, 'Les conditions de l'imamat dans la prière rituelle: La position des juristes musulmans' in: Messner (dir), *Le Statut Des Ministres Du Culte Musulman en France*, pp. 19-47 et S. D. Niane, 'Les statuts des imams au Sénégal' in: Messner (dir), *Le Statut Des Ministres Du Culte Musulman en France,* pp. 233-48.

[9] Voir G. Robbers (ed), *State and Church in the European Union* (3rd edn, Baden Baden, Nomos, 2019).

[10] Voir S. Jouanneau, *Les Imams en France. Une autorité religieuse sous contrôle* (Paris, Agone, 2013).

religieux. Leur impact auprès des jeunes musulmans est de ce fait faible et les entraine à chercher des réponses ailleurs que dans les mosquées labellisées. Cette situation ne favorise pas l'intégration des populations musulmanes et provoque au contraire des réactions d'incompréhension notamment au sein des populations des Etats ou une assimilation aux contours rigides était jusqu'à une période récente présentée comme un modèle.

Cette inorganisation joue également en défaveur des communautés musulmanes et fragilise leur capacité d'action. Ainsi en France l'organisme représentatif du culte musulman, le Conseil français du Culte musulman/CFCM ainsi que les Conseils régionaux du culte musulman/CRCM sont contrairement aux cultes chrétiens et juif adossés au droit commun d'association et cela conformément à l'article premier des statuts du Conseil français du culte musulman rédigé avec l'aval des autorités publiques. Cette architecture exclut toute création d'union d'associations cultuelles représentant un culte au niveau national. L'union doit en effet être exclusivement constituée d'associations cultuelles, comme cela est le cas du consistoire israélite de France et du synode de l'Église protestante unie de France et de la Conférence épiscopale de France. Cette désorganisation a des conséquences financières. Les associations loi 1901 représentant le culte musulman ne bénéficient pas des avantages fiscaux attachés au statut particulier des associations cultuelles. L'absence de séparation entre cultuel et culturel constitue en outre un obstacle à une gestion efficace des différentes activités cultuelle, culturelle et éducative. Enfin l'organisation et la représentation du culte musulman s'opèrent hors du régime des cultes fixé par les textes juridiques alors que ce régime a pour fonction de faciliter les relations entre l'État et les religions et la coopération ou le dialogue entre ces deux partenaires et surtout d'intégrer les religions dans la société[11].

II. Les solutions préconisées

La politique religieuse des Etats européens concernés par une montée significative du radicalisme islamiste, par l'inorganisation des communautés musulmanes et par l'interventionnisme des Etats étrangers, est caractérisée par la volonté d'intégrer l'islam dans les statuts des cultes, de solliciter l'adhésion de ses membres aux valeurs communes et de faciliter un recrutement et une formation des cadres religieux en Europe.

[11] R. Puza and N. Doe (eds), *Religion and Law in Dialogue: Convenantal and Non-convenantal Cooperation between State and Religion in Europe - Religion et droit en dialogue: collaboration conventionnelle et non-conventionnelle entre l'État et religion en Europe* (Peeters, Leuven, 2006).

A. **Engagement des religions à respecter les droits fondamentaux**

Pendant une longue période les religions et Eglises majoritaires en Europe détenaient un statut de religion d'Etat. Leur doctrine a ainsi nourri le socle des valeurs communes. Actuellement les Etats européens conditionnent leur soutien à l'islam et plus largement aux autres communautés religieuses à un engagement à respecter les droits fondamentaux. Ce renversement est d'actualité dans tous les Etats européens désormais neutres en matière religieuse même si sa mise en œuvre diffère en fonction des politiques et des procédures retenues par les pouvoirs publics. Ainsi les conventions signées entre l'État du Grand-duché du Luxembourg et les communautés religieuses établies au Luxembourg le 26 janvier 2015[12] stipulent dans leurs préambules que les communautés religieuses bénéficiant de conventions garantissent « le respect des droits et libertés constitutionnels, (de) l'ordre public et (des) valeurs démocratiques, la promotion des droits de l'homme et de l'égalité de traitement ainsi que (de) l'égalité entre hommes et femmes ». La violation de ces engagements entraine la fin du subventionnement public. Le Luxembourg traite en ce domaine toutes les religions conventionnées de manière égale alors que d'autres Etats continuent de faire une distinction entre les différents groupements religieux. Ainsi l'accord de 2013 signé entre la Ville État de Hambourg et les communautés musulmanes dispose que les deux partenaires se reconnaissent dans un socle de valeurs communes issues de la loi fondamentale et qui comprend notamment la dignité humaine, le respect des droits fondamentaux, la tolérance envers les autres formes de pensée religieuse et philosophiques et le respect des principes démocratiques dans le cadre de la vie en société. Bien plus, les deux partenaires s'engagent à lutter conjointement contre toute forme de discrimination fondée sur l'origine, le genre, l'orientation sexuelle la diversité des convictions religieuses et politiques[13]. De telles exigences n'ont pas à ce jour été formulées dans les conventions et accords signés entre les Etats fédérés et l'Eglise catholique et les Eglises territoriales protestantes.

De même l'article 2 de la loi autrichienne sur l'islam de 2015[14] précise que les sociétés religieuses musulmanes, leurs communautés locales et leurs membres pris individuellement ont le devoir de respecter les lois. La doctrine et les règlements pro-

[12] F. Messner, 'La réforme des cultes au Grand-Duché du Luxembourg en 2015' (2016) 1 *Revue du droit des religions,* pp. 185-94; G. Robbers, 'State and church in Luxemburg' in: Robbers (ed), *State and Church in the European Union*, pp. 353-62.

[13] Accord entre la Ville État de Hambourg et les communautés musulmanes, Art 2 ; <https://www.buergerschaft-hh.de/ParlDok/dokument/38534/1-vertrag-zwischen-der-freien-und-hansestadt -hamburg-dem-ditib-landesverband-hamburg-schura-–-rat-der-islamischen-gemeinschaften-in-hamburg.pdf>.

[14] Voir R. Potz, 'State and Church in Austria' in: Robbers (ed), *State and Church in the European Union,* pp. 435-60; F. Messner, 'La loi de 2015 sur l'Islam en Autriche' (2016) 2 *Revue du droit des religions*, pp. 177-84.

pres à l'islam ne peuvent se substituer au droit autrichien. Le gouvernement autrichien a été moins sévère avec l'Église catholique au début du 20e siècle. Le concordat du 5 juin 1933 stipule dans son article premier : « Elle (la République d'Autriche) reconnaît le droit de l'Église catholique d'édicter, dans le cadre de ses attributions, des lois, décrets et règlements ; elle n'empêchera ni ne compliquera l'exercice de ce droit. »

Enfin en France la loi de 2021[15] confortant le respect des principes de la République instaure un système a priori de reconnaissance des associations cultuelles et subordonne l'octroi des subventions publiques aux associations y compris aux associations à objet cultuel qui n'ont pas été reconnues en tant qu'associations cultuelles à un engagement républicain[16]. En outre le refus d'une fédération musulmane de signer la « Charte des principes pour l'islam de France »[17] rédigée par le CFCM avec un accompagnement des pouvoirs publics entraine sa marginalisation. Cette charte de huit pages comprend l'engagement à respecter les droits de l'homme et du citoyen : liberté, égalité, fraternité ; la laïcité et les lois de la République ; l'ordre public mais également la promotion de la raison et du libre arbitre. Elle appelle en outre à ne pas criminaliser le changement de religion, à promouvoir l'égalité homme femme, à rejeter toute discrimination fondée notamment sur le sexe et l'orientation sexuelle, à lutter contre toute forme d'instrumentalisation de l'islâm à des fins politiques et à respecter la neutralité des services publics. Les fédérations non signataires de la charte ne sont plus considérées comme représentatives de l'islam de France et cessent d'être invitées aux instances nationales et départementales de dialogue avec l'islam créées par le ministère de l'Intérieur. Elles risquent en outre d'être interdite de subventionnement public[18].

Dans ce contexte de respect du droit étatique, la question de l'application de la Sharia revêt sauf exception un caractère théorique. Dans la plupart des États européens les formes de régulation normative des religions ne sont pas des ordres juridiques produisant du droit reconnu par l'État ou s'imposant à l'État. Quand le juge

[15] Loi n° 2021-1109 du 24 août 2021, *JO*, 25 août 2021.

[16] Art 12, loi du 24 aout 2021, les associations concernées s'engagent "1°A respecter les principes de liberté, d'égalité, de fraternité et de dignité de la personne humaine, ainsi que les symboles de la République au sens de l'article 2 de la Constitution ; 2°A ne pas remettre en cause le caractère laïque de la République ; 3° A s'abstenir de toute action portant atteinte à l'ordre public." Voir CC, 13 août 2021, n° 823 DC, *JO*, n° 197 du 25 août 2021.

Les symboles de la République comprennent, aux termes d'une décision du Conseil constitutionnel l'emblème national, l'hymne national et la devise de la République. De même toujours selon le Conseil constitutionnel, « par actions portant atteintes à l'ordre public » il faut entendre les actions susceptibles d'entraîner des troubles graves à la tranquillité et à la sécurité publique.

[17] 'Charte des principes pour l'Islam de France' <https://www.aa.com.tr/uploads/userFiles/a0375fc1-552e-4508-bc69-6dc1b8417822/Charte-des-principes-17.01.2021-1-.pdf>.

[18] Voir F. Messner, 'Le financement des paroisses et des mosquées en droit local alsacien-mosellan. L'affaire de la construction de la mosquée Eyyub Sultan' (2021) 91 *Revue du droit local*, pp. 7-15.

est confronté à un élément du droit interne des religions cet élément est qualifié de fait religieux. Le fait religieux désigne dans ce cas une réalité sociale ou individuelle et non juridique. L'État intervient dans un conflit religieux dont il est saisi pour le régler selon ses principes et les règles de droit qui sont les siens. Le juge ne reprend pas à son compte un ordre normatif confessionnel qu'il ne reconnaît pas[19].

Consolider les financements nationaux du culte, mettre fin aux imams détachés et promouvoir la formation des imams dans les Etats européens.

Les Etats étrangers tiennent à exercer un contrôle sur leurs ressortissants installés en Europe. Ces populations, potentiels groupes de pression au sein des Etats européens sont aussi susceptibles de soutenir ou de générer une opposition au régime politique de leur pays d'origine ou au contraire de conforter son pouvoir. L'influence des Etats étrangers s'opère le plus souvent par le de biais d'une importante dépendance économique qui peut prendre deux formes, l'envoi d'imams fonctionnaires des Etats d'origine et le virement d'une dotation annuelle à certaines mosquées qui sont parfois propriétés de l'Etat étranger financeur[20]. Ces interventions de pays étrangers acceptées dans un premier temps comme un moindre mal, sont dorénavant perçues par les Etats européens comme autant de mécanismes facilitant un communautarisme mettant à mal les politiques d'intégration et l'adhésion aux valeurs communément partagées. Les politiques mises en œuvre par les gouvernements des Etats concernés pour contrer ces agissements visent le même objectif, mais leur mise en œuvre varie en fonction des particularités des droits des cultes nationaux. Ainsi l'Autriche impose aux membres des sociétés religieuses musulmanes constituées en corporation de droit public de financer l'ensemble des besoins religieux et cultuels[21]. Le financement par des institutions ou des États étrangers est interdit aux communautés musulmanes qui bénéficient de ce statut privilégié. Cette disposition a notamment pour but de mettre fin au détachement d'imams fonctionnaires de la direction des affaires religieuses de Turquie (*Dyanet*). Les imams devraient désormais être formés et recrutés en Autriche. Pour le législateur, le soutien économique d'un État étranger induit une dépendance qui ne garantit pas l'existence dans la durée d'une société religieuse constituée en corporation de droit public. L'accent est dans l'exemple autrichien, mis sur la formation des cadres religieux musulmans qui est désormais prise en charge par l'université publique avec la création d'une faculté de théologie musulmane dans

[19] R. Potz and W. Wieshaider (eds), *Juridictions religieuses et l'Etat – Religious Adjudication and the State* (Granada, Comares, 2015).

[20] J.-M. Guénois, 'Angers s'est opposé à l'acquisition d'une mosquée par le royaume au Maroc', *Le Figaro*, 27 Oct 2020 <https://www.lefigaro.fr/actualite-france/angers-s-oppose-a-la-cession-d-une-mosquee-au-maroc-20201027>.

[21] Voir R. Potz, 'State and Church in Austria', pp. 435-60.

l'université de Vienne[22]. Par cadre religieux il faut entendre les imams mais également les professeurs de religion musulmanes dans les écoles publiques. De même en Allemagne six facultés de théologie musulmane (Tübingen, Munster, Osnabruck, Francfort-sur-le-Main et Giessen) ont été créées dans les universités publiques suite à une recommandation du conseil des science/*Wissenschaftsrat* dès 2010. Le Conseil des sciences[23] estime que la création de facultés de théologie musulmane dans les universités publiques garantit la qualité de l'enseignement et de la recherche de et dans cette discipline ; permet la confrontation avec d'autres formes de pensée et d'idéologie et fournit les bases conceptuelles pour le dialogue interreligieux garant de la paix religieuse. Il considère également que les imams doivent être formés en Allemagne. La Belgique a reconnu le culte musulman en 1974 et a rémunéré les imams relevant de cette religion plus tardivement en raison de difficultés liés à l'émergence d'une représentation de cette religion. Mais cette intégration de l'islam dans le régime des cultes reconnus qui n'était assorti d'aucune interdiction d'un financement étranger n'a pas empêché la Turquie de continuer de nommer des imams détachés alors que tous les emplois d'imams rémunérés par l'administration ne sont pas pourvus. La création d'une faculté de théologie musulmane reste un objectif en Belgique. Ainsi la faculté de théologie et de sciences religieuses de l'Université catholique de Leuven a complété son master de sciences des religions par une option « théologie musulmane » plus proche cependant des sciences humaines et sociales des religions que de la théologie. Les tentatives en vue de créer une faculté de théologie à Louvain n'ont pas encore abouti malgré la création d'un institut de la promotion des formations sur l'islam en Wallonie[24].

En France le président de la République a annoncé la fin des imams détachés pour 2024[25]. Les accords avec l'Algérie, la Turquie et le Maroc ne seront pas renouvelés. Mais des solutions avaient été préconisées en vue de la formation des imams sur le

[22] Voir W. Wieshaider, 'Les enjeux de l'ancrage de la théologie musulmane dans une université publique en Autriche' in: Francis Messner et Moussa Abou-Ramadan (dir), *L'enseignement universitaire de la théologie musulmane. Perspectives comparatives* (Paris, Cerf, 2018), pp. 113-20.

[23] 'Empfehlungen zur Weiterentwicklung von Theologien und religionsbezogenen Wissenschaften an deutschen Hochschulen', *Wissenschaftsrat*, 2010 <https://www.wissenschaftsrat.de/download/archiv/9678-10.pdf?__blob=publicationFile&v=1>.

[24] J. F. Husson, 'Le statut des imams en Belgique' in: Messner (dir), *Le statut des ministres du culte musulman en France*, pp. 165-84; J. F. Husson, 'Attentes des pouvoirs publics en matière de formation des cadres musulmans. Le cas Belge' in: Messner et Abou-Ramadan (dir), *L'enseignement universitaire de la théologie musulmane*, pp. 149-62. Pour la formation des cadres religieux notamment musulmans dans les Etats européens, voir F. Messner (dir), *La formation des cadres religieux en Europe* (Granada, Comares, 2015).

[25] 'La République en actes : discours du Président de la République sur le thème de la lutte contre les séparatismes', *Élysée,* 2 Oct 2020 <https://www.elysee.fr/emmanuel-macron/2020/10/02/la-republique-en-actes-discours-du-president-de-la-republique-sur-le-theme-de-la-lutte-contre-les-separatismes>.

territoire national dès les années 2000. Dans un premier temps le gouvernement a privilégié une formation à l'intégration des ministres du culte musulman par le biais d'un diplôme universitaire (DU) articulé autour de la connaissance des institutions de la France, de son histoire religieuse, de la laïcité, du droit étatique des religions et des lois de la République[26]. Cette solution visant essentiellement à éduquer les imams détachés permettait d'écarter une discussion embarrassante sur la formation théologique des ministres du culte musulman dont le portage par une institution publique a été jugé contraire au principe constitutionnel de laïcité par l'administration. Un décret de 2017 rend ce diplôme obligatoire pour les aumôniers rémunérés par l'État. L'obligation de diplôme initialement envisagée pour les aumôniers musulmans a été étendue pour des raisons de non-discrimination aux aumôniers rémunérés de toutes les confessions religieuses concernées.

La création d'une formation civile et civique n'a pas résolu la question de la formation théologique et plus largement de la formation en sciences humaines et sociales de l'Islam. Le rapport Messner sur la formation des cadres religieux musulmans de 2015[27] a préconisé l'instauration de pôles d'excellence en sciences humaines et sociales de l'Islam au sein de quelques universités aux fins de fédérer les meilleurs spécialistes français de ce champ d'études « tout en développant des réseaux associant des enseignants chercheurs et des chercheurs d'universités étrangères ». De même, le rapport consacré à la formation des imams et des cadres religieux musulmans de Catherine Mayeur-Jaouen, Mathilde Philip-Gay et Rachid Benzine[28] remis au ministre de l'Éducation nationale, de l'Enseignement supérieur et de la Recherche et au ministre de l'Intérieur en 2016 prône la création de pôles d'excellence en islamologie, sur les mondes musulmans et le fait religieux. Les deux rapports recommandent la création de bi-parcours[29] entre universités publiques et instituts privés de formation d'imams. Ces bi-parcours donneraient accès à l'apprentissage de disciplines non-théologiques dans le champ des sciences humaines et sociales. La décision de mettre fin aux imams détachés a entrainé de la création d'Instituts d'islamologie en capacité de former des cadres religieux musulmans. Ainsi à Strasbourg un pôle d'islamologie membre

[26] F. Messner and P. H. Prélot, 'Un diplôme pour l'aumônerie des services publics' (2017) 4 *Revue du droit des religions*, pp. 181-96.

[27] F. Messner (dir), *La formation des cadres religieux musulmans* (Ministère de l'Intérieur et ministère de l'Enseignement supérieur et de la recherche, 2015 <http://dres.misha.cnrs.fr/IMG/pdf/rapp_messner_version_diffusion.pdf>.

[28] <https://www.letudiant.fr/static/uploads/mediatheque/EDU_EDU/6/3/1455063-rapport-sur-la-formation-des- imams-4-original>.

[29] Par bi parcours il faut entendre un système de formation des ministres du culte musulman, certifié par un organisme central du culte musulman, comprenant un parcours de sciences humaines et sociales de l'islam dispensé par les universités publiques et un parcours pris en charge par des établissements privés de théologie musulmane relevant de communautés religieuses.

du GIP propose dès cette rentrée universitaire (2022/2023) une licence et un master d'islamologie, une licence et un master de langue arabe, un master d'études inter-religieuses et un diplôme universitaire de formation civile et civique. Une réflexion a été engagée pour créer des diplômes adaptés aux parcours professionnels des agents cultuels et formaliser des projets de recherche sur l'islam. La Grande mosquée de Strasbourg et l'école de formation des aumôniers musulmans de Strasbourg se sont d'ores et déjà engagés à inscrire leurs cadres en fonction ou leurs futurs cadres dans un de ces diplômes à charge pour eux de compléter les enseignements dispensés par l'université publique par des cours de théologie confessionnelle. Cette solution permet à ces étudiants de bénéficier d'un statut d'étudiant et d'acquérir au terme de leurs parcours un diplôme d'Etat tout en se préparant à la fonction d'imams ou d'enseignant de religion.

B. **L'organisation et la représentation du culte musulman**

L'éclatement des communautés musulmanes par fédérations et par nationalités, le poids des Etats étrangers ne facilitent pas une organisation unifiée du culte musulman. Cette organisation comporte deux éléments pivots, la création d'une représentation bien identifiée et l'intégration de cette religion dans le statut des cultes. Les deux sont liés.

Ainsi en France l'organisation et la représentation du culte musulman s'opèrent hors du régime des cultes fixé par les textes juridiques[30] alors que ce régime a pour fonction de faciliter les relations entre l'État et les religions et d'intégrer ces dernières dans la société[31]. L'évitement du recours au statut d'association cultuelle dans la représentation du culte musulman découle de la volonté de distinguer les compétences respectives des CFCM/CRCM et des fédérations. Aux premiers seraient confiées des tâches à caractère essentiellement administratif, aux secondes la tutelle des activités en rapport avec le spirituel, la doctrine et la théologie. Le CFCM représentation du culte musulman dont plusieurs fédérations membres n'ont pas signé la charte des principes pour l'islam de France et ne sont donc plus *persona grata* auprès des pouvoirs publics est actuellement en pleine déliquescence. A l'avenir les pouvoirs publics vont essentiellement dialoguer avec des partenaires locaux ou départementaux (Forum de l'Islam de France/FORIF, Conseils départementaux du culte musulman) en phase avec la politique religieuse du gouvernement. Ces mêmes partenaires pourraient dégager sous une forme restant à déterminer une représentation au niveau national. Dans la pratique le gouvernement fixe les règles du jeu et choisit ses partenaires

[30] Loi du 9 déc 1905.

[31] F. Messner, 'Zur schwierigen Organisation muslimischer Gemeinschaften im französischen Recht', in: Kerstin von der Decken and Angelika Günzel (eds), *Staat – Religion – Recht, Festchrift fur Gerhard Robbers zum 70 Geburstag* (Baden-Baden, Allemagne, Nomos, 2020), pp. 439-56.

en fonction de leur acceptation des règles qu'il a fixé. Il est difficile dans ce cas de parler de stricte séparation. De plus la loi confortant le respect des principes de la République d'aout 2021 tend à organiser le culte musulman dans le seul cadre des associations cultuelles. Si les pouvoirs publics ne peuvent pas contraindre les communautés musulmanes locales de s'organiser dans le cadre de la loi de 1905, elles ont la possibilité de les rendre plus attractives et ainsi de détourner ces communautés des associations de la loi de 1901. Ces associations le plus souvent mixtes, culturelles et cultuelles seront désormais assujetties pour leurs activités cultuelles aux mêmes contrôles financiers et aux mêmes obligations que les cultuelles sans bénéficier des mêmes avantages fiscaux. Les associations de droit commun (loi 1901) en charge de l'exercice du culte cumuleront tous les inconvénients sans pouvoir accéder aux avantages accordées aux associations cultuelles. Le caractère cultuel d'une association lui permettant notamment de bénéficier d'avantages fiscaux doit désormais être constaté par le représentant de l'Etat dans le département lors de sa création et non plus a posteriori lors d'une procédure d'acceptation d'un don ou d'un legs.

En droit allemand des religions[32] une communauté religieuse doit avoir un objectif principal celui de répondre aux besoins religieux de ses membres, elle doit donner des garanties de durée et être dirigée par une autorité qui est légitime pour interpréter et définir les dogmes. Or les Etats fédérés concernés considèrent que l'ensemble de ces conditions ne sont pas réunies par les communautés musulmanes. Certains Etats fédérés ont rajouté une condition supplémentaire dans la loi : le respect du droit allemand. Cette condition doit alors être inscrite dans les statuts de la collectivité de droit public et les autorités la représentant doivent avoir une attitude qui n'est pas en contradiction avec cet engagement. L'absence de représentation bien identifiée de la religion musulmane et la difficulté pour les Etats fédérés/*Laender* d'ériger les communautés musulmanes en corporation de droit public ne les a pas empêché de créer des facultés de théologie musulmane avec le soutien de l'Etat fédéral et de mettre en place un enseignement religieux musulmans dans les établissements d'enseignements publics. Dans certains cas l'absence de représentation est contourné et des mécanismes originaux sont trouvés pour répondre à des situations urgentes.

III. Conclusion

La thématique de cet ouvrage collectif articulée autour de l'islam et des droits de l'homme est traversée par une question : le traitement de l'islâm par les Etats européens porte-t-il atteinte aux droits de l'homme ? A première vue, le survol des

[32] K. Hartung, 'Gesetz zur Regelung der Verleihung von Körperschaftsrechten an Religions- und Weltanschauungsgemeinschaften (Körperschaftsstatusgesetz)' (2015) 60/2 *Zeitschrift für evangelisches Kirchenrecht*, p. 165.

politiques religieuses européennes semble attester du contraire. La démarche des États européens serait plutôt d'inviter les communautés musulmanes à partager et à accepter les garanties fixées par les droits de l'homme avec un accent mis sur la non-discrimination, l'égalité homme/femme et la liberté de religion qui inclut la liberté négative de religion et le droit de changer de religion. Les valeurs communément partagés en Europe sont désormais adossées aux droits humains et non à des principes religieux. Si le respect des droits de l'homme n'est pas explicitement requis pour les religions chrétiennes historiques, supposées irréprochables en ce domaine, ces dernières peuvent cependant être impactées ces nouvelles politiques religieuses. L'application du principe d'égalité de traitement entre les confessions religieuses les soumet parfois aux contraintes imposées à la religion musulmane.

Cette adhésion aux droits humains est considérée comme étant la condition *sine qua non* de la construction d'un islam européen se déclinant nationalement sous les intitulés d'Islam de France, de Belgique, d'Autriche etc. En ce sens les politiques religieuses menées par les Etats européens concernés par la présence d'une importante communauté musulmane se rejoignent quant aux moyens pour parvenir effectivement à cette adhésion. Il importe dans tous les cas de figure de dégager une représentation légitime au niveau national, de faciliter l'autonomie financière des communautés musulmanes et de former les cadres de cette religion et notamment les imams dans les pays européens selon les critères académiques en vigueur dans les universités publiques ou parapubliques. Ces trois éléments ont le même objectif intégrer la religion musulmane dans la société européenne et son socle de valeurs en atténuant ou en effaçant les liens de dépendance avec des Etats étrangers.

Le principe de neutralité de l'Etat et le principe d'autonomie des confessions religieuses pourraient certes être invoqués pour légitimer une non intervention de l'Etat en ce domaine. Mais une indifférence totale de l'Etat serait contraire à l'intérêt général. Elle faciliterait des atteintes à l'ordre public et à la paix religieuse. En effet le morcellement institutionnel d'une religion dont le poids social est important en une multitude de communautés ne permet pas de faire efficacement obstacle aux discours communautaristes et radicaux en l'absence d'un discours religieux contextualisé porté par une autorité religieuse perçue comme légitime par la communauté musulmane. En d'autres termes les contre discours face aux idées religieuses fondamentalistes ont du mal à s'imposer. L'absence de structuration de cette religion entraine également l'émergence d'imams autoproclamés sans formation contrôlée par des autorités religieuses centrales et dispensant des discours en décalage avec la réalité sociale. Cet éclatement en multiples communautés religieuses peut être sans conséquence pour la société et donc ignoré par l'Etat lorsqu'il est porté par des micro minorités sans influence. Il en va différemment lorsqu'il facilite le dévoiement des doctrines d'une religion mondiale et l'immixtion de puissance étrangère sur un territoire national.

L'intégration de la religion musulmane qui passe par son organisation dans le cadre de statuts des cultes avantageux entraine fort logiquement une contrepartie

conformément au principe du *do ut des*. Cette organisation est une possibilité qui ne fait pas obstacle à la liberté de choix des groupements musulmans. Ils s'organisent librement dans le cadre du droit commun lorsqu'ils ne souhaitent pas bénéficier d'un traitement privilégié.

La religion musulmane tend à être intégrer dans le niveau supérieur des statuts des cultes nationaux avec un inconvénient pour les religions historiques qui pourrait progressivement être soumis au même contrôle.[33]

[33] All websites last accessed on 15 Dec 2021.

MUSLIM COMMUNITIES IN THE EU COUNTRIES. AN OVERVIEW BASED ON THE ATLAS OF RELIGIOUS OR BELIEF MINORITY RIGHTS

Silvio Ferrari [1]

This paper provides some data, taken from the Atlas of religious or belief minority rights, regarding the rights that Muslim communities enjoy in 12 EU countries. The contribution is divided into two parts. The first describes the content and purpose of the Atlas; the second presents and discusses the data regarding Muslim communities. Based on this data, an answer to three questions will be sought:

- considering all the 12 countries together, how much are the rights of Muslim communities promoted?
- how much are they promoted in each of them?
- how much are they promoted compared to the rights enjoyed by other religious minorities?

I. The Atlas of religious or belief minority rights

A. Aims and content

Promoting equal treatment of religious or belief minorities (RBMs) and fighting discrimination is a more and more pressing need in the EU countries where religious diversity is rapidly growing. To face this challenge, innovative theoretical approaches, interdisciplinary research methodologies, technological tools and implementation strategies are needed.

They must provide reliable data and information about the status of RBMs; elaborate adequate methods for measuring data and processing information concerning their rights; develop a sound scientific framework for the understanding of the impact of social and political change upon new and old minorities; make this new knowledge

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available to the general public, raising the awareness of the need to include RBMs in our societies; develop instruments that are immediately available to people confronted with discrimination based on faith or belief in their everyday life.

The Atlas is a tool to map the rights enjoyed by RBMs and to measure their respect, promotion and implementation. Mapping is about knowing what rights RBMs have in each country, measuring is essential for developing evidence-based policy making. The Atlas provides a reliable and accurate picture of how much EU states promote the identity, participation and equal treatment of RBMs. Currently, it covers 12 EU countries, 13 RBMs and 4 policy areas (see below).

The Atlas is designed to offer an easy-to-read comparative description of the status of RBMs in the EU countries. It proposes to identify and compare the different levels of minority rights promotion granted by each state, the legal status enjoyed by each minority group both across the EU countries and in each of them, and the specific areas of rights that are at stake (again, both transversally across the EU countries and within each of them).

The end result of the project is an enhanced capacity to identify where discrimination of RBMs takes place, to measure its intensity and to assess the effectiveness of the anti-discrimination actions that are put in place.

In this way, the Atlas project contributes to the governance of religious and belief diversity in Europe, reducing unjustified inequalities between religious or belief organizations, ensuring equal enjoyment of freedom of religion and belief, fostering the development of inclusive citizenship and helping to build a cohesive society grounded in the inclusion (as opposed to the marginalization or assimilation) of individuals and communities upholding different religious conceptions and ways of life.

The Atlas aims to provide data and information related to all EU countries. So far, these countries have been covered: Austria, Belgium, Estonia, Finland, France, Greece, Hungary, Italy, Poland, Romania, Spain, Sweden. The Atlas takes into consideration the following religious organizations: Buddhist communities, Church of Jesus Christ of Latter-Day Saints, Hindu communities, Islamic communities, Jehovah's Witnesses, Jewish communities, Orthodox Churches, Protestant Churches (Mainline), Protestant Churches (Evangelical), Roman Catholic Church, Scientology, Sikh communities, and Belief organizations. Finally, the Atlas collects data on eight policy areas: legal status of RBMs, RBM rights in public schools, spiritual assistance in prisons, health facilities and armed forces, religious/belief symbols, private faith/belief-based schools, marriage and family law, worship and meeting places, and mass media (the last four policy areas will be included at a later stage).

B. **Methodology**

The Atlas data and information were collected through eight questionnaires (one for each of the eight policy areas listed above) sent to the legal experts of the

countries involved in the research. The questions contained in the questionnaires have made it possible to create a set of around 150 indicators which, evaluated on the basis of international standards, allow to measure the extent to which the rights of RBMs are respected and promoted by the laws and policies of each country. Each answer was associated with a numerical value ranging from 1 (maximum promotion of rights) to -1 (maximum hindrance of rights enjoyment); a value of 0 indicates respect for the rights of RBMs. For each policy area, a score is calculated resulting from the average of the numerical values of the indicators contained therein in order to obtain a numerical value for the entire area; the average of the numerical values of all areas leads to the overall score for a country or an RBM.

Each questionnaire is divided into "clusters" that bring together questions and responses that concern related topics. Each cluster has been given a score resulting from the average of the numerical values given to the indicators included in the same cluster. This makes it possible to analytically evaluate the promotion of minority rights within each policy areas. For example, in the policy area "RBM rights in public schools", one cluster contains the questions and answers regarding the right of RBMs to teach their doctrine in public schools, another the right of RBM members to be exempted from attending the teaching of religion/belief, and yet another the right of teachers and students to wear the symbols of their RBM. In this way, it is possible to precisely identify, within the broader policy area, the fields where the rights of RBMs need to be promoted most.

As already said, the degree of respect and promotion of RBM rights in each of these policy areas has been assessed against the benchmark provided by the international standards. *International standards are the principles and rules, embodied in core international treaties, that protect and promote human rights and in our case minority rights.* The international standards that have been taken into consideration by the Atlas concern on the one hand minorities[2] and on the other hand, freedom of religion or belief.[3]

The Atlas indicators were used to construct three indices.

1. *Index of promotion of RBM rights (P-index)*

This index measures the extent to which the RBM rights are respected and promoted by each State. Respect means ensuring that the rights granted to an individual or group of people under international human rights standards are not violated. Promote means putting in place the conditions that facilitate the enjoyment of these rights.

[2] 'Minority Rights: International Standards and Guidance for Implementation', *UN Office of the High Commissioner for Human Rights (OHCHR),* 2010 <https://www.refworld.org/docid/4db80ca52.html>.

[3] 'International standards on freedom of religion or belief', *UN Office of the High Commissioner for Human Rights (OHCHR)* <https://www.ohchr.org/en/issues/freedomreligion/pages/standards.aspx>.

As already said, the index takes respect for rights as the benchmark and assigns the "0" score to the State provisions that ensure it. Everything above this line constitutes promotion and is indicated by different scores according to the significance of the promotion on a scale ranging from 0 to 1; the State provisions which fall below this line are marked with scores going from 0 to -1.

It is possible for a State to promote or hinder the rights of certain RBMs only. The index takes into account this possibility by giving the following additional scores: 0.33 (or -0.33) when the promotion/hindering affects from one RBM to one third of all RBMs considered in the research; 0.66 (-0.66) when it affects between 1/3 and 2/3 of RBMs; and 1 (-1) when it affects more than 2/3 of RBMs.

2. *Index of RBM equal treatment (E-index)*

States do not equally promote RBM rights: it happens frequently that a RBM is entitled to enjoy more rights than another. This index measures the difference between the rights recognized to each RBM in each State (differences which, if there is no legitimate justification or are disproportionate, may amount to discrimination). This index is created by breaking down the same data provided by the promotion index and considering them with reference to each RBM.

3. *Index of religious majority-minorities gap (G-index)*

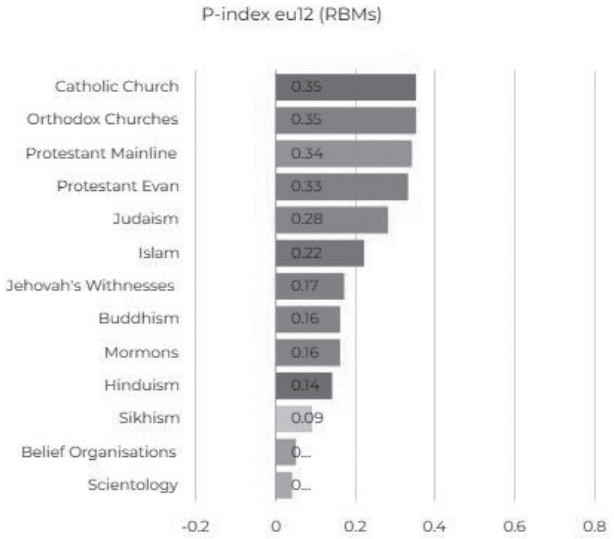
This index measures the distance between the rights recognized to the religious/belief majority and minorities in each country. It makes use of the same data of the E-index taking into account also the majority religious/belief organization.

The following remarks are based on the P-index only and limited to the measuring of the promotion of RBM rights by each legal system.

II. Muslims in Europe

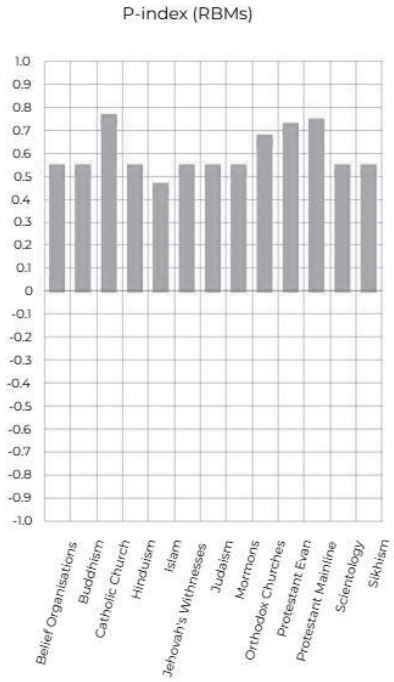
As shown in the graph n. 1, the rights of Muslim communities (score 0.22) are promoted less than those of Christian churches and Jewish communities (scores ranging from 0.28 to 0.35) but more than all other religious minorities considered in the Atlas research (scores ranging from 0 to 0.17).

Graphic 1. *Promotion index of RBM rights in the 12 countries considered in the research*



If the data are broken down by policy areas, the result does not change except for the policy area "religious symbols" (see graph n. 2).

Graphic 2. *Religious symbols. Promotion index of RBM rights*



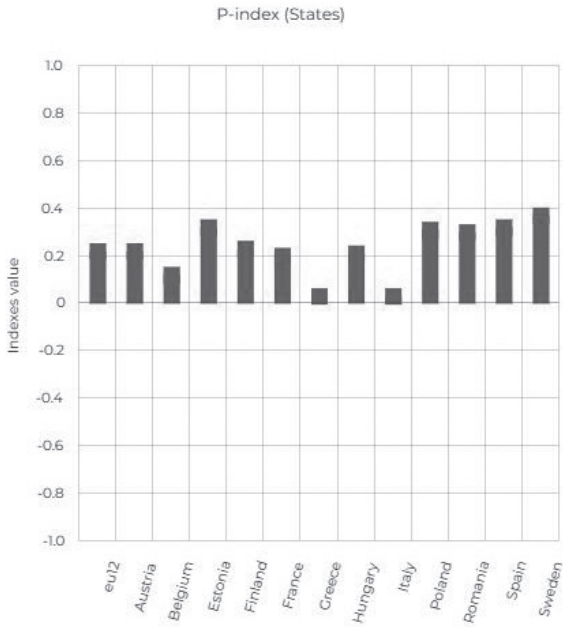
As indicated by this graph, the rights of Muslim communities are by far the least promoted (score 0.45, while the scores of other religious minorities range from 0.53 to 0.75), even though they remain well above the line that marks respect for international standards. The further breakdown of this area into its component clusters indicates that the reason for this lack of promotion lies in the fact that some countries (Austria, Belgium, France) prohibit entering public spaces and/or public institutions with garments that cover the face: this prevents Muslim women from wearing in these spaces and places religious symbols like burqas and niqabs (see table 3, Right to wear religious/belief symbols in public places and institutions). This prohibition does not affect the faithful of other religions, so that the score of the Muslim communities (0.61) is significantly lower than that of the other minorities (score 0.93-1).

Table 3. *Right to wear religious/belief symbols in public places and institutions.*

PAESE	Adventist Church	Belief organiz.	Buddhist commun.	Catholic Church	Hindu commun.	Islamic commun.	Jehovah's Witness.	Jewish commun.	Mormons	Orthodox Churches	Protestant (Evang.) Churches	Protestant (Mainl.) Churches	Scientology	Sikh commun.
Austria	1,00	1,00	1,00	**1,00**	1,00	-0,50	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00
Belgium	0,33	0,33	0,33	**0,33**	0,33	-0,67	0,33	0,33	0,33	0,33	0,33	0,33	0,33	0,33
Estonia	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00
Finland	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	**1,00**	1,00	1,00
France	1,00	1,00	1,00	**1,00**	1,00	-0,50	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00
Greece	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	**1,00**	1,00	1,00	1,00	1,00
Hungary	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00
Italy	1,00	1,00	1,00	**1,00**	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00
Poland	1,00	1,00	1,00	**1,00**	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00
Romania	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	**1,00**	1,00	1,00	1,00	1,00
Spain	1,00	1,00	1,00	**1,00**	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00
Sweden	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	1,00	**1,00**	1,00	1,00
Tot RBM	**0,94**	**0,94**	**0,94**	**1,00**	**0,94**	**0,61**	**0,94**	**0,94**	**0,94**	**0,93**	**0,94**	**0,93**	**0,94**	**0,94**

If we move from this overall view to a state-by-state examination, it turns out that the countries in which the rights of Muslim communities are least promoted are Greece (score 0.03; Thrace is not considered, see below), Italy (score 0.03) and, to a lesser extent, Belgium (score 0.12) (see graph n. 4).

Graphic 4. *Promotion index of RBM rights by States*



Breaking down the data by policy area it is possible to see that the rights of the Muslim communities in Italy are less promoted in the areas of legal status and public schools.

The examination of the clusters included in these two policy areas shows, with reference to the first, that the low score of Muslim communities is mainly due to the fact that, unlike many other religious minorities, they have not been able to conclude an agreement with the state; with reference to the second, the breakdown of the data by clusters shows that the disadvantageous situation of Muslim communities depends largely on three facts. First, in the Italian public schools Muslims do not have the right to teach their religion. Second, they are not entitled to abstain from teaching (for teachers) and from school attendance (for students) on the occasion of their religious holidays. Third, they cannot display their religious symbols. The first two rights are recognized to all minorities that have entered into an agreement with the Italian State, while the obligation to display the crucifix in classrooms suits not only the majority Church (the Catholic one) but also some Christian minorities (the Orthodox and, at least in part, Protestant ones). As a consequence, Muslim minority rights are less promoted that the rights of a number of other religious minorities.

The data concerning Greece do not take into account Thrace, where the Muslim communities enjoy rights that they do not have in the other parts of the country. As far as public schools are concerned, Muslims are in no worse position than other

religious minorities, as the only religion that can be taught in public schools is the Orthodox one (that is the majority religion) and there are no limitations that affect the Muslim community more severely than the other minorities. The policy area where Muslim are at a position of disadvantage is the legal status one and the breakdown by cluster of this area indicates that the sector in which Muslim minorities score particularly low concerns access to legal personality. This is because, outside of Thrace, they are not the beneficiaries of an *ad hoc* law (unlike the Jewish communities) nor are they mentioned in Law 4301/2014 (*Organization of the Legal Form of Religious Communities and their organizations in Greece*) unlike the Catholic and Protestant Churches. Consequently, Muslim communities can obtain legal personality only as associations under common law.

The situation of Muslim communities in Belgium is better than in Greece and Italy, but their score is adversely affected by the prohibition to enter places accessible to the public wearing garments that cover the face (Article 563bis of the Criminal Code), which prevents Muslim women from wearing burqas and niqabs.

The countries in which the rights of Muslim communities are most promoted (see table n. 5) are Sweden (score 0.37), Estonia (score 0.32), Spain (score 0.32), Poland (0.31) and Romania (0.30). With the exception of Spain (to which I will return shortly), these are the countries that promote the rights of all RBMs the most: so it is not surprising that those of Muslim communities are also well guaranteed. In Poland and Romania the rights of these communities are promoted less than those of the Catholic (respectively 0.62 and 0.47), Orthodox (respectively 0.53 and 0.55) and Protestant Churches (respectively Mainline: 0.50 and 0.43; Evangelical: 0.47 and 0.40) and to the same extent as the rights of the Jewish communities (respectively 0.31 and 0.30). In Estonia the situation is similar: the rights of Muslim minorities are promoted less than those of the Orthodox and Protestant Churches (0.37) but to the same extent as those of the Catholic Church (0.32) and more than those of the Jewish communities (0.30).

A separate discourse deserves Spain. This country, unlike the others now mentioned, obtains a rather low score in the index that measures the promotion of the RBM rights (0.31). With a score of 0.32, Muslim communities rank, albeit slightly, above Jewish communities (0.31) and above the average for the promotion of RBMs rights in general (0.31). Breaking down the data into the different policy areas, it appears that Muslim communities score particularly high in the area related to education (0.50) surpassing not only the Jewish communities (0.45) but also the Protestant ones (0.45). This is due to the fact that only in the *acuerdo* between the Spanish state and the Islamic communities is there a provision that -albeit in a non-binding form- commits school authorities "to adapt the food provided [...] to Muslim pupils in public [...] educational institutions to Islamic religious precepts" (Law 26/1992, *Agreement of Cooperation Between the Spanish State and the Islamic Commission of Spain*, Article 14.4).

Table 5. *Promotion index of RBM rights*

Country	Adventist Church	Belief organiz.	Buddhist commun.	Catholic Church	Hindu commun.	Islamic commun.	Jehovah's Witness.	Jewish commun.	Mormons	Orthodox Churches	Protestant (Evang.) Churches	Protestant (Mainl.) Churches	Scientology	Sikh commun.
Austria	0,37	0,00	0,18	**0,52**	0,04	0,22	0,18	0,31	0,20	0,46	0,48	0,48	0,02	0,04
Belgium	-0,01	0,27	-0,07	**0,28**	-0,07	0,12	-0,07	0,20	-0,05	0,19	0,22	0,22	-0,09	-0,07
Estonia	0,32	0,14	0,30	0,32	0,21	0,32	0,29	0,30	0,32	0,37	0,37	0,37	0,16	0,19
Finland	0,26	0,18	0,23	0,26	0,23	0,23	0,23	0,23	0,26	0,41	0,30	**0,50**	0,21	0,23
France	0,06	-0,08	0,18	**0,30**	0,12	0,20	0,14	0,27	0,14	0,26	0,27	0,27	-0,06	0,12
Greece	0,23	0,03	0,03	0,37	0,03	0,03	0,04	0,15	0,07	**0,65**	0,23	0,18	0,03	0,03
Hungary	0,21	0,03	0,21	0,31	0,21	0,21	0,21	0,31	0,21	0,23	0,23	0,31	0,09	0,06
Italy	0,42	-0,02	0,28	**0,64**	0,28	0,03	0,03	0,28	0,18	0,42	0,27	0,28	0,00	0,00
Poland	0,45	-0,09	0,26	**0,62**	0,26	0,31	0,26	0,31	0,26	0,53	0,47	0,50	-0,09	0,26
Romania	0,44	-0,07	-0,05	0,47	-0,05	0,30	0,30	0,30	0,03	**0,55**	0,40	0,43	-0,06	-0,03
Spain	0,45	0,02	0,04	**0,65**	0,05	0,32	0,04	0,31	0,06	0,25	0,40	0,40	0,05	0,05
Sweden	0,45	0,21	0,35	0,40	0,41	0,37	0,41	0,39	0,30	0,40	0,37	**0,41**	0,27	0,25
Tot RBM	**0,31**	**0,05**	**0,16**	**0,35**	**0,14**	**0,22**	**0,17**	**0,28**	**0,16**	**0,35**	**0,33**	**0,34**	**0,04**	**0,09**

III. Final remarks

To what reflections do the Atlas data lead? What answers can be given to the three questions raised at the beginning of this paper?

On a scale ranging from 0 (the score obtained by the most disadvantaged minorities, Belief organizations, Scientology and Sikhs) to 35 (the score of the Catholic and Orthodox minorities), the Muslim communities (score 22) are slightly above the middle. Above them are all the Christian Churches and the Jewish communities; below them are the Eastern religions, the religious organizations born of the U.S. "Great Awakening" (Jehovah's Witnesses and Mormons), the "new religious movements" (Scientology) and the Belief organizations. This ranking signals first and foremost the weight that the Christian and, to a lesser extent, Jewish tradition maintains in establishing the rights enjoyed by religious organizations. It also points out the suspicion that surrounds some new religious movements (Scientology) and the skepticism about the opportunity to equate belief organizations with religious organizations. Within the framework defined by these coordinates, the position reached by Muslim communities is the consequence of several factors: the relevant number of believers, which has forced even the least well-disposed states to take their needs into consideration (and thus, to give an example, to ensure a spiritual assistance service in prisons, hospitals and armed forces); the unfavorable political and cultural context still dominated by the fear of the clash of civilizations and concerns about immigration from Arab countries, which has slowed down the recognition of the rights of the Muslim community; the fast growth of the Muslim presence in Europe, which has drastically reduced the sedimentation time needed to adapt the legal context to the social one.

Coming now to the second question, it is quite difficult to find a key to explain why the rights of Muslim communities are more promoted in some countries and less in others. The three countries where these rights are least promoted (Greece, Italy

and Belgium) have different cultural and religious traditions (one country with an Orthodox majority, another where the Catholic religion is prevalent and the third more and more secularized); the same is true for the five countries (Sweden, Estonia, Spain, Poland and Romania) where these rights are most promoted. The same conclusion can be reached by examining their legal systems: all models of relationship between state and religion are represented, from the separatism of Estonia, to the Spanish and Italian concordatarian model, to the system of the "prevailing religion" enshrined in the Greek constitution. It does not seem possible to identify either religious or cultural traditions or legal systems that *per se* promote or hinder the promotion of the rights of Muslim communities: the different national contexts continue to play a determining role in this field.

Thirdly, the Atlas data confirms how much the "Islamic question" has been loaded with ideological meanings that make a pragmatic approach to the Muslim presence in Europe difficult. It is significant that the area in which the rights of Muslim communities have the greatest difficulty in being recognized is that of symbols: hijab, burqa, niqab, but also minarets and even a certain way of growing a beard have taken on unexpected importance, which can only be explained by considering these elements in light of the values (or disvalues, depending on one's point of view) to which they point.

Finally, a more general consideration. Even a religious minority that has been at the center of much controversy over the last twenty years is, on the whole, above the line that marks respect for its rights. This means that, in the 12 countries surveyed, religious minority rights are substantially respected, unlike in other parts of the world. Respect, however, is not the same as promotion. If we start from the principle that the promotion of the minority rights is fundamental to ensure that a country is not only democratic but also capable of including diversity in its social fabric, it is clear how far we still have to go. The shadows that still cover the promotion of the rights of Muslim communities in Europe stand as a reminder.[4]

[4] All websites last accessed on 27 Jan 2022.

ISLAM IN THE EUROPEAN UNION – SOME LEGAL ASPECTS, IN PARTICULAR THE MOST RECENT JUDGMENTS OF THE COURT OF JUSTICE OF THE EU

Michał Rynkowski[1]

I. Introduction: the social framework, including involvement in politics on the European level

The data concerning the Muslim population in various Member States (MS) is included in national reports. In many countries laws do not permit the collection of information about religious adherence, therefore only estimates are available. At the European level, the European statistical office Eurostat does not collect any data concerning religion.

As regards the involvement of Muslims in political life on the European level, there are usually a small number of Muslim deputies in the European Parliament (EP). They come from countries where the Muslim community is strong in terms of numbers (as was the case in the UK before its withdrawal from the EU) or where the Muslim community has historical roots (Bulgaria).Before the 2019 EP elections, Dr Syed Kamall was the co-chair of the ECR (European Conservative and Reformists) fraction in the EP, making him the highest-ranking MEP of Muslim origin. While Muslims often actively participate in politics at the municipal level all across Europe, at the European level they are clearly underrepresented.

There have been even fewer Muslims active in the Council of the European Union: so far only a few EU-Member States have appointed persons to their national governments who declare their attachment to Islam.

To date, there has been no EU Commissioner of Muslim origin.[2] As regards the staff at the European institutions, Muslims or persons of Muslim origin are among

[1] Dr. iur. habil, LL. M. Eur. The views expressed in this paper are a private opinion of the author and do not in any way represent the opinion of the European Commission.

[2] This should not come as surprise taking into account that the first women ever were appointed to the Commission only in 1989 (Delors II Commission), after 37 years of the existence of the High Authority/Commission.

officials and agents; however, no data is collected in this respect (prohibition of discrimination is laid down in the Staff Regulation).[3]

II. Institutional recognition by the EU

A. Legal form of Islamic communities (legal personality)

Unlike the Member States, the EU has no right to recognise (or not to recognise) Churches and religious communities. According to Article 17 TFEU, this right is clearly - although implicitly - reserved to the MS.

While it has nothing to do with legal recognition (in the sense of conferring legal personality, as the laws of the Member States do), the EU transparency register[4] lists organisations/entities that requested to be dialogue partners with the EU institutions. Of the 52 entities in chapter V 'Organisations representing churches and religious communities', the register lists only one Muslim organisation: Communita Religiosa Islamica Italiana, and that only as of June 2020. On the other hand, the transparency register includes six Jewish organisations and even one German (though with the adjective 'international' in its name) pagan organisation. Four organisations associated with Islam are listed in chapter III as non-governmental organisations; one of them, Forum of European Muslim Youth and Student Organisations, includes a detailed list of meetings with the European Commission (although the list was most recently updated in 2016).

B. Financing Islamic Communities

Theoretically, the Muslim communities, just like Churches and other religious communities, do not receive any EU-funding per se. However, organisations (NGOs) run or managed by Muslim communities may be beneficiaries of EU funds if they apply for grants available in a variety of areas, mainly youth, sport and education. As some of the beneficiaries are federations with many members, in the past MEPs have inquired about alleged links between the beneficiaries of EU grants and Islamist organisations.[5] In their questions the MEPs asked whether such a definite link exists, and also requested information on how the Commission intends to prevent such situations in the future.

[3] Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 Feb 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission, *OJ L 56, 4 March 1968,* p. 1.

[4] Transparency Register, *europa.eu* <https://ec.europa.eu/transparencyregister/public/homePage.do?locale=en#en>.

[5] E-001741/2021, MEP R. Haider and G. Mayer (both ID).

C. Stance of the state towards the Islamic communities

The EU institutions remain fully neutral as regards religion and denomination. However, the appointment of a coordinator in the fight against Islamophobia shows the willingness of the EU to temper anti-Islamic movements, hence the EU remains rather Islam-friendly. In June 2015, Vice-President of the European Commission and High Representative for Foreign Affairs and Security Policy Ms Federica Mogherini gave a (broadly discussed) speech in which she underlined that Islam is a part of Europe.[6]

In 2020 the new position of EU Anti-Racism Coordinator was created, and in May 2021 Ms Michaela Moua was appointed. Ms Moua is a Finnish former basketball player and comes from a mixed family.

D. Are there any institutionalised bodies which communicate with the Government? (e.g. Islamic Council, NGOs etc.)

Muslim organisations participate in the regular seminars (dialogues) organised by the European institutions within the framework established by Article 17 of TFEU. This is also how the dialogue is informally referred to: Article 17 dialogue. The respective EU Guidelines are available on the website for those wishing to participate.[7] Taking account of the diversity and variety of Muslim communities in Europe, there is as yet no single organisation/institution which could claim to represent the whole Muslim community in Europe.

Within the European institutions, there are special entities (positions) in charge of this dialogue. In the European Parliament, the contact person was Ms Mairead McGuinness, ex First Vice-President of the EP, before she became a member of the European Commission in 2020. Currently the contact person is the VP of the EP, Roberta Metsola, from Malta, in charge of relations with religious communities. Muslim organisations participate in the annual meetings, held since 2006. Due to the COVID-19 pandemic, in 2020 the meetings took place online only.

In the European Commission, Article 17 dialogue is now within the portfolio of the Vice President Margaritis Schinas ('Promoting our European way of life'). On the more operational level, these issues are handled by a unit within DG Justice, more precisely by Mr Vincent Depaigne, appointed in 2017 Coordinator for the dialogue between the European Commission and churches, religious associations or communities as well as philosophical and non-confessional organisations.

[6] 'The idea of a clash between Islam and "the West" – a word in which everything is put together and confused – has misled our policies and our narratives. Islam holds a place in our Western societies. Islam belongs in Europe. It holds a place in Europe's history, in our culture, in our food and – what matters most – in Europe's present and future.'

[7] 'Guidelines on the implementation of Article 17 TFEU by the European Commission', *European Commission* <https://ec.europa.eu/info/sites/default/files/guidelines-implementation-art-17_en.pdf>.

III. Application of Shari'a (both as state law and/or private international law) and its relationship to fundamental rights and human dignity

A. Family law

A great deal of discussion, both legal and political, revolves around the issue of Islamic marriage, both in terms of how they are concluded and how they are dissolved. The discussion includes the age of the parties involved, their willingness to enter into the marriage (in the context of so-called forced marriages), the co-existence of numerous marriages at the same time (polygamy) and corresponding social rights, and finally the dissolution of the marriage, predominantly unilaterally by the man.

The Court of Justice of the European Union had to take a stance in the latter question: a (Muslim) man decided to divorce his wife by unilateral declaration. The main case was handled by the Oberlandesgericht München (Higher Regional Court, Munich, Germany), which decided to ask for a preliminary ruling under Article 267 TFUE (case C-372/16). In this case, known as the case of Soha Sahyouni v Raja Mamisch, the Court stated that Article 1 of Council Regulation (EU) No 1259/2010 of 20 December 2010 (implementing enhanced cooperation in the area of the law applicable to divorce and legal separation):

> 'must be interpreted as meaning that a divorce resulting from a unilateral declaration made by one of the spouses before a religious court, such as that at issue in the main proceedings, does not come within the substantive scope of that regulation.'

Hence, the unilateral dissolution of the marriage is not recognised by the EU as a valid *legal action*.

When the UK was an EU-Member State, the question of Muslim jurisprudence in the framework of state courts was slightly more complicated, as shariah councils and the Muslim Arbitration Tribunal were (potentially) granted certain rights under the Arbitration Act 1996. Currently, no Member State grants any formal rights to courts of Muslim religious organisations, with most MS not even recognising their existence (while the shariah councils do not seek publicity or legal recognition either).

B. Labour law

It is worth recalling that there are no specific EU rules concerning religiously based work schedules (work days vs days off). Already many years ago, in case C-84/94 UK v Council,[8] the Court of Justice of the EU stated that:

> 'the fact remains that the Council has failed to explain why Sunday, as a weekly rest day, is more closely connected with the health and safety of workers than any other day of the week.'

[8] *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, C-84/94 (ECJ, 12 Nov 1996, ECLI:EU:C:1996:431), [37].

As Sunday did not obtain this special protection, mutatis mutandis one cannot expect that such a status could be granted to Friday/Saturday.

C. **Shari'a and the rights of children and women**

Shari'a law, and in particular its applicability in Europe, happens to be the subject of questions addressed to the European Commission. In her question one MEP[9] repeated data concerning 'no-go-zones' in French cities, where allegedly only Islamic law applies. She requested more information about integration programmes for Muslims and in particular on the situation regarding women and girls. A motion for a resolution on political Islam in the EU, launched in 2019 by one of the deputies, failed to succeed.[10]

Forced marriages have also been a topic of separate studies commissioned by the European Parliament. Forced marriages involving underage parties (almost exclusively girls) are a criminal offence in most Member States; however, there are no EU provisions on the subject.

IV. The question of Discrimination of Muslims

While there are no EU directives which would directly protect Muslims/persons of Muslim origin, there are a good number of provisions prohibiting discrimination on these grounds. The most important is the EU Treaty and Charter of Fundamental Rights; extensive details are provided for in the acts of EU-secondary law,[11] which are presented in many books and commentaries.

[9] E-004329/2020, question by E. Kruk (ECR), title: *the Muslim issue in the EU*.

[10] B9-0227/2019.

[11] Racial Equality Directive (2000/43/EC) of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJ L 180, 19 July 2000,* p. 22, which aims at combating direct and indirect discrimination on grounds of racial or ethnic origin in employment, education, social protection and access to public goods and services; Employment Equality Directive (2000/78/EC), combating direct and indirect discrimination on multiple grounds (religion or belief, disability, age, sexual orientation), as regards employment and occupation; Council Framework Decision (2008/913/JHA) of 28 Nov 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, *OJ L 32*8, 6 Dec 2008, p. 55, which makes offences against persons based on race, colour, religion, descent, or national or ethnic origin punishable in criminal law; Victims of Crime Directive (2012/29/EU) of 15 Oct 2012, establishing minimum standards on the rights, support and protection of victims of crime, including hate crime, *OJ L 315,* 14 Nov 2012, p. 57; Audiovisual Media Services Directive (2010/13/EU), of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), *OJ L 95,* 15 April 2010, p. 1, banning incitement to hatred in audiovisual media services and the promotion of discrimination in advertising.

Directive 2000/78[12] was intended as an instrument to protect the interest of Churches, mainly the larger Churches (Catholic and Protestant), active in many Member States as employers, allowing them to choose their own members over persons with similar qualifications but who were not members of a given denomination. The Muslim communities did not have such a position on the labour market either in 2000 or now. Despite a growing number of believers, Muslim organisations, unlike Christian churches, are not massive employers in EU Member States.

The ECJ has issued numerous judgments concerning various forms of discrimination, but four cases referring to Islamic women (and more precisely, their headscarves) should be mentioned. Two judgments[13] were issued on 14 March 2017, both by Grand Chamber, and in both cases the Advocate General delivering opinions was female (AG Kokott in the case of Achbita, AG Sharpston in Bougnaoui). This last element is of particular importance as the two women, in quite similar (or at least, comparable) cases, came to different conclusions: this contradiction was pointed out by many commentators, in particular by M. Mahlmann:[14]

> 'Whereas Advocate General Kokott regards a company rule that prohibits the wearing of any religious symbol or a symbol associated with some form of belief as a genuine determining occupational requirement that serves a legitimate aim and is proportionate, Advocate General Sharpston argues that there is no such justification.'

The two cases are presented in detail below:

In case C-157/15, Samira Achbita vs G4S Secure Solutions NV,[15] Ms Achbita, who was a receptionist at a G4S office, decided at a certain moment in time that from then on she would wear an Islamic headscarf. G4S management informed her that it was against the neutrality policy of G4S. At that time, G4S also reinforced internal corporate rules, prohibiting personnel 'in the workplace, from wearing any visible signs of their political, philosophical or religious beliefs and/or from engaging in any observance of such beliefs'. As she refused to follow these rules, Ms Achbita was dismissed. Ms Achbita referred the matter to the Labour Court in Antwerp, and later to the Higher Labour Court and to Hof van Cassatie, which decided to ask a quite straight-forward question to the ECJ:

[12] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ L 303, 2 Dec 2000,* p. 16.

[13] Cases presented and commented in: *European Union Agency for Fundamental Rights, Handbook on European non-discrimination law*, 2018 edn.

[14] M. Mahlmann, 'ECJ headscarf series (3): The Everyday Troubles of Pluralism', *Strasbourg Observers*, 12 Sept 2016 <https://strasbourgobservers.com/2016/09/12/ecj-headscarf-series-3-the-everyday-troubles-of-pluralism/#more-3329>.

[15] *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, C-157/15 (CJEU, GC, 14 March 2017, ECLI:EU:C:2017:203).

> 'Should Article 2(2)(a) of Directive 2000/78 be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?'

The answer given by the ECJ was complicated and meant that the local court should investigate and decide if other labour law options (other than dismissal) were available.

In case C-188/15, the request had been made in proceedings between Ms Asma Bougnaoui and the Association de défense des droits de l' homme (Association for the protection of human rights) (ADDH), and Micropole SA concerning the dismissal of Ms Bougnaoui because of her refusal to remove her Islamic headscarf when sent on business to customers of Micropole. Ms Bougnaoui was dismissed in June 2009 and brought a case to a labour tribunal in Paris. Following French procedures, the case reached Cour de Cassation, which decided to refer to the ECJ for a preliminary ruling. The ECJ in its judgment of 14 March 2017 (acting as Grand Chamber) interpreted the directive 2000/78 stating that:

> 'the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision.'

On 15 July 2021, the ECJ as Grand Chamber, issued a judgment in joined cases C-804/18 and C-341/19,[16] also concerning the Islamic headscarf. Both cases originated from Germany (IX v WABE e.V. C-804/18, submitted by Arbeitsgericht Hamburg and MH Müller Handels GmbH v MJ C-341/19, submitted by Bundesarbeitsgericht): Answering the first of four questions, the ECJ stated:

> 'Article 1 and Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that an internal rule of an undertaking, prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, does not constitute, with regard to workers who observe certain clothing rules based on religious precepts, direct discrimination on the grounds of religion or belief, for the purpose of that directive, provided that that rule is applied in a general and undifferentiated way.'

Addressing other questions, the ECJ underlined that this policy of the employer:

— must meet a genuine need on the part of that employer, which it is for that employer to demonstrate,

[16] *IX v WABE eV and MH Müller Handels GmbH v MJ*, C-804/18 and 341/19 (CJEU, GC, 15 July 2021, ECLI:EU:C:2021:594).

— is pursued in a consistent and systematic manner;
— and, thirdly, that the prohibition in question is limited to what is strictly necessary having regard to the actual scale and severity of the adverse consequences that the employer is seeking to avoid by adopting that prohibition.

Such limitations may not refer exclusively to big religions signs (like headscarves), but must relate also to smaller signs.

The FRA (Fundamental Rights Agency) in Vienna deals on a regular basis with the issue of discrimination, based on various grounds. Discrimination based on ethnicity and religion is among the most frequent topics of the FRA-research and investigation.

V. Exercise of religious freedom and other cultural rights: Legal framework for establishment and functioning of mosques

The establishment and functioning of mosques is the sole responsibility of the MS. However, the EU (through the Court of Justice) has some influence as regards food rituals:

The issue of halal food is comparable with the issue of kosher, which has been the subject of various judgments in Strasbourg (ECtHR) and in Luxembourg, most recently in case C-336/19, which interestingly saw the involvement of numerous entities on both sides of the legal dispute.[17] What attracts attention and is worth underlining is the fact that in this recent case, Jewish and Muslim organisations acted together, challenging a decree of the Flemish Region of 7 July 2017 prohibiting certain methods of animal slaughter.

The issue at stake was simultaneously very simple and very complicated: which value should prevail, animal welfare as enshrined in Protocol No 33 on the Protection and Welfare of Animals as annexed to the TFEU, or the freedom of religion as guaranteed by Article 10 of the Charter of Fundamental Rights.

A variety of facts and opinions had to be taken into account. One of the elements was the use of so-called reversible stunning: the use of electricity to induce animals into a state where death would not create undue suffering; yet this stunning is reversible, meaning that if not killed, an animal would return to normal life. In this respect, Muslim communities seem not to have reached a consensus as to whether such a method is compatible with their religious requirements or not. Needless to say, this technique (of electro-shocks) was unknown when the religious provisions of Islam were created. Another element, already known from the ECtHR judgment

[17] *Centraal Israëlitisch Consistorie van België e.a. and Others,* C-336/19 (CJEU, GC, 17 Dec 2020).

Cha'are Shalom Ve Tsedek,[18] referred to the possible import of such meat (kosher in that case, but also clearly applicable to halal) once it cannot be produced in a given region/country: if the importation is easy, then there is no religious discrimination. Interestingly, the prohibition of religious slaughtering of animals was introduced in Flanders and in Wallonia, but not in the Region Brussels-Capital (see also the paper by Prof. L. L. Christians). Moreover, the prohibition of such religious slaughter of animals introduced in September 2020 in Poland (one of the main suppliers of kosher/halal food) was explicitly raised in this case and was even invoked as a reason for a repeated hearing in Luxembourg. The prohibition significantly limited the access of Jewish and Muslim Communities to such food.

The Flemish and Walloon Governments considered that Member States are authorised to assure a higher level of protection of animals, as indicated by Article 4(4) of the EU Regulation 1099/2009.[19]Advocate General Hogan, in his opinion presented to the Court on 10 September 2020, did not agree with such interpretation and underlined that Member States are not allowed to adopt such rules. However, the Court, acting as Grand Chamber, ruled that the provisions mentioned by the Flemish and Walloon Governments 'must be interpreted as not precluding legislation of a Member State which requires, in the context of ritual slaughter, a reversible stunning procedure which cannot result in animal's death'.

From earlier cases judged by the ECJ we learned that:

1. In case C-426/16 Liga van Moskeen en Islamitische Organisaties Provincie Antwerpen:[20] the Court confirmed that ritual slaughter without stunning may take place only in an approved slaughterhouse (even in time when during increased demand, like before the Muslim Feast of Sacrifice, the regular slaughterhouses do not have sufficient capacity to carry out religious slaughter and additional temporary slaughter houses were organised).
2. In the case C-497/17:[21] meat resulting from ritual slaughter where the animals were killed without prior stunning may not be labelled with an organic logo, as under Article 3 of Regulation No 1099/2009, 'animals shall be spared any

[18] *Cha'are Shalom Ve Tsedek v. France,* App no 27417/95 (ECHR, 27 June 2000).

[19] […] point c) of the first subparagraph of Article 26(2) of Regulation No 1099/2009 expressly empowers Member States to depart from Article 4(4) of that Regulation".

[20] *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen, VZW and Others v Vlaams Gewest*, C-426/16 (CJEU, GC, 29 May 2018, ECLI:EU:C:2018:335). While the judgment of the ECJ is quite enigmatic, the press release: 'The Court confirms that ritual slaughter without stunning may take place only in an approved slaughterhouse' of the ECJ 69/18 is succinct and very clear <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-05/cp180069en.pdf>.

[21] *Oeuvre d'assistance aux bêtes d'abattoirs (OABA) v Ministre de l'Agriculture et de l'Alimentation and Others*, C-497/17 (CJEU, GC, 26 Feb 2019, ECLI:EU:C:2019:137).

avoidable pain, distress or suffering during their killing', (Œuvre d'assistance aux bêtes d'abattoirs -OABA).

VI. Free speech and Islam

The issues in question are treated by the European Court of Human Rights. While freedom of religion and belief is also protected by the Charter of Fundamental Rights, to date no such case has been addressed to the ECJ.

VII. Education, programmes and initiatives

Taking account of the wording of Article 165 of the TFEU, there are no EU-Guidelines or legal acts concerning the teaching of religion (about religion) in the EU.[22]

Year 2008 was proclaimed by the European institution as the European Year of Intercultural Dialogue,[23] with various programmes and events supported. At the institutional level, meetings of religious leaders took place (see also above).

VIII. Conclusions: Preferences concerning the state model of co-existence between the secular state and Islam – Critique

Eighteen years have elapsed since the European Court of Human Rights, acting as Grand Chamber, stated boldly in *Refah Partisi v. Turkey*,[24] that 'sharia is incompatible with the fundamental principles of democracy'. The court reasoned that sharia diverged too much from Western principles:

> 'particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.'[25]

[22] In 14 European schools, there are hired 79 local religion/ethics teachers, however details concerning subjects taught (as regards denominations represented) are not disclosed.

[23] Decision No 1983/2006/EC of the European Parliament and of the Council of 18 Dec 2006, *OJ L 412* of 3 Dec 2006.

[24] *Refah Partisi (The Welfare Party) And Others V. Turkey,* App nos. 41340/98, 41342/98, 4134 3/98 and 41344/98 (ECHR, GC, 13 Feb 2003).

[25] '72. Like the Constitutional Court, the Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious

While the ECJ would probably use slightly softer wording, in the above-mentioned case (case C-372/16) concerning (unilateral) dissolution of a Muslim marriage, the ECJ followed this direction, stating that a Muslim divorce is not a legal action within the meaning of the EU law.

The EU as such, is obliged to remain neutral in questions of a religious nature, as stipulated in Article 17 TEU. However, as demonstrated above, the ECJ decided the first cases concerning Muslim headscarves. One can expect the number of similar issues to grow. It will also be interesting to see developments concerning the political engagement of Muslims/persons of Muslim origin on the European level.[26]

precepts. ... In the Court's view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.'

[26] All websites last accessed on 18 Oct 2021.

NATIONAL REPORTS

LE CADRE JURIDIQUE DE L'ISLAM EN AUTRICHE

Wolfgang Wieshaider[1]

I. Les chiffres

Depuis 2011, selon la loi fédérale relative au recensement basé sur les registres,[2] le recensement se fait sur la base des registres de naissances, mariages et décès. Ces registres n'indiquent pas l'affiliation religieuse. L'alinéa 1(3) de ladite loi prévoit que, si nécessaire, le ministre compétent peut ordonner une enquête statistique qui ne fera pas état de l'identité des personnes ; à ce jour, ceci n'a pas été effectué. Selon une enquête officieuse publiée en 2017, la population comprend environ 8 % de musulmans.[3] Comme cette enquête ne précise pas quelles religions figurent parmi les 2 % « d'autres », mêmes reconnues, la question reste de savoir sous quelle rubrique elle a mis les alévis.

II. Le cadre institutionnel

Le droit différencie trois formes de personnalité juridique pour des organisations religieuses : celle de la société religieuse reconnue, celle de la communauté confessionnelle et celle de l'association. Tandis que les deux premières formes sont

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[2] *Registerzählungsgesetz,* Bundesgesetzblatt I № 33/2006 dans sa version modifiée par Bundesgesetzblatt I № 125/2009.

[3] Anne Goujon, Sandra Jurasszovich et Michaela Potančoková, *Demographie und Religion in Österreich. Szenarien 2016 bis 2046. Deutsche Zusammenfassung und englischer Gesamtbericht* (Wien : Österreichischer Integrationsfonds 2017), <https://www.integrationsfonds.at/fileadmin/content/AT/Fotos/Publikationen/Forschungsbericht/Forschungsbericht__Demographie_und_Religion_inkl_Vorwort_Web.pdf> (10 juin 2021) ; cf. Kurier du 5 août 2017, p. 5 ; Die Presse du 5 août 2017, p. 7 ; Salzburger Nachrichten du 5 août 2017, p. 8.

réservées aux organisations religieuses, la troisième constitue la forme générale pour toute association à but non-lucratif. Les deux dernières obtiennent un statut du droit privé, à la suite d'une décision administrative ; pour les communautés confessionnelles, cela se fait en application de l'alinéa 2(1) de la loi sur la personnalité juridique des communautés confessionnelles[4]; pour les associations à but non-lucratif, on applique l'alinéa 13(2) de la loi sur les associations[5], ou bien, selon l'alinéa 13(1) de ladite loi, cette personnalité est attribuée à l'expiration d'un délai de six semaines après la notification de son établissement.

Le statut de société religieuse reconnue est de droit public.[6] Nonobstant la reconnaissance dite historique,[7] il peut être conféré par loi parlementaire ou par décret.[8]

Les communautés musulmanes s'organisent de la manière suivante : La plus ancienne et la plus grande d'entre elles, la Communauté religieuse islamique,[9] est une société religieuse reconnue depuis 1979[10], sur la base de la loi sur l'islam de 1912[11]. En 2010, la Cour constitutionnelle a refusé de considérer que la Communauté religieuse islamique était seule compétente en matière d'organisation de l'Islam ; la décision de la Cour fut rendue suite à une requête déposée par une association cultuelle islamique alévie pour attaquer le refus de son enregistrement comme communauté confessionnelle distincte de ladite communauté religieuse islamique.[12] La Communauté religieuse alévie islamique,[13] finalement enregistrée en 2011, fut reconnue, en

[4] *Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften,* Bundesgesetzblatt I № 19/1998, modifée en dernier lieu par Bundesgesetzblatt I № 75/2013.

[5] *Vereinsgesetz 2002,* Bundesgesetzblatt I № 66, modifée en dernier lieu par Bundesgesetzblatt I № 32/2018.

[6] Cf. Wolfgang Wieshaider, ‹ Zu Rechtspersönlichkeit und Wesen gesetzlich anerkannter Religionsgesellschaften ›, *Österreichisches Archiv für Recht & Religion* 60 (2013) 336–346.

[7] Cf. Inge Gampl, *Staatskirchenrecht. Leitfaden,* Wien : Orac 1989, 47.

[8] Herbert Kalb, Richard Potz et Brigitte Schinkele, *Religionsrecht,* Wien : WUV 2003, 95–107 ; Stefan Schima, ‹ Die Entfaltung der Religionsfreiheit in Österreich von der Dezemberverfassung bis heute. Einblicke in die letzten 150 Jahre Stefan Schima ›, dans Stephan Hinghofer-Szalkay et Herbert Kalb (éd.), *Islam, Recht und Diversität,* Wien : Verlag Österreich 2018, 3–47 (42–46).

[9] *Islamische Glaubensgemeinschaft in Österreich,* <http://www.derislam.at/> (10 juin 2021) ; cf. *Österreichisches Archiv für Recht & Religion* 65 (2018) 91–122.

[10] L'acte de reconnaissance étant corrigé en 1988 après sa cassation par la Cour constitutionnelle : Verfassungsgerichtshof, 29 févr. 1988, V 11/87, VfSlg. 11624 ; voir *Verordnung des Bundesministers für Unterricht, Kunst und Sport betreffend die Islamische Glaubensgemeinschaft in Österreich,* Bundesgesetzblatt № 466/1988 ; Kalb, Potz et Schinkele, *op. cit.* (note 8) 628–630.

[11] *Gesetz betreffend die Anerkennung der Anhänger des Islam als Religionsgesellschaft,* Reichsgesetzblatt № 159/1912.

[12] Cf. Verfassungsgerichtshof, 1 déc. 2010, B 1214/09, VfSlg. 19240 ; cf. Barbara Gartner-Müller, ‹ Die Islamische Glaubensgemeinschaft und das Ausschließlichkeitsrecht der gesetzlich anerkannten Kirchen und Religionsgesellschaften ›, *Österreichisches Archiv für Recht & Religion* 59 (2012) 251–283.

[13] *Islamische Alevitische Glaubensgemeinschaft in Österreich,* <http://www.aleviten.at/_de/> (10 juin 2021) ; cf. *Österreichisches Archiv für Recht & Religion* 60 (2013) 102–147.

2013[14], comme société religieuse sur la base de la loi relative à la reconnaissance des sociétés religieuses[15]. Depuis son entrée en vigueur, la loi sur l'islam de 2015 règle le statut juridique de ces deux sociétés religieuses ; son alinéa 31(1) et deux décrets constatent que la Communauté religieuse alévie islamique et la Communauté religieuse islamique sont des sociétés religieuses aux termes de l'alinéa 3(1) de ladite loi.[16] En 2015, la Communauté religieuse alévie islamique supprima l'adjectif « islamique » dans sa désignation officielle.[17] Une autre entité indépendante, la Communauté religieuse islamique chiite, est enregistrée comme communauté confessionnelle depuis 2013.[18] D'autres communautés alévies établies en Autriche[19] ne se considèrent pas comme musulmanes. Par conséquent, ce texte ne les prend pas en considération.

En ce qui concerne ses structures internes, la Communauté religieuse islamique est organisée sur plusieurs niveaux. Elle se divise administrativement dans neuf communautés régionales religieuses, une pour chaque état fédéré. En même temps, il y a trois autres organisations différentes à but religieux, social ou culturel qui se distinguent par la taille : les communautés cultuelles, comprenant au moins dix communautés de mosquées et 1000 membres, les communautés de mosquées, comprenant au moins une mosquée et 40 membres et les associations.[20] La Communauté religieuse alévie (islamique) se divise en huit entités régionales.[21]

[14] *Verordnung der Bundesministerin für Unterricht, Kunst und Kultur betreffend die Anerkennung der Anhänger der Islamischen Alevitischen Glaubensgemeinschaft als Religionsgesellschaft,* Bundesgesetzblatt II № 133/2013.

[15] *Gesetz betreffend die gesetzliche Anerkennung von Religionsgesellschaften,* Reichsgesetzblatt № 68/1874.

[16] *Verordnung des Bundesministers für Kunst und Kultur, Verfassung und Medien betreffend die Feststellung des Bestandes der Islamischen Alevitischen Glaubensgemeinschaft als Religionsgesellschaft,* Bundesgesetzblatt II № 75/2015 ; *Verordnung des Bundesministers für Kunst und Kultur, Verfassung und Medien betreffend die Feststellung des Bestandes der Islamischen Glaubensgemeinschaft in Österreich als Religionsgesellschaft,* Bundesgesetzblatt II № 76/2015.

[17] <http://www.aleviten.at/_de/?page_id=11> (10 juin 2021) ; cf. Stefan Hammer, ‹ Die Aleviten im österreichischen Religionsrecht – ein Kampf um Anerkennung. Der schwere Abschied vom Ausschließlichkeitsgrundsatz, *Österreichisches Archiv für Recht & Religion* 65 (2018) 1–17.

[18] *Islamische-Schiitische Glaubensgemeinschaft in Österreich,* voir la décision administrative du 28 févr. 2013, № BMUKK12.056/0005KA/2012 ; <https://schia.at/> (10 juin 2021) ; cf. *Österreichisches Archiv für Recht & Religion* 60 (2013) 148–196.

[19] La Communauté confessionnelle vieille alévie et la Fédération des communautés alévies, <https://aleviten.com/> (10 juin 2021) ; cf. Hammer, *op. cit.* (note 17) 10–16 ; Wolfgang Wieshaider, ‹ Comme à travers un kaléidoscope : le statut des minorités religieuses en Autriche ›, dans Marco Ventura (éd.), *The Legal Status of Old and New Religious Minorities in the European Union · Le statut juridique des minorités religieuses anciennes et nouvelles dans l'Union européenne,* Granada : Comares 2021, 185–199 (197).

[20] Voir les articles 17–21 de sa constitution, <https://www.derislam.at/wp-content/uploads/2021/03/Verfassung_IGGOe_kons.13.12.2020.pdf> (10 juin 2021) ; pour une version antérieure voir *Österreichisches Archiv für Recht & Religion* 65 (2018) 91–122.

Depuis 1874, la reconnaissance des sociétés religieuses dépend de leur capacité à subvenir elles-mêmes à leurs propres besoins économiques, ce qui ressort de la division 1/2 de la loi relative à la reconnaissance des sociétés religieuses à laquelle correspond l'alinéa 4(1) de la loi sur l'islam de 2015. Pour le champ d'application de ladite loi, son alinéa 6(2) précise que ce ne sont que la société religieuse islamique en question, ses communautés locales et les membres qui doivent subvenir aux besoins ordinaires.[22]

Dans ce contexte, la Cour constitutionnelle a rejeté la requête des fonctionnaires de la République de Turquie qui avaient travaillé comme imams en Autriche et qui attaquaient des décisions de retour et des interdictions d'entrée. Selon la Cour, l'interdiction du financement des activités régulières des sociétés religieuses islamiques et de leurs institutions par des sources étrangères ne viole ni la liberté religieuse, ni l'égalité de traitement. Elle assure plutôt l'autonomie des sociétés religieuses concernées, telle qu'elle est garantie par l'article 15 de la loi fondamentale de l'État relative aux droits généraux des citoyens.[23]

L'absence d'une disposition parallèle à l'alinéa 6(2) de la loi sur l'islam du 2015 pour les communautés confessionnelles homologues[24] s'explique par la coopération plus étroite entre l'État et les sociétés religieuses reconnues, notamment dans le domaine de l'enseignement religieux dans les écoles publiques aux termes de l'alinéa 2(1) de la loi sur l'enseignement religieux,[25] de l'enseignement de la théologie dans une université publique[26] et de l'aumônerie militaire[27]. Or, les attentes de

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[21] Cf. *Österreichisches Archiv für Recht & Religion* 60 (2013) 102–147 ; Andreas Gorzewski et Cengiz Duran, ‹ Alevitentum ›, dans Ernst Fürlinger (éd.), *Religionsgemeinschaften in Niederösterreich im Kontext von Migration und Globalisierung,* Krems : Edition Donau-Universität Krems 2018, 46–62 (61).

[22] Voir Stefan Schima, ‹ Das im Islamgesetz 2015 verankerte Verbot der Auslandsfinanzierung. Anmerkungen vor dem Hintergrund der verfassungsgesetzlich gewährleisteten Religionsfreiheit ›, dans Hinghofer-Szalkay et Kalb, *op. cit.* (note 8) 369–398.

[23] Verfassungsgerichtshof, 13 mars 2019, E 3830/2018 & al., VfSlg. 20321; de façon pareille la position de la Communauté religieuse alévie (islamique) : <http://www.aleviten.at/_de/?page_id=39> (10 juin 2021).

[24] Schima, *op. cit.* (note 22) 372 sq.

[25] *Religionsunterrichtsgesetz,* Bundesgesetzblatt № 190/1949, modifié en dernier lieu par Bundesgesetzblatt I № 138/2017 ; cf. Stefan Hammer et Johannes Franck, ‹ Religion in Public Education – Report on Austria ›, dans Gerhard Robbers (éd.), *Religion in Public Education. La religion dans l'éducation publique,* Trier : Universität Trier 2011, 39–62 ; Katharina Pabel, ‹ Verfassungsrechtliche Rahmenbedingungen des Religionsunterrichts in Österreich ›, *Österreichisches Archiv für Recht & Religion* 59 (2012) 64–86.

[26] Voir Wolfgang Wieshaider, ‹ Les enjeux de la création d'une théologie musulmane universitaire en Autriche ›, dans Francis Messner et Mousa Abou-Ramadan (éd.), *L'enseignement universitaire de la théologie musulmane. Perspectives comparatives,* Paris : Cerf 2018, 113–122.

[27] Voir Wolfgang Wieshaider, ‹ Les aumôneries dans les établissements publics autrichiens ›, dans Ringolds Balodis et Miguel Rodríguez Blance (éd.), Religious Assistance in Public Institutions · Assistance spirituelle dans les services publics, Granada : Comares 2018, 41–51 (48 sq.).

l'État concernant le fonctionnement de ces dernières sont plus élevées. Dans cette logique, les paragraphes 28 et 29 de la loi sur l'islam de 2015 prévoient des mesures afin d'assurer le bon fonctionnement de la représentation extérieure des sociétés religieuses islamiques, eu égard aux élections des organes électifs. L'attribution de la personnalité morale implique d'un côté que l'État reconnaît l'attitude positive des entités concernées vis-à-vis l'État et la société et est signe, de l'autre côté, d'une attitude positive de l'État vis-à-vis ces institutions. Les interlocuteurs des autorités publiques sont les organes représentants des sociétés religieuses reconnues et de la communauté religieuse enregistrée mentionnées ci-dessus et autonomes.

III. La protection de l'ordre public

À la mi-2020, la République a établi un fonds de documentation relatif à l'extrémisme politique religieusement motivé dont le but principal est la recherche du phénomène de l'islam politique.[28] Dans sa définition opérationnelle, le fonds souligne la nécessité de différencier l'idéologie hégémonique de la religion de l'islam.[29]

Après l'attentat du début novembre 2020 à Vienne commis par un homme emprisonné pour avoir voulu rejoindre la guerre islamiste en Syrie,[30] le ministre de la Justice a proposé un projet de loi relatif à la lutte contre le terrorisme.[31] Ce projet a pour but de renforcer le contrôle des terroristes durant l'exécution de leur peine et après leur libération conditionnelle et d'améliorer les mesures de déradicalisation ainsi que de lutter contre le financement du terrorisme. Un délit spécifique condamnera l'extrémisme motivé par des arguments religieux (paragraphe 247b du Code pénal[32]).[33] Ce dernier est formulé de façon neutre en ce qui concerne la religion, l'exposé des motifs souligne néanmoins les exemples islamistes récents.[34]

Dans cette même période, le ministre compétent pour les relations de l'État avec les religions a présenté un projet visant à modifier les lois sur la personnalité morale des communautés confessionnelles et la loi sur l'islam de 2015.[35] Il a pour but de rendre plus efficace leur mise en œuvre, eu égard à la personnalité juridique

[28] Cf. Wiener Zeitung du 16 juil. 2020, 4.

[29] <https://dokumentationsstelle.at/> (10 juin 2021).

[30] Cf. Falter № 47 du 18 nov. 2020, 18 ; Profil № 48 du 22 nov. 2020, 16 sq. ; Salzburger Nachrichten du 7 déc. 2020, 8.

[31] 83/ME, XXVII[e] législature ; cf. Der Standard du 17 déc. 2020, 9 et 28.

[32] *Strafgesetzbuch,* Bundesgesetzblatt № 60/1974, modifée en dernier lieu par Bundesgesetzblatt I № 154/2020.

[33] Exposé des motifs 83/ME XXVIIe législature, 1 et № 849 *Beilagen zu den stenographischen Protokollen des Nationalrats,* XXVII[e] législature, 1.

[34] Exposé des motifs 83/ME XXVIIe législature, 10 sq. et № 849 *Beilagen zu den stenographischen Protokollen des Nationalrats,* XXVII[e] législature, 13.

[35] 85/ME, XXVII[e] législature.

des institutions au niveau inférieur, l'affiliation des fonctionnaires religieux aux sociétés reconnues et l'obligation de financer les activités ordinaires des sociétés religieuses islamiques et de leurs institutions sans faire appel à des financements étrangers.[36] Le lien entre ces deux projets de loi est évident. Des observations, qui leur sont favorables[37] ou défavorables[38], furent publiquement présentées et évaluées au sein des ministères compétents. Il y a lieu toutefois de noter que l'on peut trouver des positions qui soutiennent le projet de loi aussi bien de la part de musulmans, qui estiment que les mesures proposées peuvent protéger l'islam contre un usage abusif de son nom.[39] Au mois du mai 2021, les deux propositions gouvernementales étaient déposées au parlement.[40]

Si le paragraphe 27 de la loi sur l'islam de 2015 permet à l'autorité étatique d'interdire des réunions cultuelles qui présentent un danger direct pour la sécurité, l'ordre public ou la santé, la sécurité nationale ou les droits et libertés d'autrui, cela précise l'alinéa 6(1) de la loi relative aux réunions[41] avec comme seule différence la compétence ministérielle. En outre, l'exception du paragraphe 5 de ladite loi ne s'applique pas aux réunions traditionnelles qui ; de telles réunions ne présentent pas un tel danger. D'autres réunions, comme celles à but mi-politique, ne sont pas exceptées par ce paragraphe 5[42] auquel les autorités ont parfois, et de manière erronée, attribué un champ d'application trop large.[43]

Comme toute religion établie en Autriche quel que soit son statut juridique, la religion musulmane est protégée par le Code pénal[44]. Ses paragraphes 188–191 sanctionnent le dénigrement, les troubles à la religion, aux funérailles ainsi que la violation de sépulture. L'infraction est passible d'une peine d'emprisonnement ou

[36] Exposé des motifs 85/ME, XXVIIe législature, 2 et № 850 *Beilagen zu den stenographischen Protokollen des Nationalrats,* XXVII[e] législature, 2.

[37] Cf. p. ex. 21/SN-85/ME, XXVII[e] législature ; 26/SN-85/ME, XXVII[e] législature ; voir aussi note 38.

[38] Cf. p. ex. 22/SN-83/ME, XXVII[e] législature ; 54/SN-83/ME, XXVII[e] législature ; 17/SN-85/ME, XXVII[e] législature ; 20/SN-85/ME, XXVII[e] législature.

[39] Voir 48/SN-83/ME, XXVII[e] législature ; 23/SN-85/ME, XXVII[e] législature ; cf. à ce propos Mouhanad Khorchide, *Scharia – der missverstandene Gott. Der Weg zu einer modernen islamischen Ethik,* Freiburg et al. : Herder 2014, 2[e] éd.

[40] № 849 & 850 *Beilagen zu den stenographischen Protokollen des Nationalrats,* XXVII[e] législature.

[41] *Versammlungsgesetz 1953* – nouvelle promulgation –, Bundesgesetzblatt № 98, modifée en dernier lieu par Bundesgesetzblatt I № 63/2017.

[42] L'exposé des motifs № 446 *Beilagen zu den stenographischen Protokollen des Nationalrates,* XXV[e] législature, 10 ne clarifie pas cet aspect.

[43] Voir Cour EDH, 29 juin 2006, 76900/01 *(Öllinger c/ Autriche),* commenté par Wolfgang Wieshaider dans *Österreichisches Archiv für Recht & Religion* 55 (2008) 79–91.

[44] *Strafgesetzbuch,* Bundesgesetzblatt № 60/1974, modifiée en dernier lieu par Bundesgesetzblatt I № 94/2021.

d'une amande.[45] En 2013, la Cour suprême confirma la peine prononcée en première instance dans un cas de dénigrement du prophète Mahomet, en rejetant l'argument de l'accusé qui invoquait le droit à la liberté d'expression.[46] Aux termes du paragraphe 283 du Code pénal, l'incitation à la haine, entre autres points, contre une religion est punie d'emprisonnement.[47] Quelques condamnations en témoignent, assurant la protection de l'islam.[48]

IV. Normes religieuses et droit étatique

Le champ d'application des normes religieuses va de l'usage interne à leur référencement par le droit étatique.[49] L'application des normes religieuses à l'intérieur des communautés bénéficie de la protection constitutionnelle de la liberté religieuse, inscrite aux articles 14 et 15 de la loi fondamentale de 1867,[50] l'alinéa 63(2) du Traité d'État de Saint-Germain-en-Laye[51] et l'article 9 de la Convention européenne des droits de l'homme,[52] ayant valeur constitutionnelle[53].

Le droit étatique, pour sa part, ne renvoie aux normes religieuses que ponctuellement. Il n'accorde pas des effets civils à des actes d'un droit religieux ni dans le domaine du statut personnel, ni dans le droit du mariage à l'exception des renvois qui se font sur la base du droit international privé.[54]

[45] Voir Alice Sadoghi dans Frank Höpfel et Eckart Ratz (éd.), *Wiener Kommentar zum Strafgesetzbuch,* Wien : Manz 1999 ss. (feuillets mob.), 2e éd., § 188 StGB, № 2, 3, 6, 20/1 (1er mars 2020).

[46] Oberster Gerichtshof, 11 déc. 2013, 15 Os 52/12d, *Österreichisches Archiv für Recht & Religion* 62 (2015) 156–163, commenté par Doris Wakolbinger, *ibid.* 163–169 ; Oberster Gerichtshof, 10 juin 2015, 15 Os 40/15v.

[47] Voir Franz Plöchl dans Höpfel et Ratz, *op. cit.* (note 45), § 283 StGB, № 7 (1er mars 2020) ; Herbert Kalb, ‹ Religionsstrafrecht – aktuelle Änderungen ›, dans Brigitte Schinkele, René Kuppe, Stefan Schima, Eva M. Synek, Jürgen Wallner et Wolfgang Wieshaider (éd.), *Recht – Religion – Kultur. Festschrift für Richard Potz zum 70. Geburtstag,* Wien : Facultas 2014, 243–259 (255–258).

[48] Oberster Gerichtshof, 27 févr. 2001, 14 Os 5/01 ; Oberster Gerichtshof, 30 mai 2012, 15 Os 160/11k ; Oberster Gerichtshof, 22 nov. 2017, 15 Os 129/17k et 15 Os 130/17g ; Oberster Gerichtshof, 23 mai 2018, 15 Os 33/18v ; Oberlandesgericht Graz, 23 janv. 2019, 9 Bs 370/18g.

[49] Cf. Wolfgang Wieshaider, ‹ Religious Rules Under Austrian Law ›, dans Rossella Bottoni, Rinaldo Cristofori et Silvio Ferrari (éd.), *Religious Rules, State Law, and Normative Pluralism – A Comparative Overview,* Cham : Springer 2016, 77–90.

[50] *Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger für die im Reichsrathe vertretenen Königreiche und Länder,* Reichsgesetzblatt № 142/1867, modifée en dernier lieu par Bundesgesetzblatt № 684/1988.

[51] *Staatsvertrag von Saint-Germain-en-Laye,* Staatsgesetzblatt № 303/1920 dans sa version modifiée par Bundesgesetzblatt III № 179/2002.

[52] Bundesgesetzblatt № 210/1958, modifée en dernier lieu par Bundesgesetzblatt III № 139/2018.

[53] Voir l'alinéa 149(1) de la Constitution fédérale *(Bundes-Verfassungsgesetz),* Bundesgesetzblatt № 1/1930, modifée en dernier lieu par Bundesgesetzblatt I № 2/2021 et la division II/7 de la loi fédérale constitutionnelle, Bundesgesetzblatt № 59/1964.

[54] Cf. Wieshaider, *op. cit.* (note 49) 83 sq.

L'alinéa 603(1) du Code de procédure civile[55] permet de choisir le droit religieux pour l'arbitrage ;[56] en contrepartie, l'alinéa 611(2) dudit code établit des règles générales pour la reconnaissance des sentences arbitrales, y compris une clause d'ordre public.[57]

La loi sur l'islam de 2015 se rattache au droit religieux par plusieurs aspects, notamment pour les coutumes traditionnelles concernant l'éducation des enfants, les prescriptions alimentaires, le calendrier et les cimetières.

Les alinéas 11(4) et 18(4) de ladite loi précisent que les sociétés religieuses islamiques, ainsi que leurs membres, ont le droit d'élever leurs enfants selon leur tradition religieuse. Dans ce contexte les travaux préparatoires mentionnent explicitement la circoncision des fils comme faisant partie de cette tradition.[58]

Les alinéas 12(1) et 19(1) de la loi sur l'islam de 2015 autorisent les sociétés religieuses islamiques à organiser la production des denrées alimentaires et notamment de la viande conformément aux prescriptions religieuses. Les alinéas 32(3–5) de la loi relative à la protection des animaux[59] et le paragraphe 11 et l'annexe A du décret concernant les abattages[60] doivent être lus sous cet angle. L'alinéa 32(3) de la loi relative à la protection des animaux respecte l'approche des normes religieuses selon lesquelles l'étourdissement des animaux et leur mise à mort s'effectuent en une même opération.[61] Son alinéa 32(4) impose que les abattages religieux se fassent dans les abattoirs concessionnaires. L'opération elle-même exige une concession à part, dispose l'alinéa 32(5) qui garantit que la mise à mort soit correctement appliquée par une personne formée sous contrôle d'un vétérinaire et qui requiert l'application d'un acte d'étourdissement à part après la mise à mort. L'annexe A dudit décret précise les conditions.

[55] *Zivilprozessordnung,* Reichsgesetzblatt № 113/1895, modifée en dernier lieu par Bundesgesetzblatt I № 148/2020.

[56] Cf. Christian Hausmaninger dans H. W. Fasching et A. Konecny (éd.), *Kommentar zu den Zivilprozessgesetzen, vol. 4/2,* Wien : Manz 2016, 3e éd., § 603 ZPO, № 13 ; Helmut Heiss et Leander D. Loacker dans Christoph Liebscher, Paul Oberhammer et Walter H. Rechberger (éd.), *Schiedsverfahrensrecht, vol. II,* Wien : Verlag Österreich 2016, № 9/96.

[57] Hausmaninger, *op. cit.* (note 56) § 611 ZPO, № 12–20 ; cf. Wieshaider, *op. cit.* (note 49) 86–88.

[58] № 446 *Beilagen zu den stenographischen Protokollen des Nationalrats,* XXV^e^ législature, 6 et 8.

[59] *Tierschutzgesetz,* Bundesgesetzblatt I № 118/2004, modifée en dernier lieu par Bundesgesetzblatt I № 86/2018.

[60] *Tierschutz-Schlachtverordnung,* Bundesgesetzblatt II № 312/2015.

[61] Cf. Wolfgang Wieshaider, ‹ Abattage rituel. Droit des États européens ›, dans Francis Messner (éd.), *Dictionnaire du Droit des Religions,* Paris : CNRS Éditions 2010, 7–9 (7) ; Tareq Oubrou, ‹ Abattage rituel. Droit interne des religions, Islam ›, *ibid.* 9–12 (11). Voir aussi la division 2/f du Règlement (CE) № 1099/2009 sur la protection des animaux au moment de leur mise à mort, JOUE L 303/2009, 1, comprenant par étourdissement aussi « tout procédé entraînant une mort immédiate », cf. Wolfgang Wieshaider, ‹ Equal Treatment, not Just Religious Freedom: On the Methods of Slaughtering Animals for Human Consumption ›, dans Armin Lange, Kerstin Mayerhofer, Dina Porat et Lawrence H. Schiffman (éd.), *Comprehending and Confronting Antisemitism. A Multi-Faceted Approach vol. I,* Berlin, Boston : De Gruyter 2019, 503–516.

Les alinéas 12(2) et 19(2) de la loi sur l'islam de 2015 ne se limite pas aux questions de production et obligent les établissements publics militaires, pénitentiaires, hospitaliers et autres autant que les écoles publiques à tenir compte des prescriptions alimentaires religieuses correspondantes.

Les paragraphes 13 et 20 garantissent la protection des fêtes religieuses par l'État. La détermination des dates suit le calendrier islamique, en application des premiers alinéas de ces paragraphes. Ces fêtes, énumérées aux alinéas 2,[62] n'ont pas de caractère de jours fériés qui découlent, eux, de la tradition catholique, la plupart étant inscrits à l'article IX du Concordat[63]. La seule disposition par laquelle le calendrier officiel tenait compte des besoins minoritaires, celle du Vendredi saint pour les membres des Églises protestante, vieille-catholique et méthodiste, était discriminatoire en elle-même.[64] Mais le jugement de la CJEU sur ce point[65] et la réaction du législateur n'ont, à ce jour, apporté aucune ouverture à une reconnaissance d'un pluralisme religieux dans ce domaine,[66] sauf à l'égard des élèves, pour lesquels une dispense de fréquenter l'école aux dates de leur jours fériés religieux est recommandée, sur la base des lois scolaires.[67]

En ce qui concerne des pauses effectuées pour réciter les prières les jours ouvrables, la Cour suprême a considéré qu'était justifié le licenciement d'un salarié qui avait fait ses prières habituelles, en perturbant le déroulement du travail,[68] décision prise avant l'entrée en vigueur de la Directive 2000/78/CE[69]. En général, l'alinéa

[62] Voir Handan Aksünger-Kızıl, ‹ Alevitische Feier- und Gedenktage in Österreich ›, *Österreichisches Archiv für Recht & Religion* 66 (2019) 225–234 ; Ahmed Gad Makhlouf, ‹ Islamische Feiertage ›, *Österreichisches Archiv für Recht & Religion* 66 (2019) 244–257.

[63] *Konkordat zwischen dem Heiligen Stuhle und der Republik Österreich samt Zusatzprotokoll,* Bundesgesetzblatt № 2 II 1934, modifée par Bundesgesetzblatt № 195/1960.

[64] Wolfgang Wieshaider, ‹ Religious Holidays in State Law and Directive No. 2000/78/EC ›, dans Lucie Grešková (éd.), *State-Church Relations in Europe. Contemporary Issues and Trends at the Beginning of the 21st Century,* Bratislava : Institute for State-Church Relations 2008, 106–116.

[65] CJEU (grande chambre) 22 janv. 2019, C193/17 *(Cresco Investigation GmbH c/ Markus Achatzi)*.

[66] Pour les détails y compris une proposition *de lege ferenda* voir Wolfgang Wieshaider, ‹ Aller heilige Zeiten und das staatliche Recht ›, dans *Österreichisches Archiv für Recht & Religion* 66 (2019) 339–378.

[67] Voir les recommandations les plus récentes pour les élèves chiites : BMB-21.001/0001-Präs.12/2017 ; pour les élèves alévis : BMB-21.001/0002-Präs.12/2017 ; pour les élèves musulmans : BMBWF-21.001/0007-II/4/2019. Les documents concernent les élèves selon leur affiliation communautaire.

[68] Oberster Gerichtshof, 27 mars 1996, 9 ObA 18/96 ; cf. le commentaire critique de Rudolf Mosler dans *Das Recht der Arbeit* 47 (1997) 35–37.

[69] Directive portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail, JOUE L 303/2000, 16–22.

1154b(5) du Code civil[70] et l'alinéa 8(3) de la loi relative aux employés[71] permettent d'équilibrer les intérêts de l'employeur et les besoins religieux des salariés.[72]

Pour la gestion des cimetières on peut observer une prise en compte indirecte par le droit étatique des revendications religieuses. Vu que le droit étatique prévoit la possibilité générale de fermer des cimetières,[73] il faut souligner que les alinéas 15(1) et 22(1) de la loi sur l'islam de 2015 prévoient la construction durable de cimetières musulmans ce qui correspond aux exigences du droit religieux.

V. L'enseignement

La religion est enseignée dans les écoles publiques par des enseignants nommés ou autorisés par chaque société religieuse reconnue aux termes des paragraphes 3 et 4 de la loi sur l'enseignement religieux[74]. L'alinéa 1(1) de ladite loi oblige tous les élèves affiliés à une religion à y participer, mais son alinéa 1(2) permet une désinscription. La religion des communautés confessionnelles n'est pas enseignée dans les écoles publiques, la confession peut néanmoins être mentionnée dans les bulletins scolaires.[75]

La Communauté religieuse islamique et des associations à but non-lucratif sont des instances chargées de l'organisation des écoles privées musulmanes.[76] La formation des enseignants de la religion s'effectue à l'Institut des études théologiques islamiques au sein de l'Université de Vienne,[77] à l'Institut de la théologie islamique

[70] *Allgemeines bürgerliches Gesetzbuch,* Justizgesetzsammlung № 946/1811, modifée en dernier lieu par Bundesgesetzblatt I № 86/2021.

[71] *Angestelltengesetz,* Bundesgesetzblatt № 292/1921, modifée en dernier lieu par Bundesgesetzblatt I № 74/2019.

[72] Voir Andrea Potz, ‹ Dienstverhinderung aus religiösen Gründen ›, dans Schinkele, Kuppe, Schima, Synek, Wallner et Wieshaider, *op. cit.* (note 47) 639–661 ; Michaela Windisch-Graetz, ‹ Freistellung bei Entgeltfortzahlung aus religiösen Gründen ›, *Zeitschrift für Arbeits- und Sozialrecht* 52 (2017) 147–151 (149 sq.).

[73] Voir p. ex. le paragraphe 22 de la loi basse autrichienne *(NÖ Bestattungsgesetz 2007),* Landesgesetzblatt № 94800, modifée en dernier lieu par Landesgesetzblatt № 17/2020 ; le paragraphe 33 de la loi styrienne *(Steiermärkisches Leichenbestattungsgesetz 2010),* Landesgesetzblatt № 78/2010, modifée en dernier lieu par Landesgesetzblatt 54/2019 ; les paragraphes 35 et 56 de la loi vorarlbergeoise *(Gesetz über das Leichen- und Bestattungswesen),* Landesgesetzblatt № 58/1969, modifée en dernier lieu par Landesgesetzblatt № 24/2020 ; le paragraphe 35 de la loi viennoise *(Wiener Leichen- und Bestattungsgesetz),* Landesgesetzblatt № 38/2004, modifée en dernier lieu par Landesgesetzblatt № 50/2018.

[74] *Religionsunterrichtsgesetz,* Bundesgesetzblatt № 190/1949, modifiée en dernier lieu par Bundesgesetzblatt I № 138/2017.

[75] Voir l'alinéa 3(2) du décret *Zeugnisformularverordnung,* Bundesgesetzblatt № 415/1989, modifiée en dernier lieu par Bundesgesetzblatt II № 210/2021.

[76] Voir <https://www.schulen-online.at/sol/index.jsf> (10 juin 2021).

[77] Voir <https://iits.univie.ac.at/> (10 juin 2021).

et de la pédagogie de religion au sein de l'Université d'Innsbruck[78] et à l'Institut de la religion islamique au sein de l'École supérieure pédagogique ecclésiastique[79]. En particulier, le paragraphe 24 de la loi sur l'islam de 2015 instaure le cadre pour l'établissement et le financement particulier des études de la théologie musulmane au sein de l'Université de Vienne.[80] Son alinéa 24(2) oblige l'université à créer une branche d'études spécifiques pour chaque société religieuse islamique reconnue. C'est pourquoi il existe une branche islamique et une branche alévie (islamique).[81] De façon analogue, ladite École supérieure pédagogique ecclésiastique héberge un Institut de la religion alévie.[82]

Alors que la question de la participation des élèves musulmanes aux cours mixtes de natation[83] n'était pas portée de façon directe devant les tribunaux,[84] elle fut soulevée à plusieurs reprises dans des procédures de demande d'asile afin d'évaluer l'orientation culturelle des demandeurs.[85]

VI. La visibilité cousue : les voiles

Au point de vue vestimentaire, on peut observer deux étapes dans la législation. Une première était fondée sur des considérations générales sécuritaires garantissant un vivre-ensemble pacifique,[86] comme il ressort du paragraphe 1er de la loi interdisant de se voiler le visage[87]. Le paragraphe 2 prohibe la dissimulation des traits du visage dans les lieux publics sauf si c'est prévu par la loi ou motivé par des raisons culturelles, sportives, de santé ou professionnelles.[88] Les travaux préparatoires soulignent la vision d'un vivre ensemble dans une société pluraliste.[89] Par contre,

[78] Voir <https://www.uibk.ac.at/islam-theol/> (10 juin 2021).

[79] Voir <https://www.kphvie.ac.at/institute/institut-islamische-religion.html> (10 juin 2021).

[80] Pour les détails voir Wieshaider, *op. cit.* (note 26) *passim*.

[81] Pour des réflexions de la Communauté alévie (islamique) sur la branche petite alévie voir 18/SN-85/ME, XXVIIe législature, 3–5 demandant l'établissement d'une propre filière alévie.

[82] Voir <https://www.kphvie.ac.at/institute/institut-alevitische-religion.html> (10 juin 2021).

[83] Cf. Katharina Pabel, ‹ Religion im öffentlichen Schulwesen ›, dans Manfred Prisching, Werner Lenz et Werner Hauser (éd.), *Bildung und Religion* (Schriften zum Bildungsrecht und zur Bildungspolitik 10), Wien : Verlag Österreich 2006, 37–76 (52–60).

[84] Cf. Kalb, Potz et Schinkele, *op. cit.* (note 8) 635 sq.

[85] Voir Bundesverwaltungsgericht, 9 févr. 2015, W117 1431228-1 ; 3 juil. 2015, W208 2017232-1 ; 8 mars 2017, W159 2111120-2 ; 3 janv. 2018, W124 2135363-1 ; 2 sept. 2019, W159 2159991-1.

[86] Cf. Cour EDH (grande chambre), 1er juil. 2014, 43835/11 *(S. A. S. c/ France),* № 121 sq., 141 sq., 153 et 157.

[87] *Anti-Gesichtsverhüllungsgesetz,* Bundesgesetzblatt I № 68/2017.

[88] Wolfgang Wieshaider, ‹ Public Security and Religion : An Austrian Approach ›, dans Merilin Kiviorg (éd.), *Securitisation of Religious Freedom : Religion and Limits of State Control · Sécurisation de la liberté religieuse : La religion et les limites du contrôle de l'État,* Granada : Comares 2020, 151–163 (158 sq.).

[89] *№ 1586 Beilagen zu den stenographischen Protokollen des Nationalrates,* XXVe législature, 11.

l'interdiction du voile porté par des jeunes filles dans les écoles primaires et dans les écoles maternelles n'envisageait que le voile islamique, comme il est décrit dans les travaux préparatoires.[90] Le paragraphe 43a de la loi sur l'enseignement scolaire[91] qui a introduit cette prohibition pour les écoles fédérales, a finalement été annulé par la Cour constitutionnelle, pour violation des principes d'égalité de traitement et de neutralité de l'État ainsi que de liberté religieuse.[92]

En ce qui concerne le monde du travail, une cour de deuxième instance a attribué des dommages-intérêt à une femme dont la candidature à un emploi n'avait pas été prise en considération à cause de son voile, femme qui, en outre, avait été l'objet de remarques désobligeantes à propos de sa religion.[93] Une autre plainte échoua parce que la plaignante n'arrivait pas à démontrer la discrimination.[94] Eu égard à une notaire qui couvrait ses cheveux du voile et qui plus tard a commencé à porter le niqab, la Cour suprême opéra une distinction : Tandis qu'elle reconnut une discrimination lorsqu'il s'agissait du voile, elle considéra le licenciement justifié en cas de niqab.[95] Elle renvoya à la jurisprudence de la Cour européenne des droits de l'homme[96] et aux conditions de la communication entre personnes qui constituent une exigence professionnelle essentielle et déterminante aux termes de l'alinéa 20(1) de la loi relative à l'égalité de traitement.[97]

VII. La visibilité bâtie : les mosquées

La plupart des mosquées sont établies dans des édifices qui, de l'extérieur, ne se reconnaissent pas comme édifices de culte.[98] Les débats politiques d'autrefois autour de la construction des mosquées et notamment des minarets[99] ont largement

[90] Motion parlementaire № 495/A, XXVIe législature, 2 ; exposé du comité parlementaire № 612 *Beilagen zu den stenographischen Protokollen des Nationalrates,* XXVIe législature, 3.

[91] *Schulunterrichtsgesetz,* Bundesgesetzblatt № 472/1986, dans la version de Bundesgesetzblatt I № 54/2019.

[92] Bundesgesetzblatt I № 159/2020 ; Verfassungsgerichtshof, 11 déc. 2020, G 4/2020.

[93] Oberlandesgericht Wien, 17 mai 2018, 9 Ra 117/17t, ARD 6617/4/2018.

[94] Oberlandesgericht Linz, 21 sept. 2016, 12 Ra 63/16w.

[95] Oberster Gerichtshof, 25 mai 2016, 9 Ob A 117/15v, *Österreichisches Archiv für Recht & Religion* 63 (2016) 407–426, commenté par Andrea Potz, *ibid*. 426–445 ; voir aussi la critique pour ne pas avoir demandé de décision préjudicielle aux termes de l'article 267 du TFUE (JOUE C 202/2016) Franz Marhold dans *Zeitschrift für Arbeits- und Sozialrecht* 52 (2017) 42–44.

[96] Cour EDH (grande chambre), 1er juil. 2014, 43835/11 *(S. A. S. c/ France)*.

[97] *Gleichbehandlungsgesetz,* Bundesgesetzblatt I № 66/2004, modifée en dernier lieu par Bundesgesetzblatt I № 16/2020 ; cf. l'alinéa 4(1) de la Directive 2000/78/CE.

[98] Ernst Fürlinger, *Moscheebaukonflikte in Österreich. Nationale Politik des religiösen Raums im globalen Zeitalter,* Göttingen : V& R unipress, 2013, 144–170.

[99] Cf. Wolfgang Wieshaider, ‹ Von Moscheenbau und Muezzinruf. Bau- und Immissionsschutzrecht als Schranken der Religionsausübung ›, dans Andreas Haratsch, Norbert Janz, Sonja Rademacher,

cessé. L'ordre juridique ne laisse pas apparaître des dispositions discriminatoires.[100] Au surplus, la mosquée à Bludenz, dont les plans alimentaient les débats politiques et qui fut construite suite à des prescriptions déjà modifiées, dispose d'un minaret de seize mètres de haut. Mais ce minaret fut réalisé de façon insolite,[101] étant orné des versets du Coran autant que de la Bible.[102]

VIII. La perspective interreligieuse[103]

En 2012, la plateforme des églises et sociétés religieuses reconnues fut fondée, ouverte pour toute église et société reconnue par l'État.[104] La Communauté religieuse islamique et la Communauté religieuse alévie (islamique) en font partie. D'habitude, elle est convoquée tous les six mois. En outre, il y a des cercles de discussion[105] et le projet formateur de l'École supérieure pédagogique ecclésiastique mentionné ci-dessus. L'exemple du minaret de Bludenz souligne que le dialogue peut dépasser l'enseignement et les cercles de discussion et se refléter même dans l'architecture.[106]

Stefanie Schmahl et Norman Weiß (éd.), *Religion und Weltanschauung im säkularen Staat,* Boorberg : Stuttgart et al. 2001, 155–180 (162–169) ; Friederike Bundschuh-Rieseneder, ‹ Rechtliche Rahmenbedingungen für die Errichtung von Moscheen oder Gebetstürmen in Tirol ›, *Baurechtliche Blätter* 10 (2007) 75–81 ; Wolfgang Wieshaider, ‹ Das harmonische Minarett. Zur Vereinbarkeit von Minaretten mit dem Orts-, Straßen- und Landschaftsbild ›, *Baurechtliche Blätter* 10 (2007) 209–213 ; Thomas Kröll, ‹ Kruzifixe, Minarette, Sonntagsruhe. Aktuelle Fragen des öffentlichen Rechts im Jahr 2009 ›, *Jahrbuch Öffentliches Recht* 2010, 215–248 (233–240) ; Fürlinger, *op. cit.* (note 98) 170–408.

100 Wolfgang Wieshaider, ‹ Ums Minarett ›, dans Hinghofer-Szalkay et Kalb, *op. cit.* (note 8) 423–433 (425–431).

101 Vorarlberger Nachrichten du 23 juil. 2015, p. BL5; Vorarlberger Nachrichten du 14 févr. 2017, p. B2.

102 <http://www.vol.at/das-ist-die-neue-moschee-fuer-bludenz/4198705> (10 juin 2021).

103 Cf. Elisabeth Dörler, ‹ Vom bosniakischen zum österreichischen Islam. Pluralismus und Islam in Österreich ›, dans Peter Hünseler et Salvatore Di Noia (éd.), *Kirche und Islam im Dialog. Europäische Länder im Vergleich,* Regensburg : Pustet 2010, 262–280.

104 <https://www.ots.at/presseaussendung/OTS_20120525_OTS0066> (10 juin 2021).

105 Cf. Susanne Heine, Rüdiger Lohlker et Richard Potz, *Muslime in Österreich. Geschichte, Lebenswelt, Religion. Grundlagen für den Dialog,* Innsbruck, Wien : Tyrolia 2012, 261–266.

106 Wieshaider, *op. cit.* (note 100) 432 sq. ; voir aussi le projet <https://www.campus-der-religionen.at/> (10 juin 2021).

L'ISLAM COMME TEST POUR LE MODÈLE CONSTITUTIONNEL BELGE

Louis-Léon Christians[1]

I. Préalable

Au moment où, en 2021, l'Assemblée nationale française adopte une nouvelle législation sur les principes de la République, dans la perspective de lutter contre les « séparatismes » au sein-même d'un système juridique qui affirme depuis 1905 la séparation du religieux et de l'Etat, la Belgique s'interroge de façon perplexe sur la nécessité d'introduire un concept de « laïcité de l'Etat » dans une Constitution belge muette sur ce point depuis 1830. Qu'y aurait-il de commun entre ces deux moments français et belge ? Certains répondront qu'ils y voient l'incertitude et l'instabilité d'un concept de laïcité. D'autres y observeront le défi commun posé par l'Islam à tous les systèmes juridiques européens, quelque soient leurs principes constitutionnels. Certes, il est d'autres facteurs que juridiques : l'histoire coloniale (et de la décolonisation) très différente d'un pays à l'autre, les structures de l'immigration, les politiques sociales d'intégrations, les rapports de forces politiques au regard de l'électorat musulman, constituent tous des contextes d'arrière-plan à la fois importants et profondément distincts. Alors que certains contentieux se sont développés de façon très similaire en Belgique et dans les autres pays européens, que l'on pense à la question des signes confessionnels, de la discrimination, de la neutralité publique, de l'enseignement, des usages alimentaires, de la représentation organisée de l'Islam, les modèles juridiques, et notamment constitutionnels, présentaient, au moins formellement, des singularités fortes et des distinctions apparemment majeures. Aucun indicateur évident ne permet de distinguer un ou des modèles juridiques qui auraient potentiellement assuré une résolution plus aisée de ces contentieux, ou mieux

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encore, la prévention de ceux-ci. Ce constat doit certainement être interrogé non seulement par des juristes mais aussi des politologues et des sociologues du droit. Une littérature émerge lentement sur cet examen croisé des influences mutuelles des contextes socio-historiques et des structures juridico-constitutionnelles. En quoi un système normatif formel comme le droit peut-il moduler les rapports sociaux autour de l'Islam ? Certains auteurs indiqueront d'emblée, dans une ligne marxienne, que la question est, selon eux, mal posée : la religion ne serait à prendre en compte ni comme réponse, ni comme question pour penser la cohésion sociale. C'est bien par l'indifférence juridique la plus complète envers les superstructures religieuses que les vraies questions devraient être seules posées : celle de l'immigration et de la précarité sociale, bref des rapports de force face au nouveau prolétariat musulman. Sans doute une attention plus complexe à la variété des facteurs doit-elle, pour d'autres auteurs, intégrer les données religieuses, y compris dans une approche normative. Il ne s'agit plus alors d'ériger ce facteur en critère unique et de surplomb, mais de la prendre en compte parmi d'autres. C'est avec ces réserves et précautions que le présent rapport entend examiner les statuts juridiques dans lesquels l'Islam est singularisé et régulé comme religion par le droit belge.

II. Introduction: le cadre social

A. Nombre de musulmans, anciens et nouveaux immigrants (qu'il y ait ou non des mosquées, qu'il y ait ou non des musulmans dans les parlements nationaux et régionaux)

Il n'existe en Belgique aucun chiffre officiel concernant le nombre d'habitants de religion musulmane. Les estimations visent entre 600.000 et 700.000 musulmans sur 11.000.000 d'habitants, soit 6,3 %, inégalement répartis sur le territoire.

La Belgique compte environ 300 mosquées, ont 70 officiellement reconnues et soutenues financièrement par les pouvoirs publics.

Certains députés sont certainement de religion musulmane, mais les données ne sont ni publiques ni connues. Dès qu'une députée (d'origine turque, membre du parti ex-chrétien) a souhaité porter le foulard au Parlement, il y a eu une vaste polémique.

B. Minorités musulmanes en Europe (distinction entre minorités historiques traditionnelles et communautés d'immigrants)

La part la plus importante de la population musulmane est liée aux conventions d'immigration convenues dans les années 1960, essentiellement avec le Maroc. Un importante communauté d'origine turque est également présente. Les secondes, et troisièmes générations ont également fréquemment acquis la nationalité belge. Très minoritaires, des minorités musulmanes sont arrivées en Belgique de Tchéchénie et de Syrie.

III. Reconnaissance institutionnelle par l'État

A. Assise juridique des communautés islamiques (personnalité juridique)

Deux statuts juridiques peuvent coexister en droit belge pour les associations islamiques : d'une part, pour toute association d'au moins trois personnes, la possibilité d'acquérir, par déclaration officielle, dépôt des statuts et des comptes, un statut de droit commun d'association sans but lucratif, doté de la personnalité juridique ; d'autre part, pour les communautés locales reconnues par les pouvoirs publics comme « cultuelles », un statut d'établissement de droit public, doté de la personnalité juridique, pour leur organes de gestion comptable. Pour acquérir ce second type de statut, des conditions plus sévères de contrôle comptable et budgétaire est prévu par des normes propres à chaque Région, ainsi que des déclarations de loyauté à la Constitution belge et aux droits fondamentaux.

B. Financement des communautés islamiques

Les communautés locales reconnues bénéficient d'un financement public du traitement et de la pension d'un ou plusieurs imams (en fonction de la taille de la communauté), ainsi que du comblement des déficits de frais de fonctionnement et d'entretien des mosquées ou salles de prières affectées au culte, par les provinces, pour ce que n'arriveraient pas à financer les dons des fidèles eux-mêmes. Il est communément admis que la part du culte islamique dans le financement des cultes est moins que proportionnelle par rapport au financement reçu par l'Eglise catholique, ou les structures reconnues de la Laïcité organisée.

Les professeurs de religion islamique de l'enseignement public sont également rémunérés par les pouvoirs publics.

C. Position de l'État envers les communautés islamiques / D. Existe-t-il des organes représentatifs, qui communiquent avec le gouvernement?

Les positions de l'Etat ont évolué depuis la reconnaissance du culte islamique en 1974.

Dans une première période, le régime des cultes est essentiellement perçu comme du dispositif e gestion de l'immigration. Les relations marocaines, turques et l'influence de l'Arabie saoudite sont manifestement abordée en termes diplomatiques.

Dans un second temps, le régime des cultes se recentre progressivement sur l'Islam comme religion, et non comme immigration. Cependant, le principe de séparation des religions et de l'Etat, ainsi que l'absence de clergé sunnite, conduit l'Etat à faire émerger un organe représentatif des musulmans de Belgique qui au début est limité au seul rôle de gestionnaire administratif des flux financiers. L'Exécutif des musulmans de Belgique, mis progressivement en place par élections depuis 1998, s'est doté d'un Conseil des théologiens pour valider les dimensions religieuses de

ses décisions internes au régime administratif et comptable (désignation des imams et des professeurs de religion, habilitation des communautés dans les dossiers de reconnaissance).

Dans un troisième moment depuis 2016 : le Gouvernement souhaite désormais officiellement que l'Exécutif des musulmans de Belgique puisse élargir ses compétences sociales et assurer un rôle de représentant de nature religieuse pour l'ensemble des questions pertinentes sur l'Islam, même en dehors du cadre règlementaire comptable, et même en ce qui concerne les communautés islamiques non reconnues.

En 2021, le Ministre libéral de la Justice a estimé que l'influence du Maroc demeurait trop grande auprès de l'Exécutif des Musulmans de Belgique et a exercé des pressions sur certains de ses membres qui ont été amenés à démissionner. Le Ministre en appel à la jeunesse musulmane pour reprendre la dynamique et fonder un Islam de Belgique.

IV. Application du droit islamique (à la fois en tant que droit d'État et / ou droit international privé) et sa relation avec les droits fondamentaux et la dignité humaine

A. Droit de la famille

Dans le cadre du droit international privé, et notamment de l'applicabilité de la loi nationale au statut personnel, l'application du droit d'un Etat étranger impliquant une référence ou une généalogie islamique ne fait pas de problème en soi, y compris pour la mise en œuvre des sous-classements religieux des systèmes plurilégislatifs personnels (comme le Liban ou l'Egypte). En revanche, l'ordre public international belge s'oppose à la reconnaissance des lois prévoyant un empêchement religieux à mariage, ou à succession, la polygamie ou encore un divorce par répudiation. Dans le cas de la répudiation accomplie à l'étranger, les juges belges en ont souvent admis l'effet en Belgique sur la base de l'assentiment de la femme, du moins de 1984 à 2004. Depuis 2004, le Code de droit international privé belge s'oppose à toute reconnaissance de la répudiation, même en cas d'assentiment, sauf d'une femme n'ayant ni nationalité belge, ni résidence belge.

B. Droit successoral

La Cour constitutionnelle de Belgique a confirmé la validité du partage de la pension de survie d'un belgo-marocain entre ses deux épouses, l'une résidant en Belgique et l'autre résidant au Maroc. Le principe d'atténuation de l'ordre public international en cas de situation ne présentant pas une proximité forte avec la société belge justifie cette solution. La Cour estime par ailleurs que le même règle de partage s'applique également aux belges ayant eu plusieurs conjoints au cours de leur vie,

suite à des divorces. La Cour assimile explicitement, du point de vue de la sécurité sociale, polygamie instantanée et polygamie successive.

C. Droit du travail

La jurisprudence évalue, au cas par cas et de façon variable, la possibilité pour un chômeur de d'invoquer des prescrits de l'Islam pour estimer qu'une offre d'emploi ne serait pas « convenable » pour lui. L'invocation de prescrits religieux dans le cadre de la relation de travail suscite un contentieux particulièrement abondant concernant le port de signes religieux, mais n'a pas suscité de jurisprudence réelle dans d'autres cas. L'invocation de règles religieuses n'a pas débouché sur des questions d' « applicabilité » de ces règles mais seulement quant à leur titre factuel de justification potentielle à une demande d'accommodement.

D. La charia et les droits des enfants et des femmes

Différents débats publics ou parlementaires ont invoqué l'argument de *vulnérabilité* pour s'opposer au port de signes religieux de la part des femmes adultes ou des enfants. Il en a été de la sorte en 2011 lors des débats visant à interdire pénalement le fait de se couvrir le visage, même si par la suite, la Cour européenne des droits de l'homme a estimé irrecevable un tel argument. En 2020, cet argument a été soutenu pour interdire le port de signes religieux à des étudiantes majeures de l'enseignement supérieur organisé par la Ville de Bruxelles. La Cour constitutionnelle a admis la validité d'une telle interdiction, sans toutefois ériger cette prohibition en règle constitutionnelle générale, mais seulement comme une faculté d'orientation, parmi d'autres, susceptibles d'être adoptées par l'enseignement communal au nom d'interprétation « admissible » d'une des façons d'entendre le principe de neutralité.

V. Discrimination des musulmans

A. En droit du travail (chiffres de l'emploi, cadre juridique, considérations politiques)

La Belgique ne dispose pas de statistiques précises sur les différents aspects de la discrimination envers les personnes de religion musulmane. Mais une agence publique indépendante, UNIA, Centre interfédérale pour la lutte contre les discrimination et l'égalité collecte toute plainte ou signalement de discrimination, en relevant les diverses catégories protégées, dont l'appartenance religieuse, et public chaque année un rapport faisant état des fluctuations apparentes de la situation des musulmans. Depuis 2008, UNIA a également adopté le concept d' « islamophobie » en l'assortissant d'une grille de lecture spécifique et objective. Ici encore, l'évolution des catégorisations de UNIA est significative puisqu'à l'origine le dossier « islam » n'était pas suivi comme dossier religieux, mais bien lié à la figure des immigrés.

B. Application du droit communautaire pertinent (non-discrimination religieuse, directive 2000/78)

La directive européenne 2000/78 a fait l'objet d'une transposition par la loi du 7 mai 2007, ainsi que par différents décrets régionaux et communautaires, selon la répartition belge des compétences législatives. L'islam n'y fait pas l'objet d'un suivi spécifique. En revanche, la jurisprudence confirme que l'importance du contentieux relatif aux personnes de religion musulmane, notamment dans le cas de femmes portant le foulard, mais aussi dans d'autres hypothèses (souhait de non-mixité, etc). La jurisprudence admet que le port de signes religieux puisse être légalement admis dans un certain nombre de cas (cfr plus haut).

C. Genre, sexualité et islam en Europe (comparaison avec les églises chrétiennes)

La réfection d'hymen, les certificats de virginité, le refus d'être approché par un médecin de sexe différents, l'excision et la circoncision ou encore le statut islamique de l'avortement ont fait l'objet de polémiques, ainsi que de certaines prises de position des Conseils de l'Ordre des médecins ou des pharmaciens, ainsi que du Comité national consultatif de Bioéthique. On ne dispose pas de comparaison précise concernant les femmes chrétiennes. La Belgique connaît un taux de sécularisation élevé et en nette progression. La religion catholique, historiquement dominante à 90 % au XIXe siècle, est aujourd'hui considérée comme elle-même minoritaire. L'éthique chrétienne des soins de santé (refus de l'IVG, de l'euthanasie, de la PMA) est de plus en plus considérée comme « fondamentaliste » dans les services publics de santé. La législation renforce les contraintes de pluralisme axiologique envers les institutions de santé catholiques, jadis majoritaires, et aujourd'hui obligées par exemple de ne pas refuser d'euthanasie en leurs murs, au risque de perdre leurs subventions publiques.

VI. Exercice de la liberté de religion et d'autres droits cultuels

A. Cadre juridique et procédure pour la création et le fonctionnement des mosquées

La création et le fonctionnement des mosquées sont libres, et simplement soumis au droit commun de l'urbanisme. Certaines difficultés surviennent à propos de la possibilité d'ériger un minaret. Différentes formes architecturales moins visibles s'inscrivent plus facilement dans les contraintes urbanistiques (par exemple un minaret symbolique sous forme de panneau lumineux soumis à la réglementation relative à l'affichage publicitaire urbain).

En revanche, la reconnaissance d'une mosquée dans le cadre du régime des cultes reconnus, suppose une procédure administrative auprès de la Région et auprès de l'Etat fédéral. La création d'un comité de gestion, l'établissement d'une compta-

bilité soumise à tutelle administrative de la Province, et déclaration de loyauté à la Constitution sont des éléments majeurs du dossier, ainsi que le nombre de fidèles et la qualité du bâtiment qui servira de mosquée ou de salle de prière. Les pouvoirs publics n'interviennent pas dans le financement de l'achat ou de la construction de la mosquée mais seulement dans le comblement du déficit éventuel lié à son fonctionnement et à son entretien.

Sur 300 mosquées connues en Belgique environ 70 sont reconnues. Les nouvelles législations régionales depuis 2005 prévoient désormais la possibilité de révoquer la reconnaissance d'une mosquée, ce qui a déjà été fait lorsque les pouvoirs publics estiment que des activités radicalistes se déploient dans une mosquée. De même, l'imam, s'il est étranger, peut se voir donner l'ordre de quitter le territoire en cas de propos contraires à l'ordre public (par exemple quant aux violences légitimes qui peuvent être faites sur les femmes par leur mari). Certains lieux de cultes peuvent également être fermés pour violation des restrictions sanitaires Covid-19.

B. **Interdiction des rituels islamiques**

La question de la **circoncision rituelle** des garçons a fait l'objet d'un avis du comité consultatif national de bioéthique qui n'a pas établi de consensus sur une position unique, mais se borne à proposer des arguments en sens divers. En revanche, il y a eu consensus pour inviter aux dialogues et à l'accompagnement des communautés en vue de faire évoluer leurs pratiques.

U moins une poursuite pénale a donné lieu à jugement correctionnel concernant des *exorcismes islamiques* ayant conduit à des séquelles ou à des décès.

Le commerce de *produits halal* n'est pas réglementé. Un grand nombre de label halal sont présents. Ils sont considérés comme de nature privée en Belgique et n'ont pas fait l'objet de contentieux en justice. La Région wallonne organise un soutien à l'exportation de produits halal.

Le bien-être animal relève depuis 2014 des compétences législatives des Régions, et non plus de l'Etat fédéral. Depuis 2017, l'exemption d'étourdissement préalable à *l'abattage rituel*, qui était légalement confirmée depuis 1929, a été supprimée dans les Régions flamande et wallonne, avec entrée en vigueur en 2019. La législation octroie toutefois -aux seuls abattages religieux- la garantie d'un étourdissement qui soit réversible. Cette forme d'étourdissement a été négociée avec l'Exécutif des Musulmans de Belgique comme pouvant être tenue conforme à l'Islam. Par ailleurs, l'importation de viandes religieusement conformes reste autorisée. Plusieurs recours devant la Cour constitutionnelle ont été introduits contre les décrets wallons et flamands. Ils ont donné lieu à un arrêt de la Cour de Justice de l'Union européenne. La Cour constitutionnelle devrait rendre son arrêt final en 2021. La Région de Bruxelles-Capitale, où réside une part importante de la population musulmane, et où les abattoirs régionaux consacrent une part importante de leur

activité à des abatages halal, a quant à elle, maintenu l'exemption d'étourdissement préalable au bénéfice des abattages religieux.

C. Éducation des élèves musulmans

L'article 24 de la Constitution oblige les écoles publiques à offrir le choix entre un cours de religion reconnue et un cours de morale de non confessionnelle. L'accès à ces cours de religion ne nécessite pas l'appartenance personnelle à la dénomination religieuse. Il n'est pas requis d'être musulman pour pouvoir s'inscrire au cours de religion islamique. Le cours de religion islamique est celui qui bénéficie de plus haut taux de progression depuis plusieurs années. Les enseignants, qui doivent être titulaire d'un titre universitaire au moins accessoire, doivent bénéficier d'un visa de l'Exécutif des musulmans de Belgique. Des contentieux ont mis en cause la répartition des compétences entre l'EMB et les autorités publiques. A l'origine, même des sanctions disciplinaires de droit commun devaient faire l'objet d'une approbation de l'EMB. Ce n'est plus le cas depuis 2017. Progressivement, pour l'Islam comme pour les autres religions reconnues, l'autorité religieuse a vu son rôle régresser progressivement, tant à l'égard de la nomination que de la révocation des professeurs de religion.

Il est possible pour un élève de solliciter une dispense totale des cours de religion et de morale, à la condition de s'inscrire, en Communauté française, à un cours subsidiaire d'une heure de citoyenneté, et en Communauté flamande, à une formation au questionnement philosophique assurée par les parents eux-mêmes. Aucun contrôle n'est effectué quant aux motifs de cette demande d'exemption.

Aucune dérogation n'est prévue concernant les autres cours (sport, natation, biologie etc) ou concernant les repas de cantines scolaires. Diverses polémiques se sont déclenchées concernant l'absentéisme d'enfants réputés musulmans à de tels cours ou cantines.

D. Éducation religieuse des musulmans (dans les institutions privées ou publiques et éducation non formelle)

De rares écoles confessionnelles musulmanes sont reconnues (principalement à Bruxelles), alors que cette possibilité est prévue par la législation, à l'exemple du réseau libre subventionné catholique (qui scolarise 65 % de l'ensemble des enfants au niveau secondaire).

Depuis 2010, divers décrets de la Communauté française et de la Communauté flamande sont venus soumettre à de nouvelles conditions et de nouveaux contrôles les formes d'enseignements à domicile (et des enseignements totalement privés qui y sont assimilés). A l'origine, cete enseignement à domicile supposait seulement qu'au terme de son parcours l'enfant se soumette à un examen public spécifique pour accorder à l'élève l'équivalence d'un diplôme public. Désormais, des examens publics

intermédiaires doivent être réussi, à défaut de quoi l'enfant doit être réintégré dans l'enseignement public.

Plusieurs initiatives des pouvoirs publics doivent être mentionnées concernant l'amélioration de la formation des cadres musulmans sur le contexte belge, et aussi concernant la formation sur l'Islam auprès des différents acteurs sociaux en Belgique. En Flandres, le Gouvernement flamand a ainsi soutenu la création d'un master en islam à l'Université de Leuven, ainsi qu'un programme de formation des imams. Il en va de même en Wallonie pour la formation des Imams et celles des professeurs de religion islamique subventionnées à l'Université catholique de Louvain ? En Communauté française, une initiative plus large a été prise en créant par décret un Institut public de promotion des formations sur l'islam, dont la direction est composée de représentants des autorités publiques, des universités et de l'Exécutif des musulmans de Belgique. Cet organe est doté d'un budget annuel garanti visant à soutenir des initiatives diverses de formation, outre la création d'une chaire interuniversitaire en islamologie pratique et la préparation de la création d'une faculté de théologie islamique.

E. Individualité des droits de l'homme contre communautarisme des religions : le cas de l'islam européen

La plupart des droits fondamentaux mis en œuvre par des personnes musulmanes relève bien d'un droit individuel, sans contrôle ni confirmation doctrinale par de quelconques autorités religieuses ou l'invocation de textes sacrés. En revanche, l'accès aux services cultuels organisés dans le cadre du régime des cultes est soumis à l'aval de l'autorité religieuse locale ou de l'EMB. Par exemple, si l'élaboration des carrés confessionnels musulmans au sein de certains cimetières publics relèvent de l'autorité religieuse, le droit d'y être enterré est un droit purement individuel, ne supposant aucun aval religieux.

VII. Liberté d'expression et islam

Il n'existe pas en droit belge de délit de blasphème. En revanche, le code pénal prévoit un délit d'outrage aux objets de culte, mais demeure dépourvu de jurisprudence, quelque soit la religion concernée.

Un délit d'incitation à la haine est instauré dans le cadre de la législation antidiscrimination. Il n'existe en revanche pas de délit d'atteinte aux sentiments religieux ou d'injure à raison de l'appartenance à un groupe religieux.

Un abondant contentieux s'est déployé concernant des propos racistes ou d'incitation à la haine envers «les musulmans», provenant de diverses sources, dont notamment de militants d'extrême-droite, voire de clergés chrétiens intégristes. Comme mentionné plus haut, UNIA, agence publique indépendante, a développé un suivi concernant l'«islamophobie» et une grille d'analyse précisant ce concept.

Concernant des propos tenus d'incitation à la haine tenus par des musulmans, à l'encontre de tiers (selon le genre, l'orientation sexuelle, la religion etc), un certain nombre de propos tenus publiquement par des imams ou des professeurs de religion ont conduit à des expulsions (en cas de nationalité étrangère) ou à des révocations. Un cas a particulièrement fait polémique concernant un adolescent appelant Dieu à se venger sur les chrétiens. Cet adolescent, fils d'un imam connu pour ses propres discours polémiques) a fait l'objet d'un placement en résidence fermée de protection de la jeunesse (IPPJ).

Les motifs haineux constituent par ailleurs des circonstances aggravantes pour certains crimes de droit commun commis avec de tels motifs.

VIII. Défis posés par l'islam dans la compréhension et l'application traditionnelles de la démocratie et des droits en Europe

A. Demandes politiques émanant des communautés musulmanes? Quelque chose de plus que l'égalité de traitement ? / B. aspects publics / privés

Parmi les demandes sous-jacentes aux débats publics, on trouve deux ordres de revendications. D'abord des revendications « universalistes » visant à assurer une justice et estime sociale aux musulmans issus de l'immigration, comme à toute autre habitant : une politique plus ferme contre les discriminations directes et indirects, et contre les déviations d'un principe de neutralité essentiellement entendu comme ségrégatif envers une population qui se ressent de « seconde zone ». Les débats relatif à l'introduction du concept de laïcité dans la Constitution belge sont perçus comme essentiellement focalisé sur l'Islam comme problème.

Ensuite des revendications plus particularistes visent au respect de certains usages religieux ou culturels (comme l'abattage rituel des animaux, le droit de porter le foulard, ou le droit de ne pas voir moquer sa religion). Un point particulier est la revendication des musulmans e ne pas souffrir d'intrusion de l'Etat dans la structuration de l'organe représentatif national des musulmans. Dans cet ordre de singularité religieuse, l'Exécutif des Musulmans de Belgique a de plus en plus tendance adopter des positions communes avec les différents cultes reconnus en Belgique et à poser la question globale du religieux et de la spiritualité dans la société belge de plus en plus polarisée au fur et à mesure de sa sécularisation.

D'un point de vue politique, un parti politique dénommé « islam » a eu une vie éphémère en Région de Bruxelles-Capitale. Un débat plus discret porte sur la possibilité pour l'Islam de se structurer en pilier comme les autres courants majeurs de la société belge (écoles, mutuelles, partis, mouvements de jeunesse, culte etc). Ce qui a été reconnu à la mouvance catholique ou à la mouvance laïque ne pourrait-il l'être aux musulmans ?

Les partis politiques de gauche (socialiste, extrême-gauche, ex-chrétien) sont attentifz à s'attacher une part de l'électorat musulmans, et à éviter l'émancipation de

ce dernier. Il n'en va pas de même du parti libéral. Le Centre d'action laïque, qui est très critique envers toute tolérance des signes religieux musulmans a développé une initiative collective regroupant des musulmans « laïques « agissant comme lobbys laïques auprès des médias et des politiques.

B. Sécurité et liberté à la lumière de l'islam(ophobie)

1. *Existe-t-il des défis particuliers en ce qui concerne les musulmans? Radicalisation et sécurité - comparaison avec d'autres défis religieux ou non-religieux relatifs à la sécurité*

A la suite es attentats de Paris puis de Bruxelles, puis de nombreux départs de jeunes vers la Syrie, le dossier politique de l'Islam a été clairement associé à celui de la prévention et de la lutte contre la radicalisation. Une commission parlementaire spéciale a formulé des recommandations, incluant l'accroissement du nombre de conseillers islamiques en prison. Le budget destiné aux cultes en prison a été réorienté pour assurer cette augmentation de façon rapide des conseillers ainsi que leur formation. Il n'est toutefois pas certains que ces conseillers soient réellement efficace auprès des détenus radicalisés dès lors qu'ils ont la réputation d'être des agents de l'Etat. Les recommandations de la Commission ont également concernés divers lieux où les jeunes musulmans peuvent être suivis, dans l'enseignement ou dans les mouvements sportifs. La politique de contrôle envers le prosélytisme jihadiste, y compris au sein de certaines mosquées a fait l'objet d'une attention particulière, même s'il apparaît que ce ne sont pas les mosquées qui constituent le lieu majeur de radicalisation.

2. *Les conséquences de l'islamophobie sur l'engagement des États européens en faveur des droits fondamentaux*

Mis à part le protocole officiel de l'agence publique UNIA concernant le concept d'islamophobie, l'usage de ce lexique demeure controversé au titre de l'amalgame qu'il provoque entre protection des musulmans et protection de la doctrine de islam et de même en sens inverse de dépréciation ou de suspicion.

C. Le lien entre l'islamophobie et les mouvements politiques anti-immigration ou l'adoption de politiques anti-immigration et des prises de position des partis politiques

Les principaux mouvements politiques anti-immigration s'enracinent dans une perspective essentiellement nationaliste (principalement en Flandres). L'Islam n'est qu'un élément second dans leur revendication, quoique il soit mis souvent en avant. Côté francophone, ces questions fracturent le front laïque qui convergeaient souvent contre le catholicisme, mais se divisent davantage sur l'Islam, entre un parti socialiste

plus attentif à la cause d'un nouveau prolétariat musulmans et un parti libéral qui a repris davantage le combat pour la « laïcité » de l'Etat.

D. Initiatives en faveur de la compréhension mutuelle et du dialogue inter-religieux en Europe

Le Premier ministre Charles Michel a constitué auprès du Gouvernement fédéral un conseil des cultes reconnus et des philosophies non confessionnelles reconnues. L'Islam est donc associé à ce nouveau dispositif. Une polémique est toutefois survenue à l'encontre de la Charte fondatrice qui a du être signée par les divers organes représentatifs et qui vise notamment la primauté de la loi civile sur la loi religieuse.

IX. Conclusions: Préférences concernant le modèle étatique de coexistence entre l'État laïc et l'islam – Critique

La caractéristique du système juridico-politique belge est de fonder dès l'origine en 1830 un régime de cultes reconnus, et un système consociationaliste articulant le pouvoir politique entre pilier catholique et pilier laïque. Le pilier laïque est lui-même devenu l'équivalent d'un culte reconnu en 1993/2002.

Si le régime de cultes reconnus a été étendu à l'Islam dès 1974, il n'en a pas été de même du système de pilarisation, qui n'a pas été étendu au profit d'un « pilier musulman ». D'une part, la population musulmane est longtemps demeurée liée à son statut d'immigration, à faible capacité d'action économique ou politique, et d'autre part, la sécularisation progressive de la société belge a déstabilisé le régime de piliers, notamment chrétien. Il n'en reste pas moins que le système pilarisé est loin d'avoir disparu en droit, sans bénéficier toutefois à l'Islam.

On notera ainsi que depuis 1998, un décret de la Communauté française a interidt aux écoles de réseau libre catholique d'encore organiser es cours e religions islamique pour les nombreux enfants musulmans qui préféraient le réseau catholique au réseaux publics. Depuis 1998, seul le réseau public peut organiser des cours de religions islamique, ou des écoles musulmanes, guère reconnues précisément.

Le système de pilier a encore été validé indirectement à plusieurs reprises par la Cour constitutionnelle de Belgique : en 2015, à propos des cours de morale, qui jadis réputés neutres ont été attribués à la militance laïque en raison de son statut reconnu ; en 2020 : où la Cours a admis que le concept de neutralité pouvait constitutionnellement aussi bien fonder l'interdiction que l'autorisation des signes religieux dans le chef des étudiantes, majeures ou mineures, selon l'orientation (= le pilier) choisie par l'école.

Enfin, le troisième trait majeur du statut juridique de l'Islam en Belgique est son resserrement progressif d'un statut général lié à l'immigration, vers un statut plus spécifiquement lié au culte. Mais que faire alors des autres dimensions des communautés musulmanes ? On a souligné combien l'intervention de l'Etat envers l'organe

représentatif a conduit l'Etat à se justifier en réduisant formellement la compétence de l'Exécutif des musulmans de Belgique à un statut purement administratif, ce qui a eu pour effet contreproductif de priver cet organe de réelle légitimité sociale. C'est face à ce paradoxe que se trouvent confrontés les pouvoirs publics belge : comment étendre la capacité d'action sociale de l'organe représentatif du culte, sans trop le libérer d'un droit de regard étatique, constitutionnellement interdit en principe en matière religieuse.

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ISLAM AND SECULARISM IN BULGARIA

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I. Introduction: historical background and social framework

Bulgaria, like Greece, is a predominantly Orthodox Christian-majority country, but within the European Union (EU) it also has the largest native Muslim minority. The greater part of Bulgaria's indigenous Muslim communities of ethnic Turks, Pomaks (Bulgarian Muslims)[3] and Roma dates back to Ottoman times. The Balkan Peninsula was conquered by the Ottomans at the end of the fourteenth century and, with variations in the different countries contained therein, remained in their Muslim empire until the late nineteenth to early twentieth centuries, being called Rumeli, or Rumelia. As a result, in contrast with the 'new', immigrant Muslim communities in Western Europe or, more recently, in Greece, Muslims in most of Southeastern Europe have been part of the indigenous population since the times of Ottoman rule.

Bulgarian independence from the Ottoman Empire was announced on 3 March 1878, at San Stefano following the Russo-Turkish War (1877–1878). Officially, the modern Bulgarian state was founded a few months later, at the Congress of Berlin in July 1878, as a state of and for the Bulgarians under a 'Christian government'.[4] The power structure in Bulgaria and the other nation states emerging in the Balkans was upended, which has been reflected in the emerging pattern of secularism.[5] Outside

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[3] The historical origin of the Pomaks is discussed by T. Georgieva, 'Pomaks: Muslim Bulgarians' (2001) 12/3 *Islam and Christian-Muslim Relations*, pp. 303-16.

[4] J. Connelly, *From Peoples into Nations: A History of Eastern Europe* (Princeton and Oxford, Princeton University Press, 2020), p. 218.

[5] D. Eickelman and S. Evstatiev, 'On the Eastern Edge of Europe: Christianity, Islam, and the Bulgarian Political Imagination' in: Simeon Evstatiev and Dale F. Eickelman (eds), *Islam, Christianity, and Secularism in Bulgaria and Eastern Europe* (Leiden and Boston, Brill, 2022), pp. 1-24.

the empire, Muslims in Bulgaria transformed from Ottoman subjects belonging to the larger imperial society into a minority community within a nation-state. Many Muslims declined to sign up as Bulgarian subjects and wanted to register instead as 'Ottomans'. In an effort to achieve national homogeneity, the new Bulgarian state developed policies toward the Muslim population ranging from educational and cultural measures to forced assimilation.[6]

The system used as the structural organisation of subjects in the late Ottoman Empire based on their religious affiliations, the so-called *millet* system, goes a long way in explaining the major role played by religion in shaping collective identity and managing religious diversity in Bulgaria and Southeastern Europe. The Ottoman term *millet* denotes, first, a community, a group of individuals deriving their identity from a shared religious affiliation. The classical Ottoman non-Islamic millets, along with the Muslim one, made up the traditional four major communities (*millet-i erbaa*): Muslims (administratively not organized in a millet), Greek Orthodox, Armenians, and Jews. However, *millet* could also refer to a formal organization of a religious community with an ecclesiastical hierarchy, clerical and judicial organs.[7] The *millet* pattern for accommodating diversity thus refers to *milletism* with its twofold potential; as an integrative social force and as a venue for a communal extrication, or emancipation,[8] which was historically evidenced in the emergence of the Bulgarian *millet* (*eksarhhâne-i millet-i bulgar*) embracing all subjects of the Ottoman state who belonged to the Bulgarian Orthodox Church (the Bulgarian Exarchate).

These events led the way to Bulgaria's national emancipation and prepared its establishment as a modern state. In the post-1878 era, however, the new rulers upended the priority of privileged subjects, putting Orthodox Bulgarians at the top of the social hierarchy. The *millet*-type of relations has thus been socially transformed and mixed with modern European concepts, such as nation-building[9] and secularism. This transformation has evoked dichotomous narratives and divisions that characterise the political imagination of many throughout Southeastern Europe, where the revival of Islam is further seen in 'national' terms by contrasting 'traditional' (moderate) and

[6] M. Methodieva, *Between Empire and Nation: Muslim Reforms in the Balkans* (Stanford, CA, Stanford University Press, 2021), pp. 33-70.

[7] R. Davison, 'The *Millets* as Agents of Change in the Nineteenth-Century Ottoman Empire' in: Benjamin Braude and Bernard Lewis (eds), *Christians and Jews in the Ottoman Empire*, (vol 1, New York, Holmes & Meier, 1982), pp. 319–37 (320).

[8] See M. Neuburger, *The Orient Within: Muslim Minorities and the Negotiation of Nationhood in Modern Bulgaria* (Ithaca, NY, Cornell University Press, 2004), p. 33.

[9] S. Katsikas, 'Millet Legacies in a National Environment: Political Elites and Muslim Communities in Greece (1830s–1923)' in: Benjamin Fortna, Stefanos Katsikas, Dimitris Kamouzis and Paraskevas Konortas (eds), *State-Nationalisms in the Ottoman Empire, Greece and Turkey: Orthodox and Muslims, 1830–1945* (London, Routledge, 2013), p. 64.

'external' (radical) forms of Islamic experience.[10] Such categories "capitalize upon notions of local Islam as being challenged by incoming foreign networks".[11] Whatever the purpose of the distinction is, there is a clear sense of an 'old' and a 'new' Islam, by which the latter term designates the more recent immigrants as in countries like Greece.[12] These distinctions follow from the specific pattern of '*milletic* secularism'[13] in Bulgaria and other post-Ottoman nation states. The term evokes the Ottoman *millet* system and refers to divergent and competing contemporary transnational collective identities, loyalties and frames of reference coexisting within the same nation-state. These identities resemble the way religious communities functioned within the Ottoman *millet* system, but instead apply to both Muslims and non-Muslims in reverse.

Socially, the century-long religious co-existence of traditional communities in Bulgaria has often been perceived as rooted in the peaceful practices of what is usually described as *komşuluk* – neighbourly interactions between Christians and Muslims.[14] However, this practice was uneven. A typical example of the ambivalent inter-ethnic and inter-religious relations was the so-called Revival Process (*vuzroditelen protses*) – a set of policies introduced by the Communist regime (1944–1989) to assimilate the Turkish minority and Muslims, which included the forceful change of their Arabic-Turkish names between 1984 and 1989. Those measures were the culmination of the assimilationist approaches adopted in the twentieth century. During the Revival Process, some 360,000 people left Bulgaria, only around 40,000 of whom returned within the three-month period allowed by their visas in 1989.[15] By the end of 1990, the number of returnees had reached 150,000.

After 1989, the religious freedoms in Bulgaria were restored but the coexistence of Christians and Muslims has since faced new challenges, some of which are posed by transnational factors. With the restoration of civil and individual rights, the role

[10] S. Evstatiev, 'Salafism is Coming: "Balkan" versus "Arab" Islam in Bulgaria under Milletic Secularism' in: Simeon Evstatiev and Dale F. Eickelman (eds), *Islam, Christianity, and Secularism in Bulgaria and Eastern Europe* (Leiden and Boston, Brill, 2022), pp. 74-112.

[11] A. Elbasani, 'Introduction: Nation, State, and Faith in the Post-Communist Era' in: Arolda Elbasani and Olivier Roy (eds), *The Revival of Islam in the Balkans: From Identity to Ideology* (Basingstoke, Hampshire, Palgrave Macmillan, 2015), p. 9.

[12] K. Tsitselikis, *Old and New Islam: From Historical Minorities to Immigrant Newcomers* (Leiden and Boston, Brill/Nijhoff, 2012), p. 19.

[13] S. Evstatiev, 'Milletic Secularism in the Balkans: Christianity, Islam and Identity in Bulgaria' (2019) 47/1 *Nationalities Papers*, pp. 87-103.

[14] S. Evstatiev and P. Makariev, 'Islam and Religious Education in Bulgaria: Local Tradition vis-à-vis Global Change' in: Jørgen Nielsen, Samim Akgönül, Ahmet Alibašić, Brigitte Maréchal, and Christian Moe (eds), *Yearbook of Muslims in Europe* (vol 2, Leiden, Brill, 2010), pp. 635–62.

[15] M. Gruev and A. Kalyonski, *Vuzroditelniyat Protses: Myusyulmanskite obshtnosti i Komunisticheskiyat Rezhim* [*The Revival Process: Muslim Communities and the Communist Regime*] (Sofia, Ciela, 2008), p. 23.

of religion in Bulgaria underwent significant changes in the post-Communist period. Freedom of religion on an individual level is guaranteed by the Constitution (1991, as last amended 2008). Article 37 reads:

> 'The freedom of conscience, the freedom of thought and the choice of religion and of religious or atheistic views shall be inviolable. The State shall assist the maintenance of tolerance and respect among the believers from different denominations, and among believers and non-believers. The freedom of conscience and religion shall not be practised to the detriment of national security, public order, public health and morals, or of the rights and freedoms of others.'[16]

A. Demographic data, number of Muslims, and their political representation

Following the vicissitudes of history, the number of Muslims in Bulgaria has also varied greatly in the last one and a half centuries reflecting the ongoing social and political transformations in the course of de-Ottomanisation in the region. If before the Congress of Berlin about 40 percent of the population in the future Bulgarian state (i.e. the Principality of Bulgaria and Eastern Rumelia before 1885) were Muslim, half a century later the Muslim population in the Kingdom of Bulgaria had decreased to 14 percent[17], while by 1887 their number had already fallen to 21 percent. After 1913, thousands of Muslims left Bulgaria while Christians of Eastern Thrace immigrated to the countryside. Even at 14 percent, however, Bulgaria was the first modern state in the region that – unlike Greece or Serbia, for example – maintained such a large Muslim population[18] after its emancipation from the Ottoman Empire.

B. Current statistics and new trends

According to the most recent census of 2011, Muslims constitute about 10 percent of Bulgaria's 7,3 million population in the early 21st century.[19]

[16] Bulgarian Constitution <https://www.parliament.bg/en/const>.

[17] *Statisticheski Godishnik na Bulgarskoto Tsarstvo 1909* [*Statistical Annual of the Bulgarian Kingdom 1909*] (Sofia, Durzhavna Pechatnitsa [State Printing House], 1910), p. 38; G. Danailov, 'Izsledvaniya vurhu demografiyata na Bulgaria' in: *Sbornik na Bulgarskata Akademiya na Naukite, Klon Istoriko-Filologicheski i Filosofsko-Obshtestven* (vol 24, Sofia, Pechatnitsa Glushkov, 1931), p. 39.

[18] N. Todorov, *The Balkan City* (Seattle, University of Washington Press, 1983), pp. 328-32.

[19] In comparison with the previous censuses, that of 2011 <http://censusresults.nsi.bg/Census>, used a new methodology. It allowed people to choose whether or not to declare their religious affiliation and ethnic identity. As a result, 21,8 % of citizens did not answer these questions. Therefore, the percentage of believers presented in the tables reflects only the proportion of people who have declared one or another religious affiliation and ethnic identity compared to the total number of people who have declared them. For further details, see S. Evstatiev, P. Makariev and D. Kalkandjieva, 'Christianity, Islam, and Human Rights in Bulgaria' in: Hans-Georg Ziebertz and Gordan Črpić (eds), *Religion and Human Rights: An International Perspective* (Heidelberg, Springer, 2015), pp. 3-4.

Overall distribution of religious affiliations among the population of Bulgaria

Eastern-Orthodox Christians	4,374,135	76,00%
Muslims	577,139	10,00%
Protestants	64,476	1,10%
Catholics	48,945	0,80%
Other religions	11,444	0,20%
No religion	272,264	4,70%
Not stated	409,898	7,10%

Muslim Religious Affiliations

Ethnic Bulgarians	Sunni Muslims	67,350
Ethnic Turks	Sunni Muslims	441,926
	Shi'a Muslims	21,610
	"Muslims" (not specifying Sunni or Shi'a)	2,008
Roma	Sunni Muslims	43,201

These ethnically diverse Muslims, making up 10 percent of the Bulgarian population, identify themselves as predominantly Sunni of the Ḥanafī *madhhab,* and their religious practices continue to reflect interpretations and rituals inherited from the Ottoman period. Most of the remainder are Shi'a, who have been primarily associated with the community of Alevis or the Sufi mystical order of the Bektashis,'heterodox' Muslims with a culture of their own in Bulgaria. There is also a small number of 'newcomers' – the Ahmadis concentrated in the city of Blagoevgrad. The Ahmadiyya community was officially registered in Bulgaria in 2019 but there is no official statistical information about the members of the group.[20]

A large part of the 'old', indigenous Muslim population lives in the Rhodope Mountains along the southern border with Greece and Turkey. From the standpoint of geographical distribution, ethnic Turks make up a particularly high percentage of the population in the southeastern region (Kurdzhali, Haskovo) and northeastern Bulgaria (Razgrad, Ruse, Targovishte, Silistra and Shumen). Some recent Romani converts to Islam live in towns in the central region, such as Plovdiv and Pazardzhik. Furthermore, other groups of 'new' Muslims migrated to Bulgaria in recent post-1989 decades, especially in the course of the ongoing refugee crises (Arabs, Afghans,

[20] Office of International Religious Freedom, *2019 Report on International Religious Freedom: Bulgaria* <www.state.gov/reports/2019-report-on-international-religious-freedom/bulgaria>.

Kurds, Syrians, Iraqis, etc.), though their exact numbers cannot be estimated with accuracy due to the lack of detailed statistical data.

According to the most recent data of the UN Refugee Agency (UNHCR) in Bulgaria, in 2020, more than 2,500 migrants from Afghanistan, Syria, Iraq, Pakistan, and Iran were taken into custody. From 2012 to 2020, over 70,000 refugees and migrants from Afghanistan, Syria, Iraq, Morocco, and Pakistan have applied for asylum in Bulgaria while around 20,000 of them received a refugee status or humanitarian protection. Most of these refugees are based in the capital city of Sofia or other major cities throughout the country.[21]

At present, the total number of mosques and masjids in Bulgaria is 1,747, of which nearly 120 mosques are non-operating.[22] The Chief Muftiate is currently conducting restoration works on many Muslim places of worship. For example, the landmark Makbul Ibrahim Paşa Mosque in Razgrad, which had been closed for around 50 years, will be transformed into a functioning mosque. In October 2020, local authorities used a 2.3-million- leva (1.74-million-euro) grant from the national government to start renovating the mosque, listed officially as a cultural monument.

C. The political representation of Muslims

The Constitution of the Republic of Bulgaria prohibits the formation of political parties (as well as the use of religious beliefs, institutions, and communities) for political purposes by stressing that "religious institutions and communities, and religious beliefs shall not be used to political ends" (Article 13.4). The penal code provides up to three years' imprisonment for forming "a political organization on religious grounds" or using a church or religion to spread propaganda against the authority of the state or its activities. Therefore, the political representation of Muslims in Bulgaria can be traced through their involvement in the system of political parties that evolved after 1989. Some Muslims take part, including as members of parliament, through major centre-right parties, such as GERB,[23] or left-wing political formations, such as the Bulgarian Socialist Party (BSP).

Direct political participation of citizens who identify as Muslim has been provided since 1989 by the party Movement for Rights and Freedoms (MRF), founded by the well-known politician and secularist Ahmed Doğan, who subsequently resigned while

[21] Personal communication with representatives of the UNHCR, Bulgaria, May 2021. See also, 'Statistika: Tochna i Aktualna [Statistics: Exact and Up-to-Date]', *UNHCR – The United Nations Refugee Agency, Bulgaria*, 20 Dec 2016 <https://www.unhcr.org/bg/46-bgresursistatistika-html.html>.

[22] A. N. Shakir, 'Bulgaria' in: Oliver Scharbrodt, Samim Akgönül, Ahmet Alibašić, Jørgen S. Nielsen (eds), *Yearbook of Muslims in Europe* (vol 12, Leiden, Brill, 2020), p. 152.

[23] GERB – abbreviation of *Grazhdani za evropeysko razvitie na Bulgaria* (Citizens for European Development of Bulgaria). The word "gerb" itself also means "coat of arms" in Bulgarian.

remaining 'honorary chairman'. More recently in April 2016 Lyutvi Mestan, the second MRF chair, was ousted from the Movement, and established a new party – DOST.[24] Although DOST emerged as a viable alternative for Muslim voters, with members of the new party explicitly evoking Islamic rhetoric,[25] its influence rapidly diminished and the MRF has kept its position as a *de facto* minority party, including in parliament.

II. Institutional organisation of Muslims and the Bulgarian state

Bulgaria is a secular state – the principle of *laïcité* clearly underlies Article 13.2 of the Constitution: "Religious institutions shall be separated from the state." However, while "the practising of any religion shall be unrestricted" (Article 13.1), "the traditional religion in the Republic of Bulgaria is Orthodox Christianity" (Article 13.3). There are 203 registered religious groups in addition to the Bulgarian Orthodox Church. According to the Religious Denominations Act (Zakon za veroizpovedaniyata) (in force since 2002), registered religious groups must maintain a registry of their clergy and employees, provide the Directorate for Religious Affairs with access to the registry, and issue a certificate to each clerical member, who must carry it as proof of representing the group.[26] Along with the post-1989 transition to a democratic political system, Muslims in Bulgaria have been increasingly reviving their shared religious identity and the institution of the Muftiate claims to play the leading role in that process.

A. Muslim institutions in Bulgaria and the funding of denominations

The Grand Mufti of the Republic of Bulgaria organizes and controls the religious life of Muslims in the country. It was established in 1909 under the Mufti's agreement on 6 April the same year, between King Ferdinand and the Ottoman state. The decision was promulgated by Parliament and published in the *State Gazette* on 19 January 1910. The activities of the Denomination are carried out according to the statutes adopted on 12 February 2012 and the Religious Denominations Act. The Muslim Institutional Organization comprises the Administration of the Grand Mufti and 20 Regional Mufti's Offices. There is also a Supreme Muslim Council elected by the National Muslim Congress, which holds a five-year term and governs the activities of the Muslim community.[27] The leadership of the Muftiate declared that

[24] Abbreviation of Demokrati za Otgovornost, Svoboda i Tolerantnost (*Democrats for Responsibility, Freedom and Tolerance*). The name of the new party was deliberately designed, so its abbreviation corresponds to the Turkish word *dost* ("friend").

[25] Evstatiev, 'Milletic Secularism', pp. 87–8.

[26] Religious Denominations Act 2002 <https://www.legirel.cnrs.fr/spip.php?article540>.

[27] As listed on the official website of the Grand Mufti's Administration in Bulgaria <https://grandmufti.bg/bg>.

Bulgarian Muslims have "an Islamic and Turkish identity" while only from a "civil point of view, can one speak of a Bulgarian identity" though in recent years "Bulgarian Muslims have also obtained a European identity".[28]

Apart from the Muftiate, a Muslim Sunni-Hanafi Denomination in the Republic of Bulgaria was founded by Nedim Gendzhev, a former Grand Mufti and Head of the High Muslim Council in the last years of the Communist regime.[29] In recent decades, Gendzhev has continually sought to legally challenge the new leadership of the Chief Muftiate. The *Denomination Act* was amended anew on 20 March 2020 when the Bulgarian Parliament decided to explicitly mention the Muslim institution entitled to receive the state subsidy – the Muslim Denomination, and not its rival organization, Nedim Gendzhev's Muslim Sunni-Hanafi Denomination. A considerable portion of this financial aid was supposed to cover the salaries of present employees of the Muslim Denomination.[30]

Current Bulgarian legislation requires the government to provide funding for all registered religious groups based on the number of self-identified followers in the latest census (2011), at a rate of 10 Bulgarian leva (around 5 euros) per capita to those religious communities comprising more than one percent of the population, while various amounts are granted to the other smaller communities. The aim of this legislation is to restrict foreign influence on Bulgarian religious denominations. In 2020, for example, the national budget allocated 5.77 million leva (2.95 million euros) to the Muslim community. This amount is granted for ongoing expenses, such as remuneration for their employees, muftis and imams, educational activities, cemetery maintenance, and capital investments, such as construction and maintenance of religious facilities and related expenses. In July, the municipal council in Blagoevgrad, at the request of Sunni Muslim community leaders, rejected a 10,000-euro donation from the Ahmadi Muslim Community to the city for general emergency relief "in order not to legitimize the organization and its activities in the region".[31]

B. **Communication of the state with religious institutions**

This state funding of religious communities, recently introduced within legislative measures to counter 'radicalisation' and 'foreign influence', has sought to modify

[28] Editorial, 'Religiozna Identichnost na Myusyulmanite v Bulgaria [Religious Identity of Muslims in Bulgaria]' (2009) 1/169 *Myusyulmani/Müslümanlar*, p. 2.

[29] A. Eminov, 'The Turks in Bulgaria: Post-1989 Developments' (1999) 27/1 *Nationalities Papers*, pp. 31–55.

[30] 'Promyana v Zakona za Veroizpovedaniyata [A Change in the Denomination Act]' (2020) 4 *Myusylmani/Müslümanlar*.

[31] Office of International Religious Freedom, *2020 Report on International Religious Freedom: Bulgaria*, 12 May 2021 <https://www.state.gov/reports/2020-report-on-international-religious-freedom/bulgaria>.

the inherent neo-milletic model, partly by trying to restrict Turkish intervention in the affairs of Bulgarian Muslims. Initially, relations between the modern Bulgarian state and the post-Ottoman Muslims (and the members of other recognised religions) were arranged under the prerogatives of the Ministry of Foreign Affairs and Denominations through the Directorate of Religious Affairs. In 1950, responsibility was transferred to the Council of Ministers to be renamed in 1954 the Committee on the Affairs of the Bulgarian Orthodox Church and the Religious Cults, which since 1957 functioned again under the Ministry of Foreign Affairs. Since 1990, these activities have been the responsibility of the Directorate of Religious Affairs at the Council of Ministers. In the post-Communist period, Turkey has gradually been regaining influence over Muslims in Bulgaria. A protocol signed in 1998 by Bulgaria and Turkey established the financial support of the Muftiate from Ankara through the Directorate of Religious Affairs (*Diyanet İşleri Genel Müdürlüğü*).

Subsequently, the protocol has come under greater scrutiny in Bulgaria as the Diyanet has gained an unprecedented role in the domestic, regional, and international policies of Turkey during the governments of the Justice and Development Party. The protocol, supposedly suspended in 2017, arranged for some financial support of the Muftiate, including sending Turkish teachers to the Islamic schools in Bulgaria and sending visiting imams and lecturers. While this model is different from the explicit neo-*millet* treatment in post-1878 Bulgaria, it nonetheless revived an earlier pattern shunned because of Communism in Bulgaria and Kemalism in Turkey. The functions of the present Directorate of Religious Affairs are regulated under the Denominations Act. It reconfirmed the statute of Orthodox Christianity as the "traditional religion" represented by the Bulgarian Orthodox Church existing *ex lege* unlike all other confessions, which have to register at Sofia City Court.[32]

A National Council of Religious Communities functions in the realm of civil society though it is formally and informally supported by the state and the Directorate of Religious Affairs. The members of the National Council include representatives of Bulgarian Orthodox, Armenian Apostolic Orthodox, Muslim, evangelical Protestant, Catholic, and Jewish communities. It is aimed at serving as a platform for the largest religious groups to organize joint events and defend a common position on religious issues, such as legislative proposals, political statements, and actions by others, and on religiously motivated vandalism.[33]

[32] Evstatiev, 'Milletic Secularism', pp. 87-8.

[33] See, for example, 'Bulgarian Council of Religious Communities backs Muslims in controversy over prosecutor's statement', *The Sofia Globe*, 6 April 2018 <https://sofiaglobe.com/2018/04/06/bulgarian-council-of-religious-communities-backs-muslims-in-controversy-over-prosecutors-statement>.

III. Application of *sharī'a*

Before the Second World War, Islamic law (the *sharī'a*), continued to be partially applied in post-Ottoman Bulgaria, mostly in the areas of family and inheritance law. This resembled the Greek 'neo-*millet*' model, in which the functions of the Ottoman Mufti issuing Islamic legal opinions (fatwas) and the judge (*ā - qāḍī*) "were fused into a new Mufti".[34] Over the course of time, that pattern has changed but remains implicitly in the social structure.

A. Family and inheritance law

In Bulgaria, those 'milletic rules' remained in force until the establishment of the Communist regime in 1944, which restricted the rights of all religious communities. In the early 1950s, the acts subsumed legally under the Civil Code (marriage, divorce and inheritance law) were defined as legitimate only if performed by the respective state institutions. Further, the number of imams was heavily restricted and decreased from 3200 to 580, for whom an appointment was granted only upon approval by the Communist authorities.[35]

Based on Islamic family rules, some Muslim leaders in Bulgaria today criticize European secular societies for "ruining traditional values" by encouraging family planning and birth control, or by promoting same-sex civil unions or marriages. In 2008, the Deputy Chief Mufti, Vedat Ahmed, published an article criticizing a new draft Bulgarian Family Code, which intended to reform the law related to cohabitation. According to him, the legalisation of same sex marriages or arrangements by two non-married individuals to live together "implies a high risk as a danger [leading to a] moral degradation of society".[36] There was considerable objection to the bill, mainly from the Bulgarian Orthodox Church and the Chief Muftiate, and consequently the Bulgarian Family Code, which was passed in 2009, did not recognise the legal status of cohabitation as a valid form of marriage.[37] Its existence has been recognised by various regulations, but only civil marriage has legal validity.

B. *Sharī'a*, gender equality and the rights of women

Evoking *sharī'a* in their everyday practice and public life, Muslim women in the post-1989 period increasingly seek a stricter adherence to Islamic norms. The public

[34] K. Tsitselikis, 'The Legal Status of Islam in Greece' (2004) 44/3 *Die Welt des Islams*, pp. 414, 430.

[35] I. Yalamov, *Istoriya na myusyulmanskata obshtnost v Bulgaria* [*A History of the Muslim Community in Bulgaria*] (Sofia, Ilinda-Evtimov, 2002).

[36] V. Ahmed, 'Priema se na Eks Nov Semeen Kodeks [A New Family Code is Passed Very Quickly]' (2008) 12/168 *Myusyulmani/Müslümanlar*, p. 4.

[37] 'Family code', Bulgarian Ministry of Labor and Social Policy <https://www.mlsp.government.bg/ckfinder/userfiles/files/admobs/Family_Code.pdf> (last accessed on 8 April 2020).

expression of faith is thus a means to maintain social distance between the genders. The discourse by the Muslim leadership in Bulgaria has been integral to promoting the Islamic concept of hijab after decades of state-forced national modernisation and the emancipation of "socialist women" pursued under Communism. Since the fall of the Communist regime in Bulgaria, the Chief Muftiate has argued that there is a consensus position on the mandatory nature of the Islamic headscarf. Most of the ethnic Turkish population in Bulgaria today is secular and in recent years the headscarf has become less common among the younger generation compared to the increasingly massive expression of religious identity via hijab-veiling among the Pomaks. The Pomaks are gaining the reputation of 'revived Muslims', which causes problems hitherto unknown in Bulgarian society as the *sharī'a* norms contradict basic principles of country's secular legislation.[38]

IV. Discrimination and Tensions on Religious Grounds

On Friday 20 May 2011, in front of the Banya Bashi Mosque in central Sofia, the leader of the Bulgarian political party Ataka ('Attack'), Volen Siderov, and other members and supporters of its far-right group clashed with Muslim worshippers who had gathered around the mosque for the regular Friday prayer. Ataka was founded in April 2005 and since then – alone or in coalitions – has gained around 4–9 percent of the vote in various parliamentary elections until April 2021 when it could not reach the electoral threshold to enter the parliament. Until these recent parliamentary elections in April 2021, the coalition partners of the ruling centre-right political party GERB included the United Patriots (a coalition of the right-wing nationalist parties), Ataka, the National Front for the Salvation of Bulgaria (NFSB), and the Internal Macedonian Revolutionary Organization (VMRO).

The representatives of Ataka often instil hatred, discrimination and violence on ethnic and religious grounds, more specifically against Roma, Muslims and refugees.[39] Five years prior to this incident, Ataka began a campaign against the noise emanating from the loudspeakers installed on Banya Bashi Mosque and presented a petition to the Sofia Municipal Council calling for their removal. In April 2011, supporters of Ataka mounted loudspeakers on a car and circled close to the mosque,

[38] For further details, see G. Evstatieva, 'The Hijab in Contemporary Bulgaria. Muslim Views on Veiling' in: Simeon Evstatiev and Dale F. Eickelman (eds), *Islam, Christianity, and Secularism in Bulgaria and Eastern Europe* (Leiden and Boston, Brill, 2022), pp. 161-186. See also below, Section V/D, in this study.

[39] For more details, see 'Written Comments of the Bulgarian Helsinki Committee Concerning Bulgaria for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 92nd Session', March 2017, pp. 8–10 <https://www.bghelsinki.org/media/uploads/special/2017-bhc-written-comments-for-cerd-92-session.pdf>.

playing recordings of church bells and Christian chants during the regular Friday prayer taking place at the time. This was repeated during the week that preceded the incident of 20 May 2011. Veli Karaahmed, a Bulgarian Muslim, lodged a complaint against Bulgaria in the European Court of Human Rights (ECtHR) in connection with the May 2011 incident, claiming that he was among the direct victims of the 'Islamophobic aggression' and that the Sofia municipality did not prevent the violent demonstration near the house of worship. The Bulgarian Helsinki Committee, providing legal support to Karaahmed, stated that the attack on the mosque in May 2011 was not an isolated act by Siderov and Ataka, but part of "long-term Islamophobic campaign" against Muslims in Sofia and elsewhere in the country.[40]

The then President of the Republic, Georgi Parvanov, condemned Ataka's involvement in the incident and the Parliament adopted a declaration categorically condemning the aggression of the Ataka political party of 20 May 2011 against worshippers in the centre of Sofia. The declaration affirmed that the conduct of that party is utterly alien to the Bulgarian people and to its religious and ethnic tolerance, and that according to the Bulgarian Constitution, it is impermissible to use religious communities and institutions, or religious beliefs, for political ends. At the time, it also had immediate political consequences for Ataka, which was criticized across the political spectrum, while Siderov and his party became estranged from the then-ruling party, GERB. In February 2015, the European Court of Human Rights delivered a judgment accepting that the condemnation of the demonstrators' actions by both the President and Parliament not only expressed disapproval and determination to ensure that this remained an isolated incident but also insisted that all competent state authorities, including the prosecuting authorities and courts, take the necessary measures to ensure compliance with the Constitution and laws of the Republic.[41] The state prosecutor opened an investigation into the incident, seeking to minimize its inter-religious dimensions. The reaction of society at large was not in support of the radical nationalists but rather favouring the notion of religious tolerance.

Another incident happened in July 2019, when an unknown person smashed the ground floor windows of the Chief Muftiate's building in Sofia with stones, and two days later swastikas and other hate symbols and graffiti were scratched onto the historical Kurshum mosque (built 1485) in the town of Karlovo. The Chief Muftiate insisted that such incidents should be investigated as a hate crime and not declared

[40] 'Bulgarian Muslim approaches European court over 2011 Ataka incident outside Sofia mosque', *The Sofia Globe*, 8 July 2013 <https://sofiaglobe.com/2013/07/08/bulgarian-muslim-approaches-european-court-over-2011-ataka-incident-outside-sofia-mosque/>.

[41] *Karaahmed v Bulgaria* (2015*)*, App no 30587/13 (ECHR, 24 Feb 2015).

as [the work of] drunks or hooligans. Jelal Faik, spokesperson of the Chief Muftiate, criticized the inadequate response of the Bulgarian judiciary.[42]

Some Muslims claim there is insufficient investigation of hatred-related incidents. For example, on 8 December 2020 Hayri Emin, a representative of the International Affairs and Public Relations Department at the Chief Muftiate, participated in a panel on "Anti-Muslim Hate Crimes and the Security of Muslim Communities", organized by the OSCE Office for Democratic Institutions and Human Rights (ODIHR). Emin pointed out that prejudice-motivated acts were rarely investigated in detail, often being subsumed simply as acts of hooliganism. However, he emphasised that in recent years there has been "a serious decline in anti-Muslim hate crimes and Islamophobia".[43]

V. Religious freedom, cultural rights, and exercise of rituals

A. Legal framework for establishment and functioning of mosques

In general, the establishment and operations of mosques in Bulgaria is the responsibility of the Chief Muftiate – a rule that has some significant exceptions, such as the notorious Abu Bekir Mosque in the Roma neighbourhood "Iztok" in the city of Pazardzhik.[44] A highly controversial issue in recent years has been the functioning of the only mosque in Sofia, Banya Bashi, and the initiative to build a second mosque in the capital. The leadership of the Muslim community claims that the number of Muslims in the Bulgarian capital has greatly increased in recent years due to the influx of construction workers from economically underdeveloped regions with significant Muslim populations, and to the relatively high number of Middle Eastern immigrants in the city. Therefore, the only existing mosque does not provide sufficient space for worshippers and their right to practise their religion is infringed. However, the nationalist political forces have strongly objected to proposals for building a second mosque though mainstream society silently condoned these objections. The initiative is therefore on hold for the time being.

[42] M. Chereseva, 'Bulgarian Muslims condemn Islamophobic Attacks', *Balkan Insight*, 5 July 2019 <https://balkaninsight.com/2019/07/05/bulgarian-muslims-condemn-islamophobic-attacks/>.

[43] Online conference on 'Anti-Muslim Hate Crimes and the Security of Muslim Communities', *Chief Mufti of the Muslim Denomination in the Republic of Bulgaria,* 11 Dec 2020 <https://grandmufti.bg/bg/up-to-date/novini/10369-2020-12-11-09-55-20.html>.

[44] G. Krastev, E. Ivanova and V. Krastev, 'Gypsies/Roma in Bulgaria Professing Islam – Ethnic Identity (Retrospections and Projections)' (2019) 2/18 *Research and Science Today*, p. 61. On the Muslim activities in this neighbourhood from the perspective of "radicalization," see R. Dzhekova, 'Bulgaria: Country Report on National Approaches to Extremism', *KONNEKT*, 21 Dec 2020, p. 3 <https://h2020connekt.eu/publications/bulgaria-country-report-on-national-approaches-to-extremism>.

B. Religious holidays

In accordance with Article 173/4 of the *Labour Code*, the Muslim Community in Bulgaria celebrates its religious holidays freely and is entitled to a day's holiday for *mawlid* (the Birthday of the Prophet Muhammad), two days for *Ramazan bayram*, and three days for *Kurban bayram*. Muslims also enjoy the right to practise religious slaughter according to Islamic rules. Halal food is available in many shops and restaurants though not in public institutions. In 2020, the first Bulgarian online halal platform[45] was launched by a graduate of the Higher Islamic Institute, currently a student at the private New Bulgarian University. This internet-based shop initiated attempts to integrate all halal food companies certified by the Supreme Muslim Council, as well as halal companies from neighbouring Turkey. The Chief Muftiate thus introduced a "halal certificate" to prove the religious legitimacy of food products.

C. Religious education and instruction at public schools

Bulgaria is a secular liberal democracy in which public schools by law may, but are not required, to teach the historical, philosophical, and cultural aspects of religion and introduce students to the moral values of different religious groups as part of the core curriculum. A school may teach any registered religion in a special course as an elective subject upon request of at least 13 students, if the respective textbooks and teachers are available. The Ministry of Education and Science approves the syllabi, and provides books for these optional religion courses. If a public school is unable to pay for a religion teacher, it may accept financial sponsorship from a private donor or a teacher from a registered denomination. The law also allows registered religious groups to operate schools and universities, provided they meet government standards for secular education.

Before the Communist regime, young Muslims in Bulgaria studied mostly in private religious schools where they were taught Islam by imams, while the Orthodox pupils had classes of religious instructions within the curricula taught in public schools. Those classes, however, were not taught by priests and covered mainly the first three grades. The current Denomination Act guarantees the right of citizens to provide their children with instruction in their religion (Article 6), and also the right of religious communities to open secondary religious schools (under the supervision of the Ministry of Education) and higher religious schools (with the permission of the National Assembly or the Council of Ministers (Article 33). The national public school elective curriculum continues to provide three sets of classes at various grade levels in religious studies: one for Christianity, one for Islam, and one for all religions as ethical systems. The Chief Muftiate stated that some regional education inspectors

[45] *The First Online Halal Market and Halal Shop* <https://helal.bg>.

attempted to persuade principals of schools offering Islamic sciences to select members of their faculty to be trained as teachers for the programme in order to replace teachers who were alumni of the Higher Islamic Institute.

The teaching of religion at Bulgarian public schools is an especially relevant issue. The proper in question is the right to education on matters of one's religion at public schools, i.e., financed by the state and with a quality of education guaranteed by the national educational institutions. It is generally assumed that the main religious institutions in the country (the Bulgarian Orthodox Church and, to a certain extent, the Chief Muftiate) possess neither the academic experience, nor the financial capacity to organize the religious education of the children of religious parents in a private way, e.g. at Sunday schools or classes at mosques – the so-called Qur'an courses. On the other hand, public education is secular by legislation. The present state of affairs remains that religion can be taught as an elective subject at public schools provided that there is sufficient interest at the schools, i.e. that there is a significant number of potential participants in such classes to make it worthwhile to employ a teacher in this subject. In 1997–1998 and 1999–2000, courses on Christianity or Islam were introduced as elective subjects after an absence of about 50 years from public schools.[46] However, due to financial constraints the educational administration is reluctant to employ new teachers and consequently does not encourage the interest of the students or of their parents in the study of religion. As a result, many children do not have this opportunity. The number of students who participate in such classes is steadily declining.

In 1991, the abovementioned Higher Islamic Institute was established in Sofia as a semi-higher educational body, subsequently upgraded in 1998 to a higher educational school. The Institute belongs to the Chief Muftiate and – at least until the last amendment of the *Denomination Act* prohibiting foreign funding of religious institutions – used to be financed by the Muslim Denomination, mostly with the support of the Diyanet in Turkey. Apart from the various private Qur'an courses, there are three secondary Muslim religious schools recognized by the Bulgarian state, as they cover all necessary secular and scientific subjects along with the Islamic ones: the Religious High School *Nuvvab* in Shumen, the Religious High School in Ruse, and the Religious High School in Momchilgrad. Other schools train imams modelled on the Qur'an courses but on a permanent basis, e.g. in Ustina and Shumen. The Chief Muftiate is planning to open several additional courses in the nearest future.[47]

[46] The ongoing debates discussing theological *versus* religious studies approach have not significantly changed the state of religious instruction in the public schools, which seems to be one of the most conservative aspects of primary and secondary education in Bulgaria (cf. S. Evstatiev, 'Religiyata v bulgarskoto uchilishte [Religion in Bulgarian Schools]' (2007) 15/2 *Strategii na obrazovatelnata i nauchnata politika / Strategies for Policy in Science and Education*, pp. 136-140.

[47] For further detail on Islamic religious education, see Evstatiev and Makariev, 'Islam and Religious Education in Bulgaria', pp. 635–62.

D. Challenges posed by Islam in the traditional understanding of democracy and rights

The headscarf of veiled Muslim women polarised public opinion in Bulgarian society because its wearing challenges the secular concept of neutrality. In 2006, a lively national public debate about Islamic veiling ignited in Bulgaria when two Muslim girls wearing headscarves in a Smolyan high school refused to un-veil and to wear the school's uniform after the director of the school banned the veil in classrooms. A local non-governmental organization, the Union for Islamic Development and Culture, filed a complaint on their behalf against the Ministry of Education with the Commission for Protection against Discrimination. The complaint claimed that headscarves were mandatory for Muslim women and that the human rights of the two girls were being violated. This case led the Minister of Education to declare that public schools in the country are secular, and to propose changes in the future law on education forbidding the use of religious symbols in schools.

However, no changes in the legislation to ban all religious symbols in schools were formally made. The official opinion of the Ministry of Education is that the issue of religious symbols in public schools is considered in the context of the Law on National Education which states that there shall be *no privileges* or *restrictions* of rights on the grounds of *race*, nationality, ethnic identity, sex, social origin, religion, or social status.[48] In August 2006, the Commission issued a decision rejecting the accusations of religious discrimination and fined all parties in the dispute for their attempt to "incite discrimination." The two girls had to decide whether to remove their headscarves or to become private students. They chose the latter option. Immediately after the Commission's decision, the Grand Mufti Mustafa Hadzhi made a statement condemning it and declared that the headscarf is a religious duty divinely incumbent upon Muslim women.

The degree and type of Muslim veiling was the subject of heated political and public debates on the eve of adopting a law banning the full-face veil. In Bulgaria today, the face veil is not considered 'traditional' dress for native Muslim women. Since the first decades of the 20th century, they have generally worn various local types of modest attire and headscarves to cover their hair. However, recently there has been a rise in the number of fully veiled women wearing the *niqāb*, the long *jilbāb* gowns or *khimār*-like garments among Muslim communities of the Roma minority in

[48] 'Ministerstvo na Obrazovanieto: Religiozni Simvoli, koito Protivorechat na Tselite na Obrazovanieto, Sledva da Budat Ogranichavani v Suvremennoto Uchilishte [The Ministry of Education: Religious Symbols, which Contradict the Objectives of Education, Must Be Restricted at the Contemporary School]', *Focus Information Agency*, 30 May 2012, written Answer of the *Ministry of Education, Youth and Science to Focus Information Agency* with Reference to the Headscarf Affair in Bulgarian Public Schools, 30 May 2012 <http://focus-news.net/opinion/0000/00/00/21351/>.

Bulgaria, around a third of whom are Muslim. There are no statistics in Bulgaria on the exact number of Muslim women covering themselves with different types of *niqāb* and 'Arab' style *khimār*, though estimates in the media mention about 20 to 40 women from the Roma community in the Iztok neighbourhood of Pazardzhik.[49] Representatives of the State Agency of National Security stated during the deliberations on the draft law that in the Roma neighbourhoods in the cities of Plovdiv and Asenovgrad there are few women who wear full-face veils either. In the past few years, those communities have been at the centre of media attention and public controversy after their Salafī preacher, Ahmed Moussa, was put on trial several times accused of spreading 'religious hatred'. On 27 April 2016, the Pazardzhik Municipality Council voted an amendment to the Ordinance on Public Order prohibiting the wearing of any clothing or accessories that completely cover the face and/or obscure the identity of the wearer. Following Pazardzhik, several Bulgarian towns prohibited the wearing of full-face veils in public. Along with bans on the local level, on 30 September 2016 the Bulgarian parliament approved a nationwide law outlawing face-covering veils in public.

The MRF, who founded a new Political Party DOST together with six independent MPs, accused other Bulgarian parties of 'demonstrating religious intolerance' and refused to take part in the vote. In fact, the full-face veil issue put the secular leadership of the MRF into a dilemma, forcing them to take a stand on a controversial issue that divided their electorate. The vast majority of the MRF's supporters are secular Turks, and headscarves are rarely an item of women's clothing in public. Nevertheless, politicians from the MRF and DOST were strongly opposed to the law, saying it infringes on the freedom of religion guaranteed by the constitution. Despite opposition from the MRF, Bulgaria's parliament approved the Law Prohibiting the Wearing of Clothing Concealing the Face. The law "bans wearing in public clothing that partially (mouth, nose or eyes) or completely covers the face". According to the law, clothes hiding the face may not be worn in government offices, schools, cultural institutions or areas of administrative or public services, though exceptions are allowed for health or professional reasons. Infringements carry fines of 200 Bulgarian leva (102 euros), rising to 1,500 leva (767 euros) for repeated offences.[50]

VI. Free Speech and Islam

The Bulgarian penal code prohibits the incitement of religious or other discrimination, violence, or hatred "by speech, press, or other media, by electronic

[49] For further detail, see G. Evstatieva, 'The Hijab in Contemporary Bulgaria. Muslim Views on Veiling' in: Simeon Evstatiev and Dale F. Eickelman (eds), *Islam, Christianity, and Secularism in Bulgaria and Eastern Europe* (Leiden and Boston, Brill, 2022), p. 179-183.

[50] *Darzhaven Vestnik* [*State Gazette*], 80, 11 Oct 2016, p. 2 <http://dv.parliament.bg/DVWeb/broeveList.faces>.

information systems or in another manner," as well as religiously motivated assault or property damage. Either offence is punishable by imprisonment for one to four years and a fine of 5 to 10 thousand leva (roughly 2,5 to 5 thousand euros), as well as 'public censure'.

VII. Radicalisation and security

In Bulgaria there has been a lower degree of 'radicalisation' compared to the Western Balkan countries, where over one thousand foreign fighters from countries such as Albania, Kosovo, Bosnia and Herzegovina, North Macedonia, and Serbia joined the ranks of the self-proclaimed Islamic State (ISIS) in Iraq and Syria, and other violent extremist Muslim groups, such as various al-Qaeda affiliates.[51] The most notable case in Bulgaria, where there are as yet no known foreign fighters, has been a trial brought in 2012 against thirteen Muslims accused under Article 108, Paragraph 1 of

> 'propagating antidemocratic ideology manifested in opposing the principles of democracy, the separation of power, liberalism, statehood and the rule of law, basic human rights such as the equality of men and women, through propagating the ideology of the Salafist current in Islam and the imposition of a *sharī'a* state.'[52]

Confusingly for such a judicial text, the indictment contains the term 'liberalism' – a political ideology not necessarily synonymous with "liberal democracy" as a constitutionally embedded social and political order in post-Communist Bulgaria.

Among this predominantly Pomak group of defendants was the charismatic Salafī Muslim leader and preacher Ahmed Moussa from Iztok neighborhood in Pazardzhik. In the mid-1990s, when Moussa went to work in Vienna, he re-discovered Islam and eventually adopted a strictly Salafī orientation. In 1999, he attended a one-year course of study at the *Shkola za imami* in Surnitsa. In 2004, Moussa was given a three-year suspended sentence by the Pazardzhik Regional Court for spreading antidemocratic ideology and religious hatred. He became widely known for passionately demanding the establishment of a caliphate and after his arrest the media wrote "in the prayer house established by him radical Islamic literature has been found, and he put an Islamic flag on the roof of his house".[53] Many of the defendants were working within the network of the Chief Muftiate as either muftis or imams, thus enjoying the unequivocal support of that institution throughout the lawsuit.

[51] A. Shtuni, 'Western Balkans Foreign Fighters and Homegrown Jihadis: Trends and Implications' (2019) 12/7 *CTC Sentinel*, pp. 18–24.

[52] Press Release of the District Prosecutor's Office (Okruzhna Prokuratura), Pazardzhik, 18 June 2012, <https://prb.bg/oppazardzhik/bg/news/pressobsheniya/99-pressobshenie-18062012>.

[53] 'Koy e Ahmed Musa [Who is Ahmed Moussa]', *24 Chasa*, 25 Nov 2014, <https://www.24chasa.bg/Article/4444874>.

The legal proceedings at the Pazardzhik court of first instance ended with the imposition of one enforceable prison sentence, two conditional sentences and ten administrative penalties by which Moussa was deprived of liberty for one year and fined for his participation in an unregistered organisation, disseminating an antidemocratic ideology, and inciting religious hatred.[54] Although he was supposed to serve his earlier three-year sentence along with the new one, he appealed against the verdict and remained at liberty. The other convicted persons and their defence lawyers also appealed against the sentences, bringing a higher court appeal which drew on the expert testimony of one of us, Simeon Evstatiev, that Salafism is a current within Sunni Islam, among a mass of other conclusions and evidence, to emphasise that "the subject of the legal proceedings is not related to an antidemocratic ideology but to an investigation of religious disputes within Islamic religion".[55] On 1 July 2015, the Appeal Court of Plovdiv increased the sentence of Ahmed Moussa to a two-years' imprisonment while, on the other hand, Said Mutlu and the Pazardzhik regional mufti Abdullah Salih were acquitted of propagating 'antidemocratic ideology' and included in the group of defendants receiving fines. Moussa, nevertheless, appealed against his sentence at the Supreme Court of Appeal, which repealed the sentence in July 2016.[56]

VIII. Conclusions

Although religion in Bulgaria, as elsewhere in Eastern Europe and the Balkans, has been politicised and used as an instrument to achieve political goals, the implicit intertwining of religion and politics has deeper historical roots. Therefore, secularism should not be perceived as a monolithic utopian ideal. The 'wall of separation' between the domains of the religious and the secular is significantly more porous in social practice than conventionally assumed. Even under the Communist regime, religious affiliations in Bulgaria, although transformed, did not disappear entirely. The official position assigned to religion in public life under a particular political system does not necessarily reflect the actual role of faith in individual life or collective identities. Indeed, the Communist period in Bulgaria was dominated by an overwhelming ideology, in itself a form of political religion.

[54] For a brief report on all thirteen sentences issued in Pazardzhik, see G. Girginova, 'Deystvie Purvo: Na Pritsel v Sudebnata Zala – Religiyata na 13 Imami [Act One: Target in the Court Hall – the Religion of 13 Imams]', *Sudebni reportazhi* [*Court Reportages*], 23 April 2014 <http://judicialreports.bg/2014/04/>.

[55] Supplement by defence lawyers Ina Lulcheva and Vasil T. Vasilev to the Notice of Appeal against the Sentence of the Regional Court Pazardzhik No 330/2012 addressed to the Appeal Court Plovdiv, incoming number 294/2014 scheduled for 27 Jan 2015, p. 30–1.

[56] For a detailed ethnography of this major court case and its implications, see Evstatiev, 'Salafism is Coming: "Balkan" versus "Arab" Islam in Bulgaria'.

In the post-1989 period, national and religious identities began explicitly to become entwined, evoking historically continuous, albeit fluctuating, patterns of communality. Today, the Bulgarian model of secularism continues to follow the implicit rules stemming from a historical continuity of what has been described here as a reversed, upended version of the earlier Ottoman *millet*-model, presented here with the term '*milletic* secularism'. In Bulgaria, as elsewhere, Muslims are increasingly challenging this implicit model through transnational Islamic ideas and movements that facilitate "the existence and legitimacy of a global public space of normative reference and debate".[57]

Today, the transnationalisation of Muslim identities marks certain processes of convergence observed against the backdrop of the otherwise predominant diversity in Southeastern Europe. This does not mean that religious communities are 'monolithic' or altogether bound up to a 'fixed' identity. The identities remain multiple but their religious component among Muslims has gained greater public significance. Developments in Bulgaria and the Balkans (as well as some major debates around the application of the *sharī'a*, such as the hijab controversies) signal that such homogenizing forces are at work. For Muslims in the post-1989 period, the transnationalisation of religious experience, ease of travel, the internet, Facebook and Twitter have fostered a different, higher level of belonging to the global Muslim community – the *umma*. More mainstream, observant Muslims are increasingly abandoning local syncretic practices and seek to share the universal, core beliefs and rituals with their coreligionists in Turkey, the Middle East and Western Europe.[58] These dynamic processes challenge, transform and reshape the implicit pattern of secularism in Bulgaria and elsewhere in the Balkan region.[59]

[57] J. Bowen, 'Beyond Migration: Islam as a Transnational Public Space' (2004) 30/5 *Journal of Ethnic and Migration Studies*, p. 880.

[58] S. Evstatiev and D. Eickelman, 'Byzantine and Ottoman Pasts, Modern Politics: Religious Belongings and Balkan Secularities' in: Evstatiev and Eickelman (eds), *Islam, Christianity, and Secularism in Bulgaria and Eastern Europe*, Series: Social, Economic and Political Studies of the Middle East and Asia (vol 129, Leiden and Boston, Brill, 2022), pp. 27-48.

[59] All websites last accessed on 27 June 2021.

ISLAM AND HUMAN RIGHTS IN EUROPEAN UNION: THE EXAMPLE OF CROATIA

Ankica Marinović[1]

I. Introduction: the social framework

Five major religious traditions – Catholicism, Serbian Orthodoxy, Protestantism, Judaism and Islam have had a remarkable influence throughout history, on the social, cultural, political and spiritual life of Croatian society. Because of the turbulent history, religious institutions in many cases compensated for the lack of state organisation and played significant social, cultural and political roles. Nevertheless, religion and religious institutions as complex social and cultural structures were important factors in the struggle for self-determination and social autonomy. They were prominent preservers of and vehicles for national cultures and essential cultural values, as well as an important springboard for counterculture during the communist era.[2]

Croatia, as a part of Yugoslavia, shared with other parts, to paraphrase Peter L. Berger,[3] a systemic atheistic canopy. At the institutional, the ideological and therefore cultural level, as well as at the level of values, irreligiosity and atheism were desirable attitudes. According to the Yugoslav *Constitution*, religion belonged to the private sphere and religious communities and was not permitted to act within society.[4]

[1] Institute for Social Research in Zagreb Croatia.

[2] A. Marinović and I. Markešić, 'Vjerske zajednice u Hrvatskoj pred europskim izazovima' in: Vlado Puljiz, Slaven Ravlić and Velimir Visković (eds), *Hrvatska u EU: Kako dalje?* (Zagreb, Centar za demokraciju i pravo Miko Tripalo, 2012), pp. 349 (372).

[3] P. Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (New York, Anchor Books, 1967).

[4] 'As with many other social spheres, religions (covering here both the religious communities and religious people) lived in a double reality: the one that guaranteed the religious freedom and autonomy of religious communities, and another that favoured the non-religious worldview' [S. Zrinščak, D. Marinović Jerolimov, A. Marinović and B. Ančić, 'Church and State in Croatia: Legal framework, religious instruction, and social expectations' in: Sabrina P. Ramet (ed), *Religion and Politics in Central and South-Eastern Europe: Challenges Since 1989* (New York, Palgrave Macmillan, 2014), pp. 131-54].

The change in the position of religion and religious communities in Croatia after the 1990s has been followed by a considerable increase in declared religiosity. The high level of declared Catholics, religious identification, religious belief and practice, points to a highly visible trend towards the de-secularisation and revitalisation of religiosity after the fall of communism.[5] Muslims from Croatia also followed such a trend. Most of them 'found' religion again, after a long time. Mosques and other places of worship were filled with believers.

In former Yugoslavia, Croats and Slovenians were mostly perceived as Catholics, while Serbs, Montenegrins and Macedonians were considered as Orthodox. However, Bosnia and Herzegovina as a multicultural environment, implies a multinational and multi-confessional structure of the population. Socialist authorities in Yugoslavia introduced Islam as a national category or nationality, indicating that people who belong to Islamic cultural heritage, irrespective of their level of individual religiosity, belong to the national group of Muslims.[6] However, most confessional-declared Muslims identified themselves ethnically as Muslims, although some of them declared Croatian or Serbian nationality.

> 'After the breakdown of Yugoslavia, ethnic Muslims according to the Bosnia and Herzegovina Constitutional Law embraced Bosniaks as a 'historical ethnonym' and the Bosnian language as a mother tongue. Most Muslims became Bosniaks but some of them retained Croatian or Serbian identity'.[7]

In the 1990s in Croatia, the position of Bosniaks, former Muslims, was marked by the struggle for recognition and visibility. According to Peternel, Škiljan and Marinović,[8] their efforts were organised in different associations named 'Cultural Society of Muslims – *Preporod*' (revival), renamed a few years later in 'Cultural Society of Bosniaks – *Preporod*'. During the same time, the *Meshihat* was established as the executive board of the Islamic Community, along with the Islamic Community Council. The Bosniak Humanitarian Society 'Merhamet' was founded in Zagreb in 1991, and in 1993 the Islamic high school *medrese* 'Dr. Ahmed Smajlović' was opened in Zagreb. The Bosniak National Community of Croatia (BNZH), founded in 1993 as

[5] A. Marinović, 'Analysis of Catholic Religious Instruction Textbooks in Croatian Primary Schools in: How Do They Teach Atheism?' in: Gorana Ognjenović and Jasna Jozelić (eds), *Education in Post-Conflict Transition, the Politicisation of Religion in School Textbooks* (London, Palgrave Macmillan, 2018).

[6] For the most recent demographical and historical overview of Muslim population in Croatia, see D. Mujadžević, 'Croatia' in: Jørgen Nielsen, Samim Akgönül, Ahmet Alibašić and Egdūnas Racius (eds), *Yearbook of Muslims in Europe* (vol 5, Leiden, Brill, 2013), pp. 163 (171).

[7] L. Peternel, F. Škiljan and A. Marinović, 'Hidden Aspects of Social and Historical Development of Islamic Community in Sisak, Croatia' (2021) 10/1 *Journal of Muslims in Europe*, p. 8.

[8] Peternel, Škiljan and Marinović, 'Hidden Aspects of Social and Historical Development of Islamic Community in Sisak, Croatia', p. 9.

the 'Croatian National Community of Muslims' serves as the main Bosniak political party with branches in eleven Croatian counties. In 1997, the Bosniak nationality was declared the official name for the minority community in Croatia. It is also significant that the Bosniaks established the 'Homeland War Veterans Association', which has been operating since 2000.[9]

All these facts show how much the role of the Islamic Community, whether Muslims or Bosniaks, is important and present in many areas of society, however, the process of recognition and visibility is burdened with underlying dynamics.[10]

II. Numbers of Muslims, both old and new immigrants

The Muslim minority in Croatia belongs to the traditional historic minorities. The last census (2011) showed that there are 62,977 Muslims (1.5 %) in Croatia. According to their ethnicity, they declare themselves as Bosniaks (27,959), Croats (9,647), Albanians (9,594), members of the Islamic religion (6,704), Roma (5,039), others (2,361), Turks (343), Macedonians (217) and Montenegrins (159).[11]

There are four mosques (Gunja, Zagreb, Rijeka and Sisak) and 22 *masjids* in Croatia.[12] The Islamic Centre in Sisak has just been completed, while in Dubrovnik and Osijek the process of resolving the documentation is still ongoing. In Pula the construction project has been halted due to protests of its citizens over the location for the mosque.

Most Muslims live in the cities - Zagreb (16,215), Rijeka (9,029), Sisak (3,887), Dubrovnik (2,986), Vukovar (2,843), Karlovac (1,986), as well as in the counties to which these cities belong and fewer still live in rural communities along the border with Bosnia and Herzegovina.

The Muslims in Croatia belong to traditional minorities. They have lived here for centuries. As for the immigrants that appeared in Croatia as part of large migrations

[9] According to the available data, in the Homeland War, in the ranks of the Croatian Army and the police, 25,000 Bosniaks / Muslims participated, 1,187 and 70 more civilians were lost. About 370 Bosniaks were honoured for their part in the defence of Croatia.

[10] For the most recent demographical and historical overview of Muslim population in Croatia, see D. Mujadžević, 'The Consolidation of the Islamic Community in Modern Croatia: A Unique Path to the Acceptance of Islam in a Traditionally Catholic European Country' (2014) 3 *Journal of Muslims in Europe*, pp. 66-93.

[11] G. Goldberger, *Riječka džamija* (Zagreb, Naklada Jesenski i Turk, Hrvatsko sociološko društvo, 2021), p. 68.

[12] According to S. Allievi, 'Mosques in Europe: real problems and false solution' in: Stefano Allievi (ed), *Mosques in Europe: Why a solution has become a problem?* (London, Alliance Publishing Trust, 2010), p. 20, these data place Croatia in the rank of Portugal (33). Today Croatia has 2,520 Muslims per place of worship, which puts Croatia on a par with the Netherlands (2,315) and the Great Britain (2,824-1,600) (Allievi 2010:20).

from Asian countries, the number of Muslims among them is unknown. The Central Bureau of Statistic of the Republic of Croatia does not keep individual sociodemographic data on the profile of immigrants. It is difficult to make an assessment only, for example, on the basis of country of origin of the immigrants. Although there seems to have been an increase in immigrants from Asia in 2019, it can be assumed that the largest number refers to Chinese workers, who are not Muslims. According to the report 'Statistical indicators of persons granted international protection in the Republic of Croatia of 30 June 2021', there are fewer than a thousand refugees, more than half of whom went on to other countries of the European Union. Of those who remained, some are certainly not Muslims. For example, some Syrian Kurds are secular.

III. Institutional recognition by the State

The legal status of religious communities in Croatia is regulated by the Constitution, the Religious Communities Act and through specific contracts with a certain number of religious communities on issues of mutual interests.[13]

The Constitution of the Republic of Croatia guarantees equality for all persons before the law (*Article 14*), freedom of thought and expression (*Article 38*), freedom of conscience and religion, freedom to demonstrate religious and other convictions (*Article 40*). *The Constitution* postulates general principles addressing the relation between Church and State: equality before the law, separation of Church and State (*Article 41*). Article 41 is especially relevant in this regard.

> 'All religious communities shall be equal before the law and shall be separated from the State. Religious communities shall be free, in conformity with the law, to perform religious services publicly to open schools, educational and other institutions, social and charitable institutions and to manage them, and shall in their activity enjoy the protection and assistance of the State'.[14]

The Religious Communities Act was finally approved in 2002. The *Act* was ratified six years after the agreements with the Holy See were signed. That fact provoked suspicion that the *Act* had been adjusted to previously signed agreements and cast doubt on the privileged position of the Catholic Church in Croatia.[15] Among other

[13] Islamic community, among others communities has signed such a contract in 2002. II

[14] Constitution of the Republic of Croatia, published in *Narodne novine (Official Gazette)* No. 41, 7 May 2001 together with its corrections published in *Narodne novine* No. 55 of 15 June 2001.

[15] A. Marinović Bobinac and D. Marinović Jerolimov, 'Catholic Religious Education in Public Schools in Croatia: Attitudes towards Other Religions in Primary School Textbooks' in: Gabriela Pusztai (ed), *Education and Church in Central and Eastern Europe at First Glance* (Debrecen, University of Debrecen-Center for Higher Education, Research and Development, Hungarian Academy of Sciences & Religion and Values: Central and Eastern European Research Network, 2008).

issues, the *Act* regulates the position of religious instruction in the public school system in general.

The Islamic community was one of the religious communities that was given the opportunity to enter into such an agreement with the state. In 2002 the Islamic community signed the agreement which regulates important issues: relations in the field of upbringing, education and culture, chaplaincy in the military and police forces, penitentiaries and prisons and health and social institutions.

According to the Agreement,[16] the Islamic community has legal personality, it freely determines its internal organisation, it is responsible for religious appointments and the assignment of services, it can build, enlarge or renovate existing mosques according to the legislation and in agreement with the competent state bodies. The Islamic community has the freedom to print and distribute books, newspapers and magazines. Muslims have the right to choose a halal diet in schools, hospitals, prisons, the army and the police. They have the right to perform spiritual care, religious weddings that have the effects of civil marriage and religious burial. The Islamic community is free to establish institutions for charitable activities and social welfare and to conduct Islamic religious education in public preschools and primary and secondary schools. The Islamic community has the right to establish its own religious schools and media. Religious holidays are recognised as non-working days for believers. The agreement with Croatian radio and television enables the transmission of religious celebrations on holidays and guest appearances on television shows. Also, the Islamic community has the right to be financed by the State budget, according to the number of members of the community.

After the breakup of the Socialist Federal Republic of Yugoslavia, the Islamic religious community in Croatia was reorganised. The *Meshihat* of Islamic community in Croatia was established as the highest religious and administrative body of the Islamic community at the head of which is the *mufti*. The *Meshihat* is the institutional body that communicates with the Government. The Islamic community in Croatia recognises the spiritual authority of the *Riyaset* of the Islamic community of Bosnia and Herzegovina with the *reisul ulema* at the top of the hierarchy.

IV. Discrimination of Muslims (and by Muslims)

Muslims in Croatia are an accepted community of indigenous and integrated European Muslims of the fourth generation, with long history of experience of acculturation and assimilation. Today, they are present in all spheres of society (religious and

[16] The Agreement between the Govermnent of The Republic of Croatia and the Islamic Community in Croatia on issues of common interest, published in *Narodne novine (Official Gazette)* No. 196, 15 Dec 2003.

public life, interreligious dialogue). They made an important contribution to society during the transition and the war in Croatia (1991-1995).

Research on the media's representation of Islam and Muslims in Western countries has shown Islamophobia, racism and anti-Muslim discourse that contribute to the social and economic discrimination, marginalisation and exclusion of Muslims. They are ethnically, culturally and religiously others whose identity denies the identity and the way of life of the indigenous population.[17] The situation in Croatia is different. Current (and the former) president of the *Meshihat* states continuously that the position of Muslims in Croatia is quite enviable and that it can be a paradigm to Europe, with an emphasis on nurturing a European Islamic identity.

According to the general opinion of the Croatian state, but also of the Islamic community, the mutual relationship is arranged in a satisfactory manner. The leadership of the Islamic community enjoys the respect of the Croatian authorities, who use every opportunity – Islamic holidays and anniversaries -to express this by sending greetings and public messages, and public holidays to invite representatives of the Islamic community to the state celebrations.

There are few recorded cases of discrimination against Muslims in public life.

Issues of religious freedom, legal regulation of the Muslim status in society and the pre-existing problem of building mosques began to become an issue in the 1990s, after the establishment of the Croatian state and before concluding The Agreement on issues of common interest. Since the 1990s, there have been occasional cases of violations of the right to halal food in the military and police as well as ongoing problems related to the construction of mosques. After signing the contract with the state, the existing problems began to be resolved.

In the context of current cases of banning the *niqab* and *burqa* in a number of European countries, it should be said that there are no such bans in Croatia. From interviews with officials from the Islamic community we ascertained that no woman wears a *niqab* and a *burqa* in Croatia, and that about a hundred wear a *hijab*.

Unlike the serious problems facing Muslims in the countries of the European Union (education, employment and housing) which point to social marginalisation, in Croatia there is almost no discrimination of Muslims on these grounds. In the last few decades, Croatian Muslims have highlighted the lack of religious buildings and problems related to their construction as the main problems.

Rare cases that could indicate discrimination towards Muslims in Croatia occur periodically, mostly in connection with the construction of mosques in some cities (Rijeka, Sisak, Pula).[18] This appears where there is a fear of endangering the peace

[17] Goldberger, *Riječka džamija*, p. 57.

[18] Peternel, Škiljan and Marinović, 'Hidden Aspects of Social and Historical Development of Islamic Community in Sisak, Croatia'; Goldberger, *Riječka džamija*.

in the city districts, where a mosque (with *minaret*) is planned. This may be due to inadequate architectural solutions, reaction against the Ottoman style of building, and the pressure to adapt the building style to the European tradition; due to the impact that the Islamic community and Muslims may have on the preservation of traditional Christian values. Finally, we must not forget Islamophobia.

Occasionally there were discussions about building mosques with *minaret* among politicians, war veterans and locals, who were mostly against construction, though construction projects, faster or slower, have always gone further. Examples of already existing mosques in Croatia have shown that these fears were not justified, because none of the above actually materialised. Mosques are architecturally adapted to the environment in which they are built, and in no way negatively affect the daily lives of people living in these neighbourhoods.[19] In fact, coexistence and mutual acceptance are implied.

In most cases, public declarations of religious communities in Croatia on sex, reproduction, woman's and family rights, the Islamic community, together with traditional religions (the Catholic Church and Serbian Orthodox Church) and some Protestant communities known as Evangelicals, have taken a conservative stance.

V. Exercising religious freedom and other cultural rights and free speech

The Constitution of the Republic of Croatia, the Religious Communities Act and the Agreement on issues of common interest signed between the Croatian Government and the Islamic community provide the legal framework for establishing and operating mosques. As already stated, there are four mosques in Croatia, one is under construction, and two still require the necessary documents and regulations to be processed/dealt with.

According to the aforementioned Agreement, the Islamic community has the right to organise religious education in public preschool, primary and secondary schools if at least seven students attend. If there are fewer than seven, they attend religious education in the religious community, and their grade is entered in the certificate and it has equal status with all other grades. The Islamic community also has the right to establish confessional school. The Islamic community used this right by founding a high school in Zagreb.

The Islamic community, according to the Agreement, has the right to visit its believers in hospitals and social institutions so as to provide spiritual care. Also, soldiers and police officers, as well as prisoners, have the right to spiritual care. Such a practice is well-established.

[19] Goldberger, *Riječka džamija*.

There are no legal cases of defamation, blasphemy, hate speech and intolerance before Croatian courts concerning Islamic community and Muslims.

VI. Challenges posed by Islam in the traditional understanding and application of democracy and rights in Europe

The Islamic community in Croatia enjoys a settled legal position and a relationship with the state regulated by the Agreement. According to the representatives of the hierarchy of the Islamic community, all problems that arise are resolved through dialogue and agreement with the authorities. There are no political demands stemming from the Islamic community. They are fully aware of the principle of separation of Church (religious communities) and State. They are satisfied with their position in society. They feel equality with other religious communities and actively participate in interreligious communication and dialogue. Unlike the Catholic Church in Croatia, the Islamic community does not challenge the boundaries between private and public. In light of Islamophobia around the world, intolerant speech about Muslims is occasionally present in the media, especially on social networks, especially after recent large-scale migration from the Asian continent. The Islamic community cooperated with the state in resolving the migrant crisis affecting Croatia. They are actively involved in helping refugees, especially those of the Islamic faith. They provide them with material and spiritual help. In doing so, the Islamic community clearly declares itself against all radical actions of Muslims in the world, but also against Islamophobia, which can harm every Muslim, not only the radical elements. The Deputy mufti of the Islamic community in Croatia (also the director of the Islamic Gymnasium in Zagreb), Mevludi Arslani, confirms the growing Islamophobia in Europe in recent years and considers it a consequence of the migrant crises and terrorist attacks in Europe. He argues that terrorism has nothing to do with the principles of Islamic teaching, but very much to do with the abuse of Islam. He claims that Islamophobia is present in Croatia to a much lesser extent than in other European countries. Through its work in Croatia, the Islamic community promotes the middle, moderate path of Islam, which implies the rejection of all forms of violence, intolerance and terrorism.[20]

VII. Conclusions: preferences concerning the state model of co-existence between the secular state and Islam

Croatia is a state which postulates separation between Church (religious communities) and State. It promotes co-existence with religious communities, assistance and support when it is necessary.

[20] M. Arslani, 'Drugi čovjek Islamske zajednice: Zbog Hasanbegovića se stvorio dojam da svi muslimani u Hrvatskoj skreću udesno', *Lupiga,* 30 Dec 2016 <https://lupiga.com/>.

The Croatian *mufti* considers that Croatia can provide European states with a resolution to the Islamic issue, using so-called 'Croatian model', which postulates mutual integration: on the one hand the openness of the state to integrate the Islamic community, and on the other hand, a readiness on the part of the Islamic community to be integrated in the society to avoid assimilation that always threatens minorities. The key, according to the mufti Hasanović, is a strong and structured Islamic community, led by the *mufti* and the *Meshihat*, a kind of 'representative body' of the community, whose members are elected by the members of the community. European countries have a problem, the *mufti* believes, with ghettoised and dispersed Islamic organisations, often completely isolated from society, sometimes to the point that members fail to learn the language of the country in which they have lived for years. It is not a good solution for religious services in such communities to be led by *imams* who come from the Islamic world and do not understand the European tradition and way of life. The Islamic community from Croatia offers a form of coexistence that has proved effective in Croatia, a predominantly Catholic country.[21,22]

[21] Mufti Aziz Hasanović, 'Hrvatska primjer zemljama Euroe', *Al Jazeera,* 14 May 2017 <https://balkans.aljazeera.net>.

[22] All websites last accessed on 28 Nov 2021.

ISLAM AND HUMAN RIGHTS IN CYPRUS: A COMPLEX RELATIONSHIP

Achilles C. Emilianides [1]

I. The Social Framework

The status of Islam in Cyprus is largely associated with the status of the Turkish Muslim community of the island, its turbulent constitutional history and the on-going negotiations for the solution of the Cyprus problem.[2] A number of constitutional provisions concerning the Turkish community are temporarily not in force due to the abnormal situation prevailing in the island. Furthermore, the application of the bulk of legislation referring to the Turkish Muslim community of the island has been suspended due to the abnormal situation. This paper will examine the legal framework of the Republic of Cyprus only and not the areas which are not currently under the control of the Republic due to the Turkish occupation.

According to the 2011 official census the population of Cyprus was 840,407, out of whom 667,398 (79,41%) were Cypriots, 106,270 (12,64%) were European citizens and 64,113 (7,62%) were third country nationals (the majority being Asian or Russian nationals). The actual number of Turkish Cypriots residing in Cyprus is difficult to establish with precision, as the numbers of settlers from Turkey currently residing in Cyprus cannot be determined with accuracy. It is estimated, however, that more than 100,000 settlers from mainland Turkey are currently residing in the occupied areas. These settlers are not included in any calculation of the current population of Cyprus, as it is considered that any potential legalisation of the Turkish settlers would illegally modify the demographic structure of the island and threaten the stability and security

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[2] For a comprehensive analysis of the status of Islam in Cyprus see A. Emilianides, *Law and Religion in Cyprus* (3rd edn, The Hague, Kluwer, 2019); Idem, *Annotated Legal Documents on Islam in Europe: Cyprus* (Leiden, Brill, 2014). Specific additional bibliography will be referred to in the relevant sub-sections.

of the Republic.[3] It is estimated that at least 13% of the current total population of the Republic, excluding the Turkish settlers, are Turkish Cypriots of Muslim faith, living predominantly in the occupied areas. Persons of Muslim faith who are not Turkish Cypriots, living in the areas controlled by the Republic of Cyprus do not appear to exceed 1-2% of the population and are mainly immigrants.

Most Turkish Cypriots favour a secular state, despite the fact that they are Muslims, thus indicating the strong influence of Kemalism in Turkish Cypriot religious affairs. Turkish Cypriots, like most Turkish nationals, are followers of Sunni Islam. Within Sunni Islam, Turkish Cypriots have traditionally followed the Hanafi school of legal interpretation, a rather strict form of Islam. Since Atatürk's death, Turkish Cypriots have generally followed the religious practices of Turkey. There is, however, a growing number of Muslim immigrants who reside in the areas controlled by the Republic. The well-established Sunni Muslims (who count the great majority of Turkish Cypriots among their ranks) have sometimes considered the mostly immigrant Shia Muslims as intruders to the Omeriye Mosque. It should be noted, however, that violent incidents are very infrequent. In general, there seems to be a peaceful coexistence between the local immigrants visiting the Mosque and the local non-Muslim population. Similarly, there seem to be no notable problems between the Shia and Sunni worshippers who share the specific religious space.[4]

II. Institutional recognition

A. Legal personality

There is no established or state religion in Cyprus. All the religions and creeds in Cyprus deal strictly with their own affairs, without in any way interfering in the affairs of the State. However, the five main religions of the Republic, namely the Orthodox Christian, the Islamic, the Maronite, the Armenian and the Roman Catholic, enjoy a special constitutional status. In line with the principles of the system of coordination, as applied in the Republic of Cyprus, the five constitutionally recognised religious entities, including the Vakfs (religious foundation property), should be properly considered as legal persons in private law.[5]

[3] A. De Zayas, 'The Annan Plan and the Implantation of Turkish Settlers in Northern Cyprus' in: Achilles Emilianides, Costas Melakopides and George Kentas, *The Cyprus Yearbook of International Relations 2006* (Nicosia, KIMEDE and Power Publishing, 2006), pp.163-78; Committee on Migration, Refugees and Demography (Rapporteur Mr J. Laakso), 'Colonisation by Turkish Settlers of the Occupied Part of Cyprus', Doc. 9799, 2 May 2003.

[4] See also A. Emilianides, C. Adamides and E. Eftychiou, 'Allocation of Religious Space in Cyprus' (2011) 23 *The Cyprus Review*, pp. 97-121.

[5] See A. Emilianides, 'Religious Entities as Legal Persons in Cyprus' in: Lars Friedner (ed), *Churches and other Religious Organisations as Legal Persons* (Leuven, Peeters, 2007), pp. 49-53.

B. Financing

The right of the five major religions, to exclusively regulate their own property, is constitutionally recognised. By virtue of Article 23 (10) of the Constitution there can be no deprivation, restriction or limitation of any vakf of movable or immovable property, including the objects and subjects of the vakfs and the properties belonging to the mosques or to any other Muslim religious institutions, or any right thereon or interest therein, except with the approval of the Turkish Communal Chamber and subject to the Laws and Principles of Vakfs. The same prerogative is provided for the Christian denominations. Further, the Islamic religion enjoys exemption from income tax, as do the other major religions. The Republic of Cyprus does not provide funding to religions per se. Significant assistance is, however, provided to religious communities with regard to religious purposes, in the form of state aid. Provision is made in the Annual Budget of the Republic for the repair, maintenance and cleaning of Turkish Cypriot ancient monuments, mosques and cemeteries.[6]

C. Obligations of the State

Article 110 (2) of the Constitution ensures that all matters relating to Muslim religious institutions, including Vakf properties, or properties belonging to mosques, shall be governed by the Laws and Principles of Vakfs and the laws and regulations enacted by the Turkish Communal Chamber. Property may be dedicated by way of vakf for the benefit of an existing mosque. The autonomy of the Islamic religion, with respect to its internal affairs and the administration of its property, is therefore enshrined in the Constitution itself. Accordingly, the State may not interfere with matters pertaining to the administration of Vakfs, or vakfs properties, or relating to other Muslim religious institutions. Thus, it is provided that neither the House of Representatives, nor the Council of Ministers, nor any other state organ, have competences with respect to such matters.[7]

D. Institutionalised bodies

Article 2 of the Constitution provides for the establishment of a Turkish community effectively comprising all citizens of the Republic who are of Turkish origin and

[6] For a more detailed analysis see A. Emilianides, 'Equal Promotionist Neutralism and the Case of Cyprus' in: Michaela Moravčíková and Eleonóra Valová (eds), *Financing of Churches and Religious Societies in the 21st Century* (Bratislava, Institute for State-Church Relations, 2010), pp. 135-44; Idem, 'Financing of Religions in Cyprus' in: Salvatore Berlingo and Brigite Basdevant-Gaudement (eds), *The Financing of Religious Communities in the European Union* (Leuven, Peeters, 2009), pp. 111-7.

[7] For a detailed analysis see A. Emilianides 'Secularism, Law and Religion within the Cypriot Legal Order' in: Peter Cumper and Tom Lewis (eds), *Religion, Rights and Secular Society. European Perspectives* (Cheltenham, Edward Elgar Publishing, 2012), pp. 169-88.

who are Muslims. This is complemented by the constitutional provisions governing the Turkish Communal Chamber. The Constitution provides for two Communal Chambers: a Greek Communal Chamber and a Turkish Communal Chamber, which would have legislative power in educational, cultural, religious and other matters of a purely communal nature. The constitutional provisions concerning the Turkish Communal Chamber no longer apply in practice due to the abnormal situation prevailing in the island.

III. Application of Shari'a

The Treaty of 1878 between Great Britain and the Ottoman Empire expressly provided that Great Britain, the new ruler of the island, would respect Shari'a courts and Shari'a law, regarding the religious affairs of Muslims. However, the Interim Committee of Turkish Affairs observed in its 1949 report that the Kemalist reforms and the principles of sections 82-145 of the Civil Code of Turkey of 1926 ought to be adopted with respect to Turkish Cypriot Muslims. Shari'a law was thus substituted by secular principles in line with the reforms which had taken place in Turkey.[8] As a result, the Turkish Cypriot Islamic community has applied secular regulations since then. The Turkish Family Courts were not religious courts and did not apply Shari'a law. Caps. 338 and 339 were enacted on the basis of the observations of the Interim Committee of Turkish Affairs and were secular courts. Similarly, there are no exceptions regarding the application of Shari'a law in succession or labour law. Whereas, Shari'a law may potentially apply as part of private international law, no significant cases have so far been reported where its application has been considered as conflicting with fundamental rights and human dignity.

IV. Discrimination

Employment relationships in Cyprus are governed by ordinary contract law principles and are supplemented by statutory rights and obligations where appropriate. The legal status of religious functionnaires is one of private law; furthermore, the employment relationship between a religious organisation and an employee is governed by the general provisions of employment law. Muslims do not in principle have the right to a half day off on Friday afternoon for prayer at the mosque, but such arrangements can be made between Muslim workers and their employers. Council Directive 2000/78/EC has been transposed into Cypriot law with Law 58(I)/2004 concerning equal treatment in employment and occupation. The scope of this Law extends to all public and private sector bodies, including public authorities, local administration authorities, as well as public or private organisations. Thus the scope of Law 58(I)/04 extends also to religious organisations.

[8] *Interim Report of the Committee on Turkish Affairs: An Investigation into Matters Concerning and Affecting the Turkish Community in Cyprus* (Nicosia, Cyprus Government Printing Office, 1949).

Article 28 (2) of the Constitution, implementing Article 14 of the European Convention on Human Rights, provides that every person shall enjoy all the rights and liberties provided for in this Constitution without any direct or indirect discrimination against any person on the ground of his/her community, race, religion, language, sex, political or other convictions, national or social descent, birth, colour, wealth, social class, or on any ground whatsoever, unless there is express provision to the contrary in this Constitution. Article 28 is autonomous and its application is not dependent upon a finding of violation of another Article of the Constitution, contrary to Article 14 of the Convention. It should be further noted that the Republic of Cyprus has implemented Council Directive 2000/43/EC by enacting the Equal Treatment (Racial or Ethnic Origin) Law 59(I)/2004. Discrimination on grounds of religion or belief is unlawful with respect to access to employment, self-employment, or occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion, and irrespective of whether it is direct or indirect. However, the aforementioned provisions are subject to certain exceptions, with respect to religious organisations as provided in the Directive and its implementing legislation. No cases involving such exceptions within the framework of the Islamic community have been reported so far.[9]

V. Exercise of Religious Freedom and Cultural Rights

A. Legal framework for functioning of mosques

The Republic of Cyprus has declared 17 mosques in the non-occupied areas as ancient monuments and has undertaken to financially support their restoration and maintenance. Four of these mosques, the Hala Soultan Tekke and Kebir mosque in Larnaca, the Omeriye in Nicosia, and the Kebir mosque in Limassol, are funded by the State as ancient monuments and which are also used by Muslim worshippers for religious purposes. Pursuant to the Constitution, the mosques would be under the supervision of the Turkish Communal Chamber; however, this is not the case due to the abnormal situation prevailing in the island.

B. Prohibition of Islamic rituals

Islamic authorities could apply to the Veterinary Services of the Republic of Cyprus for a special derogation in order to carry out religious slaughter. By virtue of Section 32 of the Protection and Well-Being of Animals Law 46(I)/1994, the Council

[9] See in detail A. Emilianides and C. Ioannou, 'Law and Religion in the Workplace in Cyprus' in: Miguel Rodriguez Blanco (ed), *Law and Religion in the Workplace* (Granada, Comares, 2016), pp. 117-26; A. Emilianides, 'Religion and Discrimination' in: Mark Hill QC, *Religion and Discrimination Law in the European Union* (Trier, European Consortium for Church and State Research, 2012), pp.79-85.

of Ministers of the Republic enacted regulations, which have the status of secondary legislation, on the Protection of Animals at the Time of Slaughter or Killing of 2 May 2002. These regulations provided that in the case of animals subject to particular methods of slaughter required by certain religious rites, such as the Islamic religion, the general requirement that the animals should be stunned before slaughter or killed instantaneously would not apply. The religious authority on behalf of which the slaughter was being carried out would be competent for the application of the Regulation and for the monitoring of the relevant provisions of Islamic law. However, the new Regulations 347/14 no longer provide for a religious exemption. Islamic and Jewish communities have since repeatedly requested for the exemption to be re-introduced.[10]

C. **Education**

Article 20 of the Constitution provides that every person has the right to receive and every person or institution has the right to give instruction or education subject to such formalities, conditions or restrictions as are in accordance with the relevant communal law and are necessary only in the interests of the security of the Republic, constitutional order, public safety, public order, public health, public morals, the standard and quality of education, or for the protection of the rights and liberties of others including the right of the parents to secure for their children such education as is in conformity with their religious convictions. It is further provided that free primary education shall be made available by the Greek and the Turkish Communal Chambers in the respective communal primary schools. The right to free education has been extended to all levels of education, including university level, as far as public schools or universities are concerned. Education, other than primary education, shall be made available by the Greek and the Turkish Communal Chambers, in deserving and appropriate cases, on such terms and conditions as may be determined by a relevant communal law. Following the constitutional crisis of 1963 and the self-dissolution of the Greek Communal Chamber, all competencies with respect to education have been transferred to the Ministry of Education and Culture; the Turkish Communal Chamber does not function in practice due to the abnormal situation prevailing in the island.[11]

D. **Religious education**

Turkish Cypriots may receive religious instruction of their own religion and in their mother language, even in Greek-speaking schools, where there is an adequate

[10] See A. Emilianides, 'Slaughter of Animals using Kosher Method' (in Greek), *Dikaiosyni,* 13 April 2020 <https://dikaiosyni.com/katigories/arthra/sfagi-kreatwn-me-ti-methodo-koser/>.

[11] For a detailed analysis see A. Emilianides, 'Religion in Public Education in Cyprus' in: Gerhard Robbers (ed), *Religion in Public Education* (Trier, European Consortium for Church and State Research, 2011), pp. 87-98.

number of students. Turkish Cypriot children are assisted by the State to attend private schools of their choice, should they so wish. The state therefore covers all fees and expenses of Turkish Cypriot pupils whose families reside in the areas controlled by the Republic, and who attend private schools of elementary and secondary education.

VI. Free speech and Islam

There have been no significant reported legal cases on defamation, blasphemy, hate speech and intolerance relating to the Islamic community.

VII. Political demands

Based on the principle of bi-communality, Cyprus is a unitary state, comprised of two communities; the Greek community and the Turkish community. According to Article 2 of the Constitution, the Turkish Community comprises all citizens of the Republic who are of Turkish Origin and whose mother tongue is Turkish, or who share the Turkish cultural traditions, or who are Muslims. Citizen of the Republic who were Muslims were thus considered by the Constitution as members of the Turkish Community. Foreign citizens may not become members of either community. In accordance with the principle of bi-communality, it was provided that there would be increased participation of Turkish Cypriots in all positions of the executive (Turkish Vice-President with significant powers of veto, 30% of the Ministers), legislative (30% Turkish Representatives, provision for a separate Turkish Communal Chamber), judiciary, public service (30% Turkish participation), security forces (40% Turkish participation), despite the fact that when the Constitution was enacted Turkish Cypriots represented only 18% of the population. As already indicated, however, since 1963 the constitutional provisions regarding political representation of the Turkish Community are not in force due to the abnormal situation prevailing in the island.[12] The application of the *acquis communautaire*, the complete body of EU law, in the occupied areas has been suspended until a solution to the Cyprus Problem is found.[13] The occupied areas continue to form part of the Republic of Cyprus whose government is the sole internationally recognised government; however, the Republic cannot exercise any control over the occupied areas.

[12] For a detailed analysis of the constitutional situation see A. Emilianides, *Constitutional Law in Cyprus* (2nd edn, The Hague, Kluwer, 2019).

[13] S. Laulhé Shaelou, *The EU and Cyprus: Principles and Strategies of Full Integration* (Leiden, Brill/Martinus Nijhoff Publishers, 2010); C. Stefanou, *Cyprus and the EU: The Road to Accession* (Aldershot, Ashgate, 2005).

VIII. Conclusions

In view of the unique status of the (secular) Turkish Cypriot community of the island, issues relating to Islamophobia, security, radicalisation etc., which have arisen in other countries, have not been the subject of much debate in the Cypriot legal order.[14] It should be noted, however, a recent event gave rise to wider discussions regarding the position of non-Turkish Islam and its interrelation with the secular state. On 6 September 2020, the Director of a Nicosia lyceum expelled a female student for wearing an Islamic headscarf. Following a general outcry, the Director of the lyceum was transferred from his position, with the Minister of Education, the Ombudsman and political parties stating that the student should have the right to wear the headscarf since Cyprus is a multicultural society. Though the incident was the subject of intense publicity, discussion of the wider aspects seems to have only focused on superficial points without considering more specific questions relating to the co-existence between the secular state and Islam. In general, the prevailing view in the Cypriot legal order, when similar questions arise, is to stereotypically point out that Cyprus is a multicultural society and therefore respects all religions. The turbulent situation prevailing in the island and the confrontational relationship between Cyprus and Turkey have not surprisingly, made Cypriot society extremely reluctant to address sensitive general issues regarding Islam in case this might be viewed as a hostile stance by the Turkish Community.[15]

[14] See, however, G. Kentas and A. Emilianides, 'The Emergence and Regulation of Minority Religious Groups in Europe' in: Gideon Calder, Magali Bessone and Federico Zuolo (eds), *How Groups Matter: Challenges of Toleration in Pluralist Societies* (London, Routledge, 2013), pp. 260-85; A. Emilianides, 'Islamic Faith as One of the Main Religions: The Case of Cyprus' in: Michaela Moravčíková and Miroslav Lojda (eds), *Islam in Europe* (Bratislava, Institute for State – Church Relations, 2005), pp. 220-8.

[15] All websites last accessed on 28 Nov 2021.

HISTORY AND PRESENT OF MUSLIMS IN THE TERRITORY OF TODAY'S CZECH REPUBLIC

Jiří Rajmund Tretera[1]
Záboj Horák[2]

I. Introduction: the Social Framework

A. Numbers of Muslims, both old and new immigrants (whether or not there are Mosques, whether there are Muslims in the national and regional Parliaments)

Based on the findings of the Czech Statistical Institute on the population census carried out on *3 January 2001* through questionnaire, as of that date there were in total *3.699 Czech inhabitants that claimed the Islam* religious confession (including adults and children, since the parents filled out the questionnaire also for their children). It remains doubtful, however, whether this 'form of vote' is sufficiently representative. On the first place (and easy to fill out) was the check box 'no confession', the next box prompted to enter the exact name of confession. Many argue that not every believer had the ability and courage to fill in the questionnaire 'in favor' of his religion correctly. Official data on religion of the population are not kept in the Czech Republic, and for the recently founded individual Islam congregations it is difficult to elaborate a complete list of their members living on relatively extensive territory. It is firmly believed that the real number of Muslims in the Czech Republic is greater than the number shown in the mentioned statistics, potentially twice or thrice as many. Similar situation exists in many other confessions. The result that shows only 32% of the Czech Republic population claiming religious affiliation is considered underestimated.[3]

[1] Professor of Religion Law at the Faculty of Law, Charles University, Prague.

[2] Professor of Religion Law at the Faculty of Law, Charles University, Prague.

[3] See J. R. Tretera, 'Legal Status of the Islamic Minority in the Czech Republic' in: Michaela Moravčíková and Miroslav Lojda (eds), *Islam v Európe / Islam in Europe* (Bratislava, Institute for State and Church Relations, 2005), p. 302.

It is very difficult to estimate the number of Muslims in the Czech Republic because of lack of exact statistical data: indication of religious affiliation is optional in the census paper. In the latest census in *2011*, out of 10,436,560 inhabitants, *only 3,358 persons* indicated their *Islamic faith*. The estimated number of Muslims in the Czech Republic is between ten and fifteen thousand, with not more than four thousand practising. Among these are around 10 % who are Czech converts to Islam.[4]

These days, another regular census in the Czech Republic is taking place, which is to be closed on 11 May 2021. The results are to be published in 2022. We fear that the repeated system of collecting statistical data will again be underestimated in the same way, as the questionnaire emphasizes that the answer regarding religion and ethnicity is optional. According to data in the Czech Wikipedia, the number of Muslims in the Czech Republic is currently estimated at *22,000,* which is about 0.2 percent of the population of the Czech Republic.

The old group of Muslims consists of descendants of converts who converted to Islam during the First Czechoslovak Republic (1918–1938) under the leadership of Professor of physics and mathematics at the grammar school in Třebíč (Moravia) Přemysl Muhammad Ali Šilhavý (1917–2008), who succeeded just before the Second World War to complete at least part of the studies at the University of Al Azhar in Cairo (studies were interrupted by the German occupation of Bohemia and Moravia).

With the help of Saudi Arabia, he organized the construction of an Islamic cemetery in Třebíč in 1994. He collaborated with the Church Law Society in Prague and gave a lecture on the history of Muslims in the Czech Republic at its conference at the Faculty of Law in Brno on 26 September 2001.[5]

Immigration from the Islamic countries to the Czech Lands has never been extensive. Certain number of Islamic immigrants include those who under the Communist regime (1948–1989) were invited from the befriended Arabic or other Islamic countries (Syria, Iraq, Libya, Afghanistan) to study at the Czechoslovak universities, and who decided not to return home. One of the frequent motives to do this has been their entering into marriages with persons of the Czechoslovak nationality and consequent founding a family in the Czech Lands. We personally know several of them.

The third translation of the Qur'an into Czech played an important role at the time. It was made by Professor Ivan (Ahmed) Hrbek (1923–1993), the director of the

[4] See D. Němec, and Z. Hesová, *Annotated Legal Documents on Islam in Europe – Czech Republic* (draft), p. 44. The text is based on previous publication: L. Kropáček, 'Muslims in Czechia. A Small, Widely Heterogeneous Minority' in: Jaroslav Franc (ed), *Europe and Islam*, (Olomouc, Refugium Velehrad-Roma, 2015), pp. 171–3 and 179–82; S. Macháček, 'Czech Republic' in: *Yearbook of Muslims in Europe* (vol 7, Leiden – Boston, 2015), p. 179.

[5] See the English report in journal *Revue církevního práva/Church Law Review*, No 19–2/2001, p. 146 <http://spcp.prf.cuni.cz/15-20/19-cele.pdf>.

Department of African Studies at the Oriental Institute of the Czechoslovak Academy of Sciences in Prague, who converted to Islam.

After the coup in 1989, there was another wave of immigration from Islamic countries to the Czech Republic, this time mainly from Afghanistan and some former Soviet republics in Central Asia, especially from Kazakhstan. An important role was played by Dr Salahuddin Sayedi (born 1961), a Czech attorney originally from Afghanistan, a graduate of postgraduate doctoral studies at the Faculty of Law of Charles University in Prague. He is the author of the Czech-Pashto-Dari and Pashto-Czech Dictionary, and a long-time editor of the Czech Islamic magazine Hlas (Voice).

At the same time, the Czech organiser of Islam was Dr Vladimír Sáňka, geologist, who was born in Brno (Moravia) in 1959. He is currently the first vice-president of the Headquarters of Muslim Communities in the Czech Republic.

Today, the chairman of the Headquarters is Muneeb Hassan Alrawi (born 1966 in Iraq), who decided to stay permanently in the Czech Republic in 1992 and works as an entrepreneur.

There are currently six Muslim communities in the Czech Republic. Mosques were built in Brno (1998) and Prague (1999), in other communities services are held in prayer rooms.

There are several deputies of foreign origin in the Parliament of the Czech Republic. However, we do not know which of them are Muslims. The information on religion is considered sensitive in the Czech Republic, and politicians in particular do not inform the public of their religion.

A particularly popular member of the Chamber of Deputies representing a liberal conservative party, the lawyer Dominik Feri, born in 1996 in Kadaň (northern Bohemia), comes in the line of his father from Ethiopia. However, we do not know the religion of his Ethiopian ancestors.

B. Muslim minorities in Europe (distinction between traditional historic minorities and immigrant communities)

The closest historical Muslim minority in Europe that may have influenced the Czech Lands are the Muslim inhabitants of Bosnia and Herzegovina who speak Serbian. Bosnia and Herzegovina was in fact annexed to Austria-Hungary as early as 1878. After 1890, four Muslim regiments were formed in the Austrian army. The reason for the establishment of separate Muslim regiments was the need to comply a number of regulations within its internal military policies, regarding eating, taking an oath, use of hygienic facilities, and funerals. List of teachers at the Cadet Infantry School in Vienna from 1901 includes the name of military imam Effendi Asim Doglodović.[6]

[6] Tretera, 'Legal Status of the Islamic Minority in the Czech Republic', p. 303.

After the official annexation of Bosnia and Herzegovina to the monarchy (1908), Islam was recognized in Austria by Act No. 159/1912 and in Hungary by Legal Article XVII: 1916. The Czechoslovak Republic transposed both acts into its legal system, but the acts were not fulfilled because Muslims did not create any local community. It was not until 1935 that the first application was submitted to the then-forming Prague community, but it was not accepted due to some legal shortcomings.

It was discussed in the government of the Protectorate of Bohemia and Moravia in 1941/42, but the German occupation authorities did not agree to recognition of the Muslim community. After 1945, the proceedings did not continue. During the war, the reputation of Czech Muslims was compromised by the collaboration of the head of their Prague community with the German Nazis and the anti-Semitic movement.[7]

II. Institutional Recognition by the State

A. Legal form of Islamic communities (legal personality)

Communist Act No. 218/1949 repealed all existing laws relating to religious matters, including Act No. 159/1912 and Legislative Article XVII: 1916.

Since 1989, when the persecution of all religions in Czechoslovakia ended, Muslims have been free to practise their faith, so far in the form of foundations, formed mainly in Brno and Prague, and the construction of mosques.

The Headquarters of Muslim Communities, representing Muslims in the country, only achieved official recognition as a church and religious society only in 2004, following their application submitted in accordance with the Act on Churches and Religious Societies No. 3/2002. On the one hand, this Act liberalized the conditions in the Czech Republic in that a religious community that submits the signatures of 300 adult members with permanent residence in the Czech Republic can apply for registration. On the other hand, it has restricted religious freedom by allowing only some churches and religious societies to acquire until then common rights which have been declared 'special' in the Act (e.g. the right to military and prison chaplains, the right to conclude marriages with legal effects before the state, to teach religion at public schools, to found confessional schools). Since then, no other church or religious society, including the Muslims, has met the conditions for special rights.

[7] See Z. Vojtíšek, *Encyklopedie náboženských směrů a hnutí v České republice* (Prague, Portál, 2004), p. 604; J. R. Tretera and Z. Horák, *Konfesní právo* (Prague, Leges, 2015), p. 167. The collaborator was Alois Bohdan Brixius (1903–1959), after his conversion to Islam Haji Mohamed Abdallah Brikcius, Czech traveller, orientalist, journalist and author of travel books. He converted to Islam and was chairman of the Muslim religious community in Prague. He was a member of the fascist organization Vlajka (Flag). He was sentenced to eight years in prison after the war for his collaborative activities during the Nazi occupation of the Czech Lands, especially in anti-Semitic propaganda.

In addition to the Headquarters of Muslim Communities, which has legal personality as a registered church and religious society, individual Muslim communities also have legal personality. According to the register kept by the Ministry of Culture, there are currently six of these communities, but the Headquarters of Muslim Communities has the right to establish others.

B. Financing Islamic communities

Like all other churches and religious societies, Muslim communities are not eligible for state funding. We do not know to what extent they finance their activities from the contributions of their members and to what extent from their own economic activities. It is also not known whether they are supported from abroad.

Tax relief is provided by the state to the Headquarters of Muslim Communities to the same extent as to all other registered churches and religious societies. This means that they do not pay tax on collections and gifts and their donors receive tax deduction of their gifts.

C. Stance of the state towards the Islamic communities

The attitude of the state towards Islamic communities is the same as in the case of other churches and religious societies, i.e. neutral to slightly benevolent, as is usual in secular cooperative states.

D. Are there any institutionalized bodies which communicate with the Government?

On behalf of all Muslim communities, the Headquarters of Muslim Communities negotiates with the state. As far as we know, Muslims in the Czech lands have not yet established any other representation or denomination.

The position of the Presidency of the Headquarters and the names of its individual members are known not only to the state but also to the public, as they are notified to the Ministry of Culture by the Headquarters of Muslim Communities. It publishes them on its website. The same is true for individual Muslim communities and other affiliated Muslim organizations.

Until now, the legal organization of Muslims in the Czech Republic is united and unites Muslims regardless of whether they are Czech citizens or foreigners and regardless of their country of origin. It is understandable that they use Czech in official communication. It is also a unifying language for them. As far as we know, there are any organizational differences between Sunnis, Shiites or other Muslim religions in Muslim communities in the Czech Republic.

E. Islamic institutions in the EU legal order

As far as we know, the Headquarters of Muslim Communities in the Czech Republic does not integrate with another institution within the EU.

III. Application of shari'a (both as state law and / or private international law) and its relationship to fundamental rights and human dignity

A. Family law

The legal order of the Czech Republic does not prevent Muslims from using their legal system as autonomous within their religious institutions, just as it does not prevent other churches and religious societies from doing so. The autonomy of canon law within the Catholic Church can serve as a model for this autonomy.

However, no church or religious society can invoke the application of its own legislation through the secular arm (bracchium saeculare). It can only use its own religious means to enforce its own law.

Under no circumstances may Muslims enforce the Shari'a by means that would be in conflict with the Czech Constitution, international obligations and laws of the Czech Republic.

B. Succession / inheritance law

The same is true of inheritance law. The state does not prevent Muslims from making wills in the spirit of Islamic law. However, in order for them to be valid, they must have the form and contents specified by the Civil Code of the Czech Republic (Act No. 89/2012).

As for the succession according to the law (where no will has been made), of course, only inheritance is understood on the basis of the above-mentioned Civil Code.

C. Labour law

Labour Code of the Czech Republic (Act No. 262/2006) guarantees non-discrimination and equal treatment for all in working conditions, remuneration for work, training and the opportunity to achieve functional or other promotion in employment.

D. Shari'a and the rights of children and women

The rights of women and children in the Czech Republic are protected according to the international obligations of the Czech Republic and according to its Constitution.

If individuals and communities come into conflict with the protection of the human rights of women and children, then they will be treated in accordance with the legal order of the Czech Republic.

IV. Discrimination of Muslims (and by Muslims)

A. In labour law (employment figures, legal framework, political considerations)

It is not known that Muslims in the Czech Republic were discriminated against in employment relationships. Even such benefits in employment relations as are granted to disabled people are also applied in favour of Muslims. However, one cannot be favoured simply because he is a Muslim. It is evident that members of other immigrant groups are more successful in some entrepreneurial activities and occupations. For example, the vegetable trade is controlled by immigrants from Vietnam, construction workers are largely Ukrainians. The Czech state authorities do not interfere in the competitive struggles between immigrants from different countries, as they are prevented from doing so by the freedom of enterprise, which is part of the legal order of the Czech Republic.

B. Application of relevant EU law (religious non-discrimination, Directive 2000/78)

All relevant EU directives are applied in the Czech Republic.[8]

C. Gender, sexuality and Islam in Europe (comparison to Christian Churches)

In the Czech Republic, it is not allowed for people of one sex to have more rights than the other. Muslim women also have access to employment and public life as other women, and the educational process is as compulsory for women as for men. Compulsory school attendance is 9 years, starting at 6 years. Apart from the legal regulation, the strong position of women in Czech society is also helped by the rather strong de facto feminization of public life. Most judges in the Czech Republic are women, almost all primary and secondary school teachers are women. A large number of women work as doctors. There is also the use of women in the army, police, as drivers of public transport such as buses or trams.

V. Exercise of religious freedom and other cultural rights

A. Legal framework for establishment and functioning of mosques

Construction law is based on the equality of all builders. Even churches and religious societies are subject to it.

[8] See J. R. Tretera, and Z. Horák, 'Czech Republic' in: Mark Hill QC (ed), *Religion and Discrimination Law in the European Union* (Trier, European Consortium for Church and State Research, 2012), p. 89.

In practice, when creating building plans of cities and municipalities, it is possible to observe an adequately distributed construction of new church buildings of all Christian churches, mosques and shrines of other religions (Buddhism, Hinduism).

Of course, in a highly secularized society, there can be no extraordinary support for a society that does not live a religious life in favour of any religion. In the Czech Republic, it is not possible to contrast the religious structure of Christian churches, mosques and religions of South Asian origin, because all religions have the same handicap. It is a small understanding on the part of the majority secularized society that does not understand what religion is good for at all.

B. **Prohibition of Islamic rituals (e.g. slaughtering and Halal)**

A general rule concerning the slaughter of livestock for meat set in Act No. 246/1992, on the Protection of Animals against Cruelty, is supplemented with an exception for religious communities whose rules prescribe different methods of slaughter. Any exceptions shall be granted by the Ministry of Agriculture. A religious community may carry out such slaughter strictly in accordance with veterinary conditions set by bodies of the State Veterinary Administration for a particular facility. The slaughter shall be performed by a person qualified thereto, who is obliged to ensure the least possible suffering of a slaughtered animal.[9] Details are set out in Decree of the Ministry of Agriculture No. 418/2012. This decree contains a form to be completed by representatives of religious communities requesting an exemption from the rules of slaughter for religious purposes. There are two specialized sections on this form, one with the title halal, the other with the title kosher.

C. **Education of Muslim pupils at public schools, in private and in non-formal education)**

Muslims have the right to establish their own religious schools as private schools, just as a large number of other religious communities or court-registered associations do, as well as individuals. Even in private schools, it is possible to meet compulsory school attendance.

From interviews with individual Muslims, we found that they were not interested in founding their own schools. Muslims who are of foreign origin are interested in socially integrating into Czech society. They want to acquire good use of the Czech language, knowledge of standard interpersonal communication and achieve education at the same level as other residents of the Czech Republic and thus achieve the

[9] J. R. Tretera and Z. Horák, *Religion and Law in the Czech Republic* (Alphen aan den Rijn, Kluwer Law International), p. 45.

same qualifications for employment and business as other residents. If they are from mixed families, then they do not want to separate from their non-Islamic relatives.

As far as we know, Muslims in the Czech Republic do not tend to create an isolated ghetto, but to be part of a properly functioning civil society. Perhaps this is also related to the fact that extremist religious influences are seldom manifested among them and these are not welcome within Muslim communities. Very often, Czech Muslim communities issue public written protests against the violent acts of some extremist Muslim circles in Western Europe.

Perhaps we can state with regret that, as far as participation in liturgical celebrations is concerned, Muslims have also adapted to other believers in the Czech Republic in that only part of them regularly participate in these celebrations. And even with the fact that a large part of Muslims, like Christians, participate in religious life only occasionally.

Teaching religion in public schools is guaranteed by law within the so-called special rights. Among the 42 registered churches and religious societies, only nine have achieved this right so far. From the tenth year after registration, every newly registered church can apply for this right. The Headquarters of Muslim Communities have had this option since 2014. However, like other churches and religious societies, they must meet other conditions that the law lays down equally for all religious communities, regardless of religion.

Once the Headquarters of Muslim Communities submits this request to the Ministry of Culture and proves that it has met the conditions, the Muslim religion will be able to be taught in public primary and secondary schools. As with other churches and religious societies that have achieved this right, the Muslim religion will be taught where at least seven students have enrolled in one school. Of course, a canonical mission will be required from the Headquarters of Muslim Communities granted to individual teachers of religion, and can be revoked at any time later by the Headquarters.

Separation of pupils according to gender in physical education is not a problem, because in the Czech Republic it is traditionally provided for all pupils in primary and secondary schools.

Non-formal religious education of Muslims has its basis in families, as is the case in all Christian and other faiths. Similarly, no one prevents Muslims from gathering for religious instruction in their mosques and other houses owned by their religious communities and other organizations.

D. Individuality of human rights vs communitarianism of religions: the case of European Islam

Muslims in the Czech Republic participate in the *Common Voice* initiative. It is an 'informal initiative of the representatives of the three Abrahamic religions – Chris-

tianity, Judaism and Islam in the Czech Republic. Since 2010, it has been organizing meetings, lectures, discussions and events for young people. If necessary, it also comes with suggestions and comments on current events in society'.[10]

In 2019, representatives of Christians, Jews and Muslims in the Czech Republic issued a joint statement against euthanasia, addressed to the Parliament of the Czech Republic. It has contributed to the fact that euthanasia is not allowed in the Czech Republic.

A special initiative to unite Christians, Jews, Muslims and other faiths is being developed by the *Czech Christian Academy*, association which has 1,200 individual members, 5 collective members and 67 local groups from all over Bohemia and Moravia. The President of the Academy is the Catholic priest Monsignor Professor Tomáš Halík, the winner of the Templeton Prize, known for his worldwide cooperation with Jews, Muslims and Buddhists.

VI. Free speech and Islam

There are cases of defamation of Muslims in the Czech Republic, although there are probably many more cases of blasphemy against Christianity and Judaism.

The recent case of a blasphemy, which was committed in 2018 in a theatre in Brno, was the performance of a play by a Croatia Bosnian author, in which Jesus Christ descends from the cross to rape a Muslim girl. Thus, historical nonsense combined with an insult to both religions. But the lawsuit of the Archbishop of Prague before the Czech courts was rejected on the grounds that it was a literary license.

Strong solidarity of all religions has developed in the Czech Republic. This is also the case in the face of the attacks of unbelievers and the Communist Party of Bohemia and Moravia, as well as in the memory of the anti-religious communist totalitarianism in 1948–1989. This solidarity is supported and acknowledged by representants of the humanitarian philosophical trends and a very large part of the politicians of democratically oriented political parties.

VII. Challenges posed by Islam in the traditional understanding and application of democracy and rights in Europe

A. Political demands stemming from Muslim communities? More than equal treatment?

Muslim communities have not yet made a special contribution to the formation of democratic freedoms in the Czech Republic.

[10] See *Common voice (The common voice of Christians, Jews and Muslims)* <http://spolecnyhlas.cz/>.

They are treated in the same way as other citizens and residents of the Republic. As far as religion is concerned, Muslims in the Czech Republic share the same fate as all other religions. They are protected by law in the same way and the public sometimes has a positive and sometimes a negative relationship with them.

The only conflicting case was the police intervention against Prague Muslims, on April 25, 2014, which we report on below.

B. The public/private facets of religious manifestations in Europe

Just as Christians learn not to be afraid to live in public and participate in public life, so Muslims are gradually being drawn into it. Thus, both Christians, Jews, Muslims, Buddhists and Hindus, on the one hand, tend to isolate themselves into the privacy of their families and religious groups.

On the other hand, they are called upon by their superiors and, following the example of other religious communities, to abandon this 'splendid isolation', not to enter themselves into a voluntary ghetto, and to engage with other citizens in the joint creation of one civil society.

C. Security and liberty in the light of Islam(ophobia)

1. *Radicalisation and security – comparison to other religious or non-religious challenges to security*

The terrorist attacks on 11 September 2001 in New York and Washington were experienced in a very serious way by the entire population of the Czech Republic and disrupted the traditionally tolerant attitude of Czechs towards foreigners. It revived memories of the defence of the whole of Europe near Vienna (12 September 1683) against the danger of occupation by the Turkish Empire, when the commander of the defence of Vienna was a Czech nobleman and the commander-in-chief was the King of Poland. Even before 2001, there was widespread criticism among the Czech population traveling to neighbouring Germany about such a large spread of Turkish immigrants in Germany and the way they behaved in public services, which did not meet Czech standards.

After 2001, quite a bit of work by the developed Czech scientific Islamology explained to the rest of the population the difference in the terrorist actions of some newcomers from Muslim countries and real teaching of Muslim religion. This is also done by teachers of other disciplines at Czech universities.

Among those who have contributed to the understanding of Muslims are the Society for the Study of Sects and New Religions, the Society of Christians and Jews, the Czech Christian Academy and the Church Law Society in Prague.

However, the rather successful effort was hampered by the emergence of a so-called Islamic State in the Far East and terrible television and film coverage of the conditions that had developed in its territory.

The experience of Czech soldiers fulfilling the international obligations of the Czech Republic within NATO troops in Afghanistan, as well as the frequent loss of lives of Czech soldiers, also have an impact. In this case, however, the news in this area is not as negative as in the case of the so called Islamic State. The presence of Czech military chaplains from various churches in Afghanistan also contributes to the understanding.

2. *The effect of Islamophobia on the European states' commitment to fundamental rights*

In the last few years, we have seen that Islamophobic reactions to foreign experiences are growing in the Czech Republic.

Particularly perceived are the attacks of Islamic extremists in France against the Catholic Church (such as the assassination of an old priest at Holy Mass in the summer of 2016), which incite the bitterness of some lay circles among Catholics. Although Catholics are the largest church in the Czech Republic, as a minority among the religiously alienated population, they themselves resist attacks by hostile individuals and parts of the press. They are in solidarity with persecuted Christians in half of the world's countries, especially in Africa and Asia, in Islamic, Hindu and communist countries (China).

And now to the only conflict that occurred on April 25, 2014. On this day, the Organized Crime Unit of the Police of the Czech Republic raided the Headquarters of Muslim Communities in Prague, the Prague Muslim Community and the Islamic Foundation in Prague, during Friday prayers. The intervention did not concern Muslim communities in other cities. The purpose was to provide the book by Abu Ameenah B. Philips.

The Czech Bishops' Conference (i.e. the Conference of Catholic Bishops), the Ecumenical Council of Churches in the Czech Republic, which unites eleven non-Catholic churches, and the Federation of Jewish Communities in the Czech Republic protested against police intervention during prayer. Some may be surprised by the reaction of Czech Jews to Czech Muslims, but it must be borne in mind that Jews have also recently suffered from a rising tide of similar anti-Semitic attacks, focusing mainly on Jewish cemeteries.

Former chairman of the Prague Muslim community, Dr Vladimír Sáňka was subsequently accused by the state authorities of the crime of establishing, supporting and promoting a movement aimed at suppressing human rights and freedoms. According to the police, he should have done so by translating, publishing and distributing the book, which promotes Salafism, which is said to proclaim intolerance and hatred of other religions.

Dr Sáňka criticized the police intervention during the prayer, as well as the disproportionate force of the intervention. He was then acquitted by Czech courts in 2018, which was confirmed by the Czech Supreme Court in 2020. In March 2021, the court awarded him damages in the amount of 585,000 Czech Crowns (EUR 22,500) as compensation for non-pecuniary damage he suffered due to many years of unsuccessful criminal prosecution.

D. The connection between islamophobia and anti-immigration political movements or adoption of anti-immigration policies and party manifestos

In 2012, the association "We Don't Want Islam in the Czech Republic" was founded. The program of this association is clearly focused against the immigration policy of the Czech state, which supports immigration in connection with the challenges of the European Union.

E. Programmes for mutual understanding and inter-religious dialogue in Europe

An example of such programs is the project *Islam in the Czech Republic: Establishment of Muslims in Public Space* implemented within the Security Research Program of the Czech Republic in 2010-2015 organized by the Ministry of the Interior of the Czech Republic. Within its framework, the publication *Working with a Muslim Family and a Child in the Regime of Social and Legal Protection of Children* of 2015 was published (authors: Daniel Topinka, Tomáš Janků, Pavel Kliment).

VIII. Conclusions: preferences concerning the state model of co-existence between the secular state and Islam – critique

In our opinion, the current model of coexistence between the secular state and Islam in the Czech Republic is satisfactory. We believe that the acquisition of the so-called special rights under the Act on Churches and Religious Societies No. 3/2002 by the Headquarters of Muslim Communities in the Czech Republic would be desirable (as in the case of many other registered religious communities). In particular, the inclusion of the right to teach the Muslim religion in public schools. However, the exercise of this right is up to Muslim communities, i.e. whether they will be able to exercise this right at all and in how many places.

It would be desirable to obtain the right to organise the service of prison chaplains. So far, a 'praeter legem' service has been organised in several places. But it would be appropriate to include several permanent Muslim chaplains among the employees of the Prison Service of the Czech Republic.[11]

[11] All websites last accessed on 18 Oct 2021.

ISLAM, MUSLIMS AND HUMAN RIGHTS IN DENMARK

Niels Valdemar Vinding[1]

I. Introduction: the Social Framework

Religiously, politically and legally speaking, Danish research on Islam and Muslims is recent, in broad terms dating back no further than the 1980s. Before that, the issues were classified under labour migration, family reunification and refugees, but at that time people were identified by ethnicity or nationality, and religion hardly entered the conversation. Only in the late 1980s, with the issues of family and socio-religious institutions did 'Islam' begin to draw attention, first publicly, then academically,[2] and then slowly in legislation, administration and the judiciary.[3] The phenomena which are investigated here can be traced back to the great economic, political and security crises and changes from the second half of the 20th century onwards.

Nevertheless, there have been Muslims in Denmark for almost 200 years. A census from 1840 lists a single 'Mohammedan' under the heading of 'Alien Confessors of Religion' and by 1880, the number was eight.[4] During the next one hundred years the data is very scarce, although Muslims figure intermittently in public narrative.[5] In early 1961, the burgeoning community of Ahmediyya applied for the recognition of Islam in Denmark by Royal Decree to both the Ministry of Ecclesiastical Affairs and

[1] Associate professor at the University of Copenhagen.

[2] J. B. Simonsen, *Islam i Danmark* (Århus, Århus Universitetsforlag, 1990).

[3] N. V. Vinding, 'Discrimination of Muslims in Denmark' in: Melek Saral and Şerif Onur Bahçecik (eds), *State, Religion and Muslims* (Brill, 2020), pp. 144-96.

[4] G. Schmidt, 'Muslimer og muslimsk praksis i København 1863-1915: På sporet af en forsvundet historie (Muslims and Muslim practice in Copenhagen 1863-1915: Tracking a lost history)' (2021) 15/1 *Scandinavian Journal of Islamic Studies* <https://doi.org/10.7146/tifo.v15i1.125317>.

[5] E.g., Danish Convert, Ali Ahmed Knud Holmboe, who in 1930 sought to be the first Westerner to cross the Sahara from Marocco to Egypt, then fought the Italians in Libya and died in Aqaba in 1931. See, S. Aoude, *Hjulspor i sandet: Historien om Ali Ahmed Knud Holmboe 1902-1931* (København, Fateh, 2002).

the King.[6] As they numbered only 42 members, some of whom were resident aliens and embassy personnel, the Minister of Ecclesiastical Affairs rejected the application, citing lack of size and no established organisation to maintain the recognition. By 1973, the number had risen to 12,000 and Muslims again sought Royal recognition, but by then the rules had changed, and no recognition by Royal Decree could be given, only administrative ministerial recognition. The swift growth of the community and the early administrative difficulty seems to be an indicator of the issues that were to exist for the rest of the century and the beginning of the next.

As is the case in a number of European countries,[7] Muslims and Islamic communities are the largest religious minority in Denmark. While the official membership of the Church of Denmark is available through the Statistics Denmark quarterly updates – and currently standing at 4,300,979 out of a total population of 5,843,347 or 73,6 %– the numbers for Muslims are much harder to come by. There are several reasons for this. Firstly, under the 2018 Act of Data Protection[8] it is illegal to collect data on the religion of individuals and it has been for years through several iterations of the same principle.[9] This means no public authority may collect, handle or register such information, and so in Denmark there can be no public census asking individuals to specify their political or religious affiliation, and there can be no public registration of members of religious communities.[10] Secondly, in lieu of actual census data, the estimates and methods for calculating the numbers are difficult to compile. Until recently, the best estimates were drawn from official numbers of 'immigrants and descendants' according to country of origin and then correlating these numbers to the percentages of Muslims in those countries.[11] This gave an estimate of about 300,000 Muslims in Denmark. This method is telling of the fact that the Muslim population in Denmark has a recent history of migration and is still identified by ethnic and national origins, and is skewed as it only includes those who are statistically or nominally counted as Muslim, and therefore not qualified by those who actively identify as such.

In 2019, however, the Equality Section of the Ministry of Foreign Affairs published a new national survey looking at equality and masculinity amongst ethnic mi-

[6] N. V. Vinding, 'Religionsorganisatoriske udfordringer for muslimske trossamfund i Danmark' (2013) *Magasin om Religionsmøde,* pp. 28-37.

[7] See the *Yearbook on Muslims in Europe*, from Brill Publishers, for demographic data across Europe.

[8] Databeskyttelsesloven, LOV nr 502 af 23 May 2018.

[9] N. V. Vinding, *Annotated Legal Documents on Islam in Denmark* (Leiden, Brill Publishers, 2020), pp. 19-20.

[10] Vinding, *Annotated Legal Documents on Islam in Denmark*, p. 20.

[11] B. A. Jacobsen and N. V. Vinding, 'Denmark' in: Egdūnas Račius, Stephanie Müssig, Samim Akgönül, Ahmet Alibašić, Jørgen Nielsen, and Oliver Scharbrodt (eds)*, Yearbook on Muslims in Europe,* (vol 12, Leiden, Brill Publishers, 2021).

nority men, which gave a better statistical basis for estimating the number of Muslims in Denmark.[12] Based on 4,423 anonymous respondents, this statistically representative data puts the number of Muslims in Denmark at 256,000, or 4.4% of the population.[13]

Further demographical information on Muslims in Denmark is equally wrought with difficulty, but the Danish chapter from the Yearbook on Muslims in Europe has some overall estimates.[14] About 70% of Muslims are Danish citizens, and based again on the data on immigrants and descendants, amongst the largest national minority groups they are 19% Turkish, 11% Syrian, 9% Iraqi, 8% Lebanese, 8% Pakistani, 7% Somali, and 6% Afghani. Bosnian, Iranian, Moroccan and others are less than 5% each. A study from 2008 divides the Muslim sub-population into 57% Sunni, 14% per cent Shi'i, and 29% 'Islam, other', which may include Ahmadis, Alevis, and Sufis. Although most Sufis consider themselves to be Sunnis, the answers to this kind of questions are notoriously imprecise and respondents regard these categories differently.

II. Institutional Recognition by the State

A. Legal form of Islamic communities (legal personality)

Since 1970, the rules and regulations to recognise and approve religious clergy outside the Church of Denmark to perform ceremonies and weddings were left to the administrative practice of the Ministry of Ecclesiastical Affairs. This was a practice established from previous royal privilege and developed on an ad hoc basis to become part of public law. Through this gradual process, religious communities and congregations were effectively divided into three groups: communities recognised by royal decree prior to 1970, communities and clergy with approval to perform weddings, and other religious communities without any formal recognition. Recognition by royal decree prior to changes in 1970 was seen as more symbolically significant, and was only given to 11 churches and communities, that is, the Catholic Church, the Baptists, the Methodists, the Swedish Gustaf's Church, the Norwegian King Haakon Church, the Finnish Church, the Icelandic Church, the Danish Reformed Church, St. Alban's Anglican Church, the Russian Orthodox Church and to the Jewish Community. And, as is clear, no Muslim or Islamic communities.

This was changed again as of 1 January 2018, when the Act on the Religious Communities outside the Church of Denmark was enacted. Now, the distinction be-

[12] B. Følner, S. A. Johansen, S. Turner and G. E. Hansen, 'Maskulinitetsopfattelser og holdninger til ligestilling – særligt blandt minoritetsetniske mænd' (Understandings of Masculinity and Attitudes Towards Equality, Especially Among Minority Ethnic Men), *Als Research*, Feb 2019 <www.alsresearch.dk/uploads/Publikationer/Rapport_maskulinitetsopfattelser_Als%20Research.pdf>.

[13] Jacobsen and Vinding, 'Denmark', pp. 206-7.

[14] Jacobsen and Vinding, 'Denmark', p. 207.

tween 'recognised' and 'approved' was removed, and Islamic communities are now considered recognised. The act also fulfilled the constitutional promise of Article 69 in the Danish Constitutional Act, which stated that 'Rules on religious bodies dissenting from the Established Church shall be laid down by statute.'[15]

In light of recent security and financial concerns, the act included a number of provisions making classes on democracy and articles of association mandatory, and requiring annually audited accounts. However, the scope of the act is more inclusive and moved away from the narrow definition of faith community 'with worship as the main purpose'. Most importantly, the act incorporated the current understanding of *ordre public*, or as Constitution Article 67 states, 'nothing contrary to good morals or public order shall be taught or done.' This means literally that 'the teachings and activities of the faith community must comply with existing legislation'[16] and not with the whims of changing degrees of moral panic. Here, the former UN Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, had voiced significant concern in his report on Denmark from 2016 about a politicised and restrictive interpretation of the Constitution,

> 'In order to remain in line with European and international conventions that Denmark has ratified — in particular article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms and article 18 of the International Covenant on Civil and Political Rights — article 67 of the Constitution requires a broad interpretation of the scope of protection (i.e. beyond 'the worship of God') and a cautious interpretation of the limitation clause (Bielefeldt, 2016, p. 4)'.

B. **Financing Islamic communities**

As is explicit in Article 4 of the Danish Constitution, the Danish state supports the Church of Denmark, both directly through funding and indirectly through tax collection, organisational support and employment among others.

Regarding other religious communities in general, and Islamic communities in particular, the legal state of affairs is framed by whether or not they are recognised according to the 2018 Act. As with the many institutions of the Church of Denmark, recognised religious communities are exempt from the Foundations Act,[17] which means that many standard rules and regulations regarding articles of association, leadership, accounting and accountability do not apply. The exemption is in effect as long as the institutions and religious communities do not undertake any other tasks beyond their main purpose.

[15] 'My constitutions act with explanations', *Folketinget,* <https://www.ft.dk/~/media/pdf/publikationer/english/my_constitutional_act_with_explanations.ashx>.

[16] Preparatory comments, p. 13.

[17] *Bekendtgørelse af lov om fonde og visse foreninger*, LBK nr 938 af 20/09/2012.

Also, in the Act on Corporation Tax corresponding to the provisions above, religious communities are exempt from paying taxes. Of significant importance here, however, is the wording that only recognised religious communities are exempt from taxes – not all religious communities. However, with the provisions of the Act on the Religious Communities outside the Church of Denmark from 2018, some related issues are addressed, in particular regarding articles of association and audited accounts of recognised religious communities.

According to the Tax Assessment Act[18] members of religious communities may be allowed to deduct on their tax returns the value of gifts, alms and charitable donations. This applies only if the communities are found to be actual religious communities – in either Denmark or other EU countries – and only if the religious community files the donations with the tax authorities. The easiest way to establish that the religious communities are in fact religious communities is if the community is recognised under the Act on the Religious Communities outside the Church of Denmark. If the tax authorities accept this, then provisions in the Tax Assessment Act constitute the single most significant indirect support for religious communities. Exemptions from paying taxes might be of considerable value, too, but this right to deduct donations to charity opens for sources of revenue, which are subsequently exempt. One issue here, however, is that it requires a little administration and proper management of funds and donations to file the deductions to the authorities, which might add somewhat of a burden to very small religious communities. Another issue, which in recent years has become more apparent, is that the provisions for deduction of donations to religious communities is of significant benefit to wealthy communities. After the Act on the Religious Communities outside the Church of Denmark has made the audited financial records of recognised Islamic communities available through the registry, it is evident that for some communities, the relative poverty of their members means that the benefit of the exemption is minimal.

C. Stance of the state towards the Islamic communities

Thus, for religious communities who of their own volition seek recognition from the state as discussed above, there is now a Registry of Religious Communities in Denmark. This is a registry of communities, not of persons associated with the community, although membership lists should be presented on demand. Until the Act on the Religious Communities outside the Church of Denmark was enacted, there had only been a very loose framework for any control or inspection of the communities. Before the act, it had only been theorised that the ministry had the powers to rescind or withdraw recognition, and so no systematic register of religious communities was maintained.

[18] *Bekendtgørelse af lov om påligningen af indkomstskat til staten (ligningsloven)*, LBK nr 1162 af 1 Sept 2016).

The act puts into effect the Registry of Religious Communities, in Article 7(4): 'Recognition is listed in the Registry of Religions Communities, which is allocated to the Ministry of Ecclesiastical Affairs.' This paragraph sets out a number of continuing duties that the communities must adhere to, including the submission of annual reports as well as their constitutions and articles of association to the ministry. This power to control or inspect religious communities is regulated by the Executive Order on the Registry of Religious Communities from 15 November 2018. The order clearly states that the purpose of the Registry of Religious Communities is to ensure easier access and insight into which religious communities are recognised and which congregations are part of the religious communities. Also included is a requirement of insight into their financial state and organisational structures. This is done at the website of the Ministry of Ecclesiastical Affairs, where a separate 'page' lists the articles of associations, the central rituals and the articles of faith for each religious community and individual congregation. For Islamic communities, and as of 31 October 2019, all 28 recognised Islamic religious communities have uploaded this information and as an obligatory part of this they list financial information, audited accounts and donations, too.[19]

D. Are there any institutionalised bodies which communicate with the Government? (e.g. Islamic Council, NGOs etc.)

For the past twenty years, a number of Muslim networking organisations in Denmark have appeared. Generally, their impact has been limited and their purpose, reception, success and eventual lifespan have been very varied. Some were perhaps just a response to an event or specific context and disappeared quickly, while others are still active.

From a legal perspective, none have been organised with help from government or municipal bodies. From an organisational and institutional perspective, the existence and development of such networking organisations reveal important insights into how Muslims address and navigate their environment, including government bodies. In particular, in the years after the Muhammed cartoons crisis, the Muslim community saw a need for an internal consensus amongst Sunni Muslims, and the government saw a renewed potential for dialogue with a widely representative Muslim organisation.[20] Thus, in September 2006, the United Council of Muslims (Muslimernes Fællesråd) held its first General Assembly. The organisation brings together fourteen

[19] For Muslim communities invited to participate in hearings on new bills and government initatives, see L. Kühle and M. Larsen, *Danmarks moskéer. Mangfoldighed og samspil* (Aarhus, Aarhus Universitetsforlag, 2019), pp. 148-52.

[20] J. Klausen, *The Islamic challenge: politics and religion in Western Europe* (Oxford University Press, 2005).

different Muslim organisations, mosques and schools widely representing Sunni Muslims in Denmark.[21] Inaugurated in 2008, the Danish Muslim Union (Dansk Muslimsk Union) brings together some of the most significant ethnic-religious organisations and its purpose is to create a common platform for the majority of Muslim associations, organisations and private schools in order to promote integration, speak for a traditional Islam, and fight radicalism. According to their own estimates, the Danish Muslim Union speaks on behalf of 25,000 members. As with other major Muslim organisations in Scandinavia, e.g. the Islamic Council of Norway, the Danish Muslim Union is inspired by and cooperates with the Muslim Council of Britain.[22]

Since the most recent change in government of 27 June 2019, which brought a Social Democrat government to power, the Minister for Immigration and Integration, Mathias Tesfaye, and the Minister for Culture and Church, Joy Mogensen, have been in dialogue with Muslim organisations. Previous governments and ministers had on principle not met with Muslim leadership or organisations. However, the 2 October 2020 meeting with three main Muslim organisations was called after the Danish newspaper, *Berlingske*, had published stories about an imam issuing divorce certificates that bordered on criminal negative social control, as the legal termhas it.[23] The two ministers wanted the Muslim organisations to vocally and publicly disown the imam, but did not want to establish nor build relations in any way. The day after the meeting, the United Council of Muslims issued a press release that accentuated the positive outcome of the meeting but speaks volumes about the state of communication between government bodies and Muslim organisations.

> 'The United Council of Muslims is pleased that the government has understood the importance of involving Muslim organizations in the joint work of securing the civil liberties of us all. Psychological violence, negative social control and state of mind control, whether on a personal level or in a structural context, are detrimental to the individual's right to live in a dynamic society with religious freedom and versatile democracy. The United Council of Muslims looks forward to entering into an equal and long-term collaboration with the Minister of Church Affairs regarding these challenges, and we look forward to the Minister's qualified and well-thought-out solution proposal to secure the legal position of Danish Muslims.'[24]

[21] L. Kühle, 'Mosques and Organizations' in: Jørgen Nielsen (ed), *Islam in Denmark: The challenge of diversity* (Lanham, Rowman & Littlefield, 2012), pp. 81-94.

[22] Vinding, 'Discrimination of Muslims in Denmark'. See also, O. Elgvin, *Between a Rock and a Hard Place: The Islamic Council of Norway and the Challenge of Representing Islam in Europe* [Thesis for the degree of Philosophiae Doctor (PhD), University of Bergen, Norway].

[23] C. Birk, 'Nu vil Tesfaye have muslimske organisationer til »klart« at tage afstand fra Abu Bashar: »Det hører ikke til i det her århundrede«', *Berlingske*, 2 Oct 2020 <https://www.berlingske.dk/danmark/nu-vil-tesfaye-have-muslimske-organisationer-til-klart-at-tage-afstand-fra>.

[24] I. Brønk, 'Pressemeddelelse 3. oktober 2020', *MFR*, 3 Oct 2020 <https://mfr.nu/2020/10/03/pressemeddelelse-3-oktober-2020/>.

In general, Muslims in Denmark do not seem very professionally organised and are not sufficiently representative. They have had difficulty with the formation of umbrella organisations, especially in the years after the Mohammed cartoons crisis. While there seems to be a significant need for strong voices who can speak authoritatively about Islam in the Danish public, beyond much of the internal strife of the Muslim communities there is no consensus, and despite two significant networking organisations there is no general accord amongst Muslims in Denmark. American Political Scientist Jonathan Laurence has demonstrated that where Muslims have defunct or non-functional organisational representation at the national level, they enjoy fewer rights, have fewer options and experience a greater degree of discrimination.[25] Denmark might very well be a case in point to support such an argument.

III. Application of Shari'a (both as state law and / or Private International Law) and its Relationship to fundamental rights and human dignity

In 2012, Vinding & Christoffersen argued that religion in Denmark is, legally speaking, embedded in two different regulatory regimes: the Church of Denmark remains regulated as a public, administrative body in public law, whereas all other religious communities are regulated under private law as associations, charities or private institutions. From a legal, organisational, and administrative point of view, there is thus little qualitative difference between the Church of Denmark and any other public administrative body. However, other religious communities are treated just like any other private association with no (or little) regard for whether the organisation or community is religious.[26]

Principles of private international law are relevant if a family member concerned is in a country other than Denmark. Contrary to most European countries, there is no general statutory codification of private international law in Denmark.[27] Consequently, if a case is brought before the Danish courts, even though one or both parties are not Danish citizens, Danish law applies. If legal status is in question, such as a marriage performed under the law of another country, the issue for Danish law is only whether or not this status can be recognised, that is, whether or not the couple can be acknowledged as a married couple. A case of divorce or other conflicts over status that is brought in Denmark will be judged according to Danish law, not according to foreign law.

[25] J. Laurence, *The Emancipation of Europe's Muslims* (Princeton University Press, 2011).

[26] N. V. Vinding and L. Christoffersen. *Danish regulation of religion, state of affairs and qualitative reflections* (Centre for European Islamic Thought, Faculty of Theology, University of Copenhagen, 2012).

[27] M. Fogt, 'Denmark' in: Jürgen Basedow, Giesela Rühl, Franco Ferrari and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law* (Cheltenham, UK, Edward Elgar Publishing Limited, 2017) <https://doi.org/10.4337/9781782547235.ND.1>.

As part of the developing research of the project on 'Producing Sharia in Context',[28] it has been demonstrated that municipal bodies, social workers, employment service consultants as well as the national Agency of Family Law (*Familieretshuset*) are actively and pragmatically involved in negotiating Islamic ethical practices and are informed parties to divorces and informally resolved family conflicts.[29] It is well documented that 'social workers look for a gatekeeper in the imam or some person whom they hope can solve [familiy] problems'.[30] The Ministerial supervising body, the Agency for International Recruitment and Integration, are 'aware that religious communities can play a role in cases of honor-related conflicts and negative social control and for some citizens already act as parties in relation to specific issues and challenges, e.g. in connection with adherence to religious marriages.'[31] However, much more research is required to map the administrative ground-level interactions, negotiations and 'co-productions' of Islamic law, practice and ethics in Denmark.

A. **Family law**

In Denmark, family law and religion are closely connected, both historically and legally. With the growing power of the state since the Reformation, when Denmark became Protestant rather than Catholic, marriage has increasingly become a state institution for governing the family unit. In their chapter on family law, Vinding & Christoffersen (2012) argue that '…the state claims the de facto jurisdiction to define marriage not as a religious institution, but as a publicly recognized status equally available for all to enter into it and to dissolve accordingly' (p 124). This status of being governed and defined by law was seen very clearly in 2012 when Parliament decided to allow same-sex marriage and in effect expected the bishops of the Church of Denmark to produce a gender-neutral ceremony for marriage rituals taking place in church. Besides heated discussions about Church and State relations in Denmark, the question left little doubt about the fact that the state guarantees the legal validity of marriage.[32] The state defines what it means to be married, and marriage is governed

[28] N. V. Vinding, 'Research leader Niels Valdemar Vinding on Producing Sharia in Context', *Independent Research Fund Research*, 2020 <https://dff.dk/en/grants/copy_of_research-leaders-2020/copy_of_researchleader?set_language=en>.

[29] *Orienteringsnotat til departementet vedr. forespørgsel på SIRIs deltagelse i forskningsprojekt*, undated.

[30] J. Petersen, 'The emergence and institutionalization of a sharia council in Copenhagen: Analysing sharia practices using social semiotics, psychology, and ritual theory' (Routledge, forthcoming on 2022).

[31] *Orienteringsnotat til departementet vedr. forespørgsel på SIRIs deltagelse i forskningsprojekt*, undated.

[32] Christoffersen and Vinding, *Danish regulation of religion, state of affairs and qualitative reflections*; also, N. V. Vinding and E. B. H. Saggau. 'Challenges of the Institutionalization of Same Sex

mainly by the Marriage Act of 1970 (with later amendments), which not only defines civil marriage and marriage in the Church of Denmark, but also allows for the authorisation of individual preachers from religious communities to perform valid civil marriages. Such authorisation requires recognition by the Ministry of Ecclesiastical Affairs after review by the Advisory Committee on Religious Denominations. The Act on Religious Communities outside the Church of Denmark, cited above, in its Section 15 specifically considers the issue of whether a guardian's approval is a requirement or merely a ceremonial part of the marriage.

New research demonstrates that while Muslim family law exists in Denmark and is widely used socially and informally, it is only rarely embedded with formal institutions or bodies of authority. Jesper Petersen has argued that, in fact, the legal state of affairs of Islamic family law in Denmark is defined by an 'Islamic juridical vacuum'.[33]

> 'This vacuum entails that sharia is often defined locally in communities or families rather than by Islamic authorities, and when women are unable to obtain an Islamic divorce they turn to Islamic authorities for help. That is, in the absence of Islamic legal institutions they expect Islamic authorities such as imams and teachers in mosques to take the role of an Islamic judge upon themselves and issue Islamic divorces. However, Islamic authorities in Denmark have no formal legal power to issue divorces and they are often incapable of helping women whose husbands object to divorce.'

A further consequence is that not just Islamic authorities such as imams and teachers are sought to fill the juridical vacuum, but that also public service, police and municipal authorities are called upon to help with the dire situation in which Muslim women in 'limping' marriages often find themselves.[34]

B. **Succession / inheritance law**

Overall, inheritance law has not been much of an issue, although there are examples of cases and inheritance lawyers specialising in this field. Much of the trouble can be mediated through testaments, where there is leniency to dispose half of the inheritance.

Marriage for Religious Pluralism in Denmark' in: Ednan Aslan, Ranja Ebrahim and Marcia Hermansen (eds), *Islam, Religions, and Pluralism in Europe* (Springer VS, Wiesbaden, 2016), pp. 173-92.

[33] J. Petersen, 'The Islamic Juridical Vacuum and Islamic Authorities' Role in Divorce Cases' (2021) 1/10 *NAVEIÑ REET: Nordic Journal of Law and Social Research*, pp. 67–84 <https://tidsskrift.dk/nnjlsr/article/view/125692>.

[34] On the issue of limping marriages, more generally, see A. Liversage, 'Muslim divorces in Denmark–findings from an empirical investigation' in: Rubya Mehdi, Werner Menski and Jørgen Nielsen (eds), *Interpreting Divorce Laws in Islam* (DJØF Publishing, 2012), pp. 179-201.

Muslim inheritance rules are not a single code of law like Danish inheritance law. There are many schools and opinions of law, but most Islamic scholarship agrees that a Muslim cannot inherit from a non-Muslim and vice versa, citing both Bukhari and Muslim Hadith 'A Muslim does not leave anything to a non-Muslim, and a non-Muslim leaves nothing to a Muslim.'[35]

In Denmark, Danish inheritance law has jurisdiction, which means that the probate court or a division of property will settle according to Danish inheritance rules. A Muslim who is set to inherit from a non-Muslim will have the inheritance paid out in accordance with Danish rules, but is free to keep the money or donate it. In addition, a Danish court is unlikely to enforce Islamic inheritance rules if they discriminate on gender or religion, but no such court cases are reported.[36]

C. **Labour law**[37]

The Danish labour market is in principle market-regulated. General rulings are made through agreements between the parties. Legislation is foremost in use when parliament finds it necessary to establish norms for all, whether they be members of labour unions or not, in order to protect the most vulnerable on the labour market. The general approach is therefore a freedom of contract within the legal framework set by collective agreements and law. The constitution underlines that religious requirements cannot be justified for evading the fulfilment of any general civic duty. In the general understanding, this means that the individual cannot use religious arguments for asking favours, or for not fulfilling duties related to job-functions.

On this basis, the general understanding of the Danish public has been that the labour market is secular, unless it is a question of clearly religious functions and workplaces. In addition, institutions run by religious organisations must argue their case if they are to oblige their employees to take part in and pay loyalty to religious norms and rituals. This secular approach to the labour market has been the general understanding – with no real distinction between the public and private sector.

The Danish public calendar is still based on a Protestant understanding of Christian holidays, though with certain Danish particulars included. Christmas, Easter, and Pentecost, all three including the following day, are respected in public life and on

[35] S. Aoude, 'Hvorfor må vores muslimske datter ikke arve os?', *Religion.dk*, 28 Nov 2012 <https://www.religion.dk/sp%C3%B8rg-om-religion/hvorfor-m%C3%A5-vores-muslimske-datter-ikke-arve-os>.

[36] J. J. Viuff, 'Islamisk arveret i Danmark' in: Sten Schaumburg-Müller and Bodil Selmer (eds), *Retlig mangfoldighed. En fælles udfordring for retsvidenskab og antropologi* (København, Jurist-og Økonomforbundets Forlag, 2003), pp. 157-71.

[37] Vinding and Christoffersen, *Danish regulation of religion, state of affairs and qualitative reflections*, pp. 52-70.

some of the most central holidays the public peace must be kept with no disturbance from music, football and so on. The calendar does not include any holidays of the minority religions. This goes for special Roman Catholic holidays, as well as for the religious festivals of Islam and Judaism. Consequently Catholics, Muslims and Jews as well as, for instance, Jehovah's Witnesses are given no favours parallel to the Christian holidays.

The courts have ruled on a handful of questions regarding the headscarf, and three cases in particular seem to regulate the question. These are the Magasin case in 2000, the Toms case in 2001 and the Føtex case in 2005. In 1998, a Muslim girl started her internship at the Magasin department store. However, when she turned up, she was immediately dismissed on the grounds that her headscarf was a violation of the department store's requirements for staff attire. This did not mean that staff had to wear a special uniform, but it was expected that the employees would be businesslike and nicely dressed, and that their attire would be in harmony with the supply of goods in the department. In the dress code it was specified that employees should not wear headwear. However, the court ruled in 2000 that in dismissing the Muslim girl for wearing a headscarf, the Magasin department store was guilty of indirect discrimination.[38]

The second case concerned a Muslim girl who on religious grounds wore a headscarf and robes that covered everything but her hands and face. She had applied for a job at the chocolate and candy manufacturer Toms Fabrikker A/S but was unsuccessful. During an information meeting held regarding internships, she was informed that she would not be able to participate in the internship programme if she wore a scarf while working. Subsequently, an email to the plaintiff stated that it was not permissible to wear anything other than the net cap which was used during production. This was part of the manufacturer's clothing and hygiene regulations. After some attempts by the Muslim girl to meet the requirements while still wearing her headscarf and robe, she left the training course and did not join the internship programme. She complained of indirect discrimination and argued that the dress code was not objective or proportionately required by the task she was doing and she made her suggestions for meeting the hygiene criteria. The majority of the High Court found that the manufacturer was not in violation of the Discrimination Act because it had the right to define a dress code.[39]

After these two cases, the general impression was that prohibitions against headscarves were discriminatory unless proportionately rooted in hygiene or production requirements. However, in the third case, the Føtex case, the Supreme Court found

[38] 'Magasin tabte tørklæde-sag', *Berlingske,* 25 Feb 2003 <https://www.berlingske.dk/samfund/magasin-tabte-toerklaede-sag>.

[39] Eastern High Court ruling, 5 Apr 2001.

that a prohibition against headscarves was not in violation of the Discrimination Act. An employee of Moroccan origin started wearing a headscarf after several years of employment and was informed by the employer that this was in violation of her terms of employment. These included regulations that no headwear could be worn, which had been enforced consistently. The Supreme Court ruled that there was no unlawful indirect discrimination, as the dress code, which was consistently enforced among all employees, was 'objectively justified for a fair purpose and the means to fulfil the purpose are appropriate and necessary.' The Supreme Court stated, however, that formally neutral clothing rules particularly affect the proportion of Muslim women who wear headscarves for religious reasons. A 2017 ruling from the European Court of Human Rights ruled in favour of maintaining a full-face veil ban.[40]

The courts have made it clear that the employer is allowed to establish clear dress codes, but that if there is *no* dress code, then the employee has a certain freedom, limited only by general, public order arguments. All in all, there are many voices in favour of much more accommodation with regard to religious dress, because there appears to be no problem provided decent manners and the ability to communicate are upheld.

Recently this issue has again drawn public and legislative attention. On 31 May 2018 a majority in the Danish Parliament adopted a ban on face covering, which in effect is and has been discussed as a ban on wearing the niqab or burka. The ban, which amends the Danish Criminal Code, comes after renewed discussions which took place in 2017 and 2018. The question of criminalising the wearing of a burka or niqab was discussed in 2009 and 2010, but the debate quietened down after an academic report had concluded that a maximum of 200 women wore a burka or a niqab in Denmark. The applicability of the amendment has been significantly limited and does not apply where a qualifying purpose is found. Nevertheless, during the first year, a total of 23 fines were issued.

In the preparatory remarks, the Ministry of Justice discussed how freedom of speech and freedom of religion and belief came into consideration.

> 'To the extent that covering the face in itself is regarded as an expression of opinion, it may be protected by freedom of speech. This should be included in the assessment of whether the cover serves a qualifying purpose. Similarly, it will be included in the assessment whether covering the face takes place in a way — and in a concrete context — closely related to the exercise of religious freedom. It is assumed that covering the face for religious reasons as a clear starting point is not prohibited when it comes to a specific religious act or the like, for example, in a religious building or in connection with a wedding or funeral ritual, etc. Outside such concrete reli-

[40] *Dakir v Belgium,* App no 4619/12 (ECHR, 11 Dec 2017) and *Belcacemi and Oussar v Belgium,* App no 37798/13 (ECHR, 11 Dec 2017).

> gious contexts—including, for example, normal transport to and from the place of a religious act—it will not suffice to refer to the fact that the face is being covered for religious reasons.'[41]

In this commentary by the Ministry of Justice, it is quite clear that the circumstances in which the ban applies are limited, and there is considerable room for interpretation by the individual police officer. The commentary and subsequent instructions to police officers about qualifying purposes include fancy dress parties, freedom of speech and freedom of religion, especially as regards worship. In addition, it is left up to the individual officer to assess whether this is a criminal matter at all or a matter for social services: if the police suspect that the person is subject to negative social control, for example, in connection with a breach of the ban on cover, i.e. because the person expresses compulsion or other pressure to wear face-covering clothing, then the police must assess whether there is a basis for investigating a criminal offence or whether the person should be offered help and support, and so on.[42]

IV. Discrimination of Muslims (and by Muslims)

A. In labour law (employment figures, legal framework, political considerations)[43]

The legal area of rights and freedoms regarding religion in relation to the state naturally includes provisions for non-discrimination, and is arguably the most important aspect of the legal regulations between the state and Islam, especially as far as employment and the labour market are concerned. Freedom from discrimination is protected by Articles 70 and 71 of the Constitution, which prohibit discrimination on the grounds of race and religion, and specified in the executive order on the law prohibiting differential treatment in the labour market.[44] It is part of the Danish effort to uphold and adhere to the international obligations on human rights and freedoms. The executive order clearly specifies the areas of application of the discrimination laws and what is understood by discrimination: '[f]or the purposes of this Act, discrimination means any direct or indirect discrimination based on race, colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin.' It explicitly mentions religion or belief, and goes on in subsections 2

[41] S. A. Damgaard, 'UDKAST, Forslag til lov om ændring af straffeloven', *Justitsministeriet,* 6 Feb 2018, p. 17 (author's translation) <http://www.justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/2018/lovforslag_tildaekningsforbud.pdf>.

[42] 'Vejledning om Politiets håndhævelse af tildækningsforbuddet', *Politi* <https://politi.dk/tildaekningsforbud>.

[43] Vinding, *Annotated Legal Documents on Islam in Denmark*.

[44] *Bekendtgørelse af lov om forbud mod forskelsbehandling på arbejdsmarkedet* (LBK nr 1001 af 24/08/2017).

and 3 to distinguish between direct and indirect discrimination. Direct discrimination is understood as 'being treated worse than someone else is, has been or would be treated in a similar situation', and indirect discrimination is when 'a provision, criterion or practice, which appears to be neutral, would render some persons inferior to others', and this is illegal unless 'the provision, condition or practice in question is objectively justified by an objective purpose and the means for fulfilling it are appropriate and necessary.' However, the problematic cases concern indirect discrimination, which is much harder to prove, as indeed it is difficult to prove what appears neutral but is not. Also, arguments for objective justification must be heard, and the legal procedures are more complicated. Added to this, it is well established that there are financial and structural barriers to bringing cases about race, skin colour, religion or belief, or national or ethnic origin before the courts.

While the constitution as amended in Articles 70 and 71 prohibits discrimination on the grounds of race and religion (amongst others), it is the Act on Ethnic Equal Treatment 2009 and the establishing of the Board of Equal Treatment in 2009 that define, prohibit and adjudicate on both direct and indirect discrimination in Denmark. The motivation for setting up the Board of Equal Treatment was the Government's wish for better access for those wishing to complain about discrimination inside (and outside) the labour market as well as much clearer procedures and explicit criteria for ruling on discrimination cases.

While race and ethnicity are mentioned explicitly in the Act of Ethnic Equal Treatment, neither colour, language, citizenship nor religion is referred to explicitly. In general, the cases that make it to the Board of Equal Treatment are cases that potentially involve a breach of the Law on Equal Treatment ('*ligebehandlingsloven*') or the Law on Differential Treatment ('*forskelsbehandlingsloven*'). For the labour market, the board is concerned with complaints related to discrimination based on religion and belief, race, gender, colour, political views, sexuality, age, disability, nationality, or ethnicity. Outside the labour market, more generally, the board deals with complaints on race, ethnicity and gender.

Anybody may raise a case with the Board of Equal Treatment. It consists of a presidency of three judges and nine additional members, who are all jurists. The decisions of the board are final, binding on the parties and may be enforced through the courts.

From 2010 to 2017, the Board of Equal Treatment has handled a total of 28 cases concerning Islam and Muslims. These include both Muslims filing claims of discrimination in the broader labour market, but also cases that concern political opinions and views about Muslims as a cause for dismissal. Of these cases, eight were concerned with straightforward discrimination issues in relation to the labour market, such as being asked to identify as Muslim during a job interview (j.no. 7100072-12) or asked about religion in general (j.no. 2016-6810-02947), not being given an application form upon request because of a Muslim sounding name (j.no.7100039-13), a man be-

ing checked for shoplifting because of his skin colour (j.no. 2016-6811-54312), a tenant being called 'an extremist with a turban' by the landlord (j.no 2015-6811-43016), being harassed by the slur 'fuck you Muslim' in an online second-hand market (j.no 2014-6810-46338), and several similar cases. In most of these cases, the plaintiffs were awarded minor compensation, while other complaints could not be dealt with.

Four further cases were particular to the question of shaking hands or other religious or culturally habitual aspects of Muslim practice. One case concerned an interpreter who would not shake hands with women clients, and who would delay business by speaking to co-religionists about his and their opinions on religious issues (j.no. 2016-6810-36441), and the complaint was not upheld. Another case concerned a taxi driver whose employer assumed that the taxi driver would not greet women (j.no. 2015-6810-19566). Such facts could not, however, be established, and the taxi driver was awarded compensation of DKK 10,000. Two cases concerned unemployed individuals who were trained abroad as doctors. These individuals would not comply with the instructions of the job centre and accept employment involving alcohol, cigarettes, pork or meat not slaughtered according to religious rules (j.no. 2014-6810-25096 and j.no. 2014-6810-18027). Neither had the complaint upheld by the board.

The most significant case concerned a Muslim woman who won a case on indirect discrimination that between 2010 and 2015 went right through the system from the Board of Equal Treatment all the way to the High Courts (U.2015.2984). They found that it was a violation of the Discrimination Act that the Muslim woman in training as a nutritionist could not be exempted from tasting pork. The Muslim woman, who was born in Lebanon but grew up in Denmark, wore a scarf and in 2010 was training as a nutritional assistant at a vocational school. She did not want to taste pork, but she was happy to prepare and cook it. With reference to a decision by its professional committee, the school required her to taste cooking containing pork, although she did not have to eat the food, but was allowed to spit it out after tasting. When she refused on religious grounds, the school expelled her and the case came before the Equal Treatment Board. The woman argued that she had been subjected to discrimination on the basis of religion. The Equal Treatment Board found that the complaint was covered by the Discrimination Act, since the school ran a business in the form of vocational training. The requirement that the woman, like all other students, should taste the food, including pork dishes, made her, a Muslim, inferior to other pupils in terms of the chance of obtaining a nutritionist's education. She was awarded compensation. The school took the case to the City Court, which in 2013 found that since the woman did not want to taste pork for religious reasons, the requirement was indirect discrimination. In 2015, the High Court upheld the judgment on the same grounds as the City Court. This is indeed a rare case. Both the acts against discrimination and the jurisdiction of the Board of Equal Treatment apply -mainly if not solely- to the labour market.

B. Application of relevant EU law (religious non-discrimination, Directive 2000/78)

Significant amongst international reports is the Sixth Periodic report on Denmark under the International Covenant on Civil and Political Rights from the UN's Human Rights Committee (10 November 2015) as well as the concluding observations on the sixth report (15 August 2016). The committee is concerned that Danish legislation does not cover discrimination on all the grounds set forth in the Covenant, which could prevent some from fully exercising their rights.[45] As part of its recommendations, the committee suggests that Denmark improves the accessibility of effective remedies for any kind of discrimination, including expanding the mandate of the Board of Equal Treatment to all forms of discrimination. Addressing discrimination based on religion explicitly, the Committee is concerned with the different treatment of religious communities, which gives the Evangelical Lutheran Church of Denmark authorisations, privileges and powers not enjoyed by other religious communities. The committee recommends that Denmark 'should take appropriate measures to ensure non-discriminatory treatment of all religious communities within its territory.'[46]

UN Special Rapporteur Dr Bielefeldt visited Denmark from 13 to 22 March 2016. Supported by the UN team in Copenhagen and with the logistic help of the Danish Institute for Human Rights, Dr Bielefeldt consulted with government interlocutors across the legislative, executive and judicial institutions of government, including parliamentarians and judges from the Supreme Court, as well as administration at the municipal levels.[47] He spoke with civil society organisations and representatives, members of various religious communities, including the Evangelical-Lutheran Church of Denmark, other Christian, Jewish and Muslim organisations, as well as leading intellectuals, think tanks, and academics from across disciplines.

The report is from 28 December 2016 and was presented to the Human Rights Council at its 34th session from 27 February to 24 March 2017. While his report is general and touches upon a number of aspects of freedom of religion and belief in Denmark, Dr Bielefeldt looks particularly at the special challenges faced by Muslims and issues of potential discrimination of Muslims in Denmark. Dr Bielefeldt is quite critical and direct in his observations and recommendations.

Mainly, Dr Bielefeldt has issue with the political climate and the politically motivated reasons for limiting freedom of religion and belief that have been voiced in Denmark for the specific reason of limiting Muslims and Muslim practices. Dr

[45] Human Rights Committee, *Concluding observations on the sixth periodic report of Denmark*, CCPR/C/DNK/CO/6, p. 3.

[46] CCPR/C/DNK/CO/6, p. 7.

[47] UN Special Rapporteur Dr Bielefeldt, *Report of the Special Rapporteur on Freedom of Religion and Belief on his mission to Denmark*, A/HRC/34/50, p. 3.

Bielefeldt concedes that Islam in Denmark is perceived as a new religious reality and he emphasises that generally, Muslims are welcome to practise freely and without major obstacles, but states that the reception of Islam has not always been in line with international standards. Explicitly, Dr Bielefeldt criticises the unqualified understanding that holds all Muslims accountable for the actions of an extreme few:

> 'Conditioning the free and peaceful existence of freedom of religion by Muslims, which includes the right to construct and maintain places of worship, on the behaviour of an extremist minority within Islam (whose words might as well merit criminal prosecution as incitement to hatred or violence, but do not represent the views of the majority of Muslims) is unacceptable.'[48]

Dr Bielefeldt explicitly calls on and recommends that government recognises and acknowledges the increasing religious diversity in Denmark and that the contributions by Muslims and their efforts to integrate are not 'constantly questioned' in an atmosphere of unease and suspicion in society.[49] Not doing so will lead to further alienation, disintegration and loss of social cohesion. The harsh statements by leading politicians and parliamentarians 'on the need to exercise more control over religious communities, in particular Muslim organisations, could indicate a shift backwards.'[50] However, Dr Bielefeldt does not just see this when addressing the political and perhaps symbolic aspects of Danish governance of freedom of religion, but 'repeatedly sensed reluctance, including when talking to government officials, towards accommodating new religious community life in Denmark.'[51]

The third source of international criticism of Denmark is from the European Commission against Racism and Intolerance and their ECRI Report on Denmark from the fifth monitoring cycle, published 16 May 2017. The ECRI is set up by the Council of Europe and is an independent monitoring body with a specific focus on the human rights issues relating to racism, xenophobia, antisemitism and intolerance. The report on Denmark is based on document analysis, a country visit and dialogue with the Danish authorities.

The report points to the fact that Denmark has not ratified Protocol No 12 of the European Convention on Human Rights and therefore Denmark's criminal, civil and administrative law is not in line with ECRI's General Policy Recommendation No 7 on legislation to prevent racism and racial discrimination. Specifying these concerns, the report argues that 'racist hate speech, in particular against Muslims, continues to be a problem,' and continues to stress that 'under-reporting of hate speech is a

[48] A/HRC/34/50, p. 9.
[49] A/HRC/34/50, p. 18.
[50] A/HRC/34/50, p. 19.
[51] A/HRC/34/50, p. 13.

problem that requires urgent attention.'[52] There is significant concern amongst the different monitoring bodies in the European community, including from the Commissioner for Human Rights of the Council of Europe, about the 'growing trend of hate speech and negative stereotypes in Danish politics' especially concerning Muslims and refugees.[53] In particular, a number of Islamophobic public statements, verbal abuse, insults and public shaming of Muslims have drawn the attention of the ECRI report.[54] It also highlights the consequences of the Islamophobic political discourse and the view of Muslims as unable or unwilling to integrate. The report points to, 'frequent experiences of discrimination, especially among young Muslims, many of whom have grown up in Denmark, master the language and successfully completed their education. The perception that they will not be accepted as equal members of Danish society merely due to their religion, can easily lead to a vicious circle of marginalisation and radicalization.'[55] The report 'recommends that the authorities include specific measures to combat Islamophobic hate speech in the existing national strategy on the prevention of radicalisation and extremism' and adds to that the specific recommendation, 'that the authorities facilitate closer cooperation between Muslim communities and the police to prevent and combat Islamophobic violence.'[56]

V. Exercise of Religious Freedom and Other Cultural Rights

A. Legal framework for establishment and functioning of mosques

Mosques are increasingly becoming a part of the Danish cityscape, and the last few years have seen a growth in major purpose-built mosques in Copenhagen, as well as more and more local mosques throughout Denmark. Local municipal authorities retain the power to regulate the building of new religious buildings generally, including mosques. As Brian Arly Jacobensen has argued, religious buildings and in particular mosques do not necessarily harmonise well with existing housing or district plans.[57] According to the Planning Act (2013),[58] the municipalities must approve housing or district building plans, and when it comes to mosques, politics begins to play a role. Political questions and public concerns are not uncommon in this regard, and challenge whether calls to prayer are considered noise, if minarets are beyond the scope of local planning and who is funding the mosques. These reflect not just politi-

[52] *ECRI Report on Denmark* (2017), p. 9.
[53] Commissioner for Human Rights of the Council of Europe (2014), pp. 19-20.
[54] *ECRI Report on Denmark* (2017), p. 9.
[55] *ECRI Report on Denmark* (2017), p. 26.
[56] *ECRI Report on Denmark* (2017), p. 10, 19.
[57] B. A. Jacobsen, 'Hellige bygninger på grænsefladen i dansk kommunalpolitik' (2015) 62 *RVT*, pp. 91–105.
[58] Bekendtgørelse af lov om planlægning, LBK nr. 587 af 27/05/2013.

cal agendas, but a number of documented recurring issues that are, amongst others, evidenced recently through the Registry of Religious Communities.

While there is no legislation that explicitly addresses or limits the building of mosques or Muslim prayer houses, this is not for lack of trying on the part of the Danish People's Party. In recent years, they have put forward several proposals for a parliamentary resolution on this issue. One example will suffice. This proposal for a parliamentary resolution requires that Parliament should direct the government to draft a bill banning the erection of minarets at mosques in Denmark. Of course, this echoes a European debate after the 2009 Swiss minaret referendum, but in presenting the proposal the Danish People's Party argue that:

> 'Visible and distinctive Islamic symbols contribute negatively to social development by emphasising the differences between Muslims and Danes, just as these symbols are also impeding the integration of Muslims into Denmark. Against this background, the Danish People's Party wants to prohibit the construction of minarets at mosques in Denmark. The Danish People's Party prefers a total ban on building mosques and also wants to prevent foreign donations financing the construction of religious and cultural symbols related to Islam.'[59]

While such a premise is vociferously and widely contested, and the proposal was voted down by every other party in Parliament, the proposal itself reveals its biased and unfounded view of Islam and Muslims: 'As a religion and ideology, Islam is a disruptive element in Denmark. The Danish People's Party is watching with increasing concern the growing Islamisation of society…' With such a statement there can be little doubt that the Danish People's Party is not seriously interested in the integration of Islam and Muslims into Danish society.

B. **Prohibition of Islamic rituals (e.g. slaughtering and Halal)**[60]

The question of halal food is particularly pertinent to Denmark, mainly because the meat industry and meat export is a very important business sector in traditionally rural Denmark. As part of the export business for poultry, the industry has substantially incorporated the practice of Islamic religious slaughter and halal certification, and the matter continues to be one of the significant political conflicts between Muslim practice and areas of Danish right-wing politics. Religious slaughter is permitted under Articles 9, 10 and 11 of the Executive Order on slaughter and killing of animals. A number of regulations apply and the permit to perform religious slaughter is clearly defined. Despite this, Time Magazine wrote in 2015 that Denmark now bans religious slaughter. The fact of the matter is that religious slaughter is permitted only if the

[59] 'Beslutningsforslag nr. B 15 Folketinget 2016–2017', *Folketinget*, (author's translation) <https://www.ft.dk/samling/20161/beslutningsforslag/b15/index.htm>.

[60] Vinding, *Annotated Legal Documents on Islam in Denmark*, p. 102 ff.

animals in question -cattle, sheep or goats- have first been stunned by a nonpenetrating stun gun, and that slaughter by bleeding is executed swiftly and precisely so the animal never regains consciousness. For poultry the same principle applies; however, the stunning is done by submerging the animal in water which has a strong electric current running through it.

The question of weighing concerns about animal cruelty against the freedom of religion allowing religious slaughter is discussed both in the legal literature and in public. Zahle and Lund Hansen in their study of the different constitutional, human rights and animal rights concerns concluded that a statutory prohibition on ritual slaughter would be a limitation on the exercise of religious freedom. However, a prohibition on ritual slaughter which is justified by the desire to limit animals' anxiety and pain is justified by a consideration which may be in accordance with the requirements to limit religious practice. Thus, mechanical and electric stunning were introduced, which addressed most of the significant concerns for animal rights and ethics, and so there is no reasonable argument for limiting freedom of religion.[61]

C. Education of Muslim pupils

Article 76 of the Constitution guarantees freedom of education as 'a right for all children to receive a free education.' Most parents or guardians enrol their children in public schools (*Folkeskolen*), but those who want to make their own educational arrangements for their children are free to do so. Education is mandatory for every child, but the freedom to choose schooling is a special right for parents to give their children the necessary instruction either at home or in a private school. Most who do not choose public schools choose a private school for political, religious, cultural, pedagogical, national or personal reasons, as provided for in the Act on Free Schools and Private Elementary Schools (LBK 1111, 30 August 2018). However, there are core parts of the curriculum that must be followed and educational standards that must be met as part of the requirement for education.

D. Religious education of Muslims (in private or public institutions and non-formal education)

In Denmark, religious communities may offer teaching and schooling according to the education curriculum standards in private or free schools and do so on the basis of their religious ethos. They receive public subsidies if they fulfil prescribed conditions as to the teaching and curriculum, the quality of instruction, independence and executive administration. They cannot be controlled by special interests, must

[61] H. Zahle and A. Lund Hansen, 'Rituel slagtning og religionsfrihed' (1998) *EU-ret & Menneskeret.*

not abandon the curriculum and must promote democracy in education. Donations must be disclosed publicly, they are subject to inspection and control, and it is not allowed for such schools to cooperate with extraneous institutions or groups which are not relevant to the curriculum. As brought to public attention through recent media coverage and political debate, there have been cases of some religious free schools, including Muslim ones, which have been closed down by the authorities after Ministerial inspection has shown them to be failing the public standards.

According to section 1 of the Free Schools Act, 'free schools and private elementary schools (free elementary schools) can within the framework of this act and the law in general provide education that corresponds to the school's own convictions and organise teaching in accordance with this conviction.'

Free schools may choose to use religious, political or pedagogical persuasion as the foundation or ethos for their school, which usually means greater diversity. If the schools adhere to the national standards and accept the supervision of the Ministry of Education, they qualify for public funding for such education. In Denmark, there are 550 free schools with about 110,000 pupils. For Muslims in Denmark, as well as for other religious groups, this allows them to form their own schools according to their religious convictions. This freedom may be expressed directly as either a confessional statement in their charters, in their practice or indirectly through the ethnicity or religion of the students and parents of a particular school. As of October 2017, there were 29 free schools with an explicitly Muslim foundation or Islamic ethos.

In recent years, however, such Muslim free schools have attracted significant political attention. At the initial publication of various media stories relating to the schools and their conduct, management or practice, critical politicians expressed great concern about academic levels, the schools' world view, misconduct and the misappropriation of public funds or the lack of social cohesion or responsibility. Recent controversies concern the amendment to the Free Schools Act in 2016, whereby then Minister of Children, Teaching and Equality, Ellen Trane Nørby, sought to improve the quality of the free elementary schools to make it clear in their statements of purpose that they must 'strengthen the democratic education of the pupils' and 'prepare pupils to live in a society like the Danish with freedom and government, and develop and strengthen students' knowledge of and respect for fundamental freedoms and human rights, including gender equality.'[62]

[62] L36, 2006.

VI. Free Speech and Islam

Since the publication of the twelve caricatures in *Jyllands-Posten* on 30 September 2005 and the following Cartoons Crisis in 2005-2006, the issue of Islam and free speech has been fiercely debated. While there are amongst Muslims in Denmark repeated and vocal arguments against printing the cartoons and for refraining from defamation, ridicule and blasphemy against Muhammed or other tenets of Islamic faith, it seems that intra-Islamic minorities are most vocal. Front and centre are Hizb ut-Tahrir, who through press releases, public meetings and newspapers have argued against free speech and expressed rather religiously fundamentalist views on law and democracy, politicians and politics, government and authorities, society and secularism, and free speech in media.[63] Hizb ut-Tahrir complains against the series of legislative clampdowns on immigration, integration and – as they see it – Islam and Muslims. Their view of law and democracy reflects what they see as an overarching struggle between Islam and the West. They argue,

> 'The amendment is a part of the flared struggle against Islam in this country, which is led by the government and parliament and trumpeted by the so-called 'free' media. Ministers and significant politicians are frantically championing one raving and subversive suggestion after the other, in order to appear 'tough on Muslims,' and strangle Islamic expressions in a panic fear that Islam might be normalized and grow stronger roots in this country.'[64]

Turning to some of the champions of freedom of speech and rule of law in a Danish context, the independent association the Danish Free Press Society, which see themselves as defenders of the free word, we find yet another example of this willingness and readiness to discriminate. The Danish Free Press Society has been criticised as a disguise for hatred of Muslims and foreigners,[65] and many of its members have a significant right-wing political point of view.

On 18 August 2017, on its website, the columnist Aia Fog argues that 'discrimination is needed' and that the left wing and establishment's power to define discrimination as 'negative differential treatment based on prejudice, aimed at individuals or groups' must be revoked and discrimination given a definition that is less 'valued', returning to the Latin root of the word.[66] We discriminate all the time and for good

[63] N. V. Vinding, *Muslim Views on the Danish State and Law* (forthcoming), in particular, pp. 246-50.

[64] 'Press release: Det liberale forbudstyranni underminerer det danske demokrati', *Hizb ut Tahrir Skandinavien*, 16 Nov 2018 <http://www.hizb-ut-tahrir.dk/content.php?contentid=892>.

[65] R. E. Larsen 'Tøger Seidenfaden kontra Trykkefrihedsselskabet', *humanisme.dk,* 8 Oct 2007 <http://www.humanisme.dk/logbog/log092.php>.

[66] A. Fog, 'Discrimination skal der til', *trykkefrihed.dk*, 18 Aug 2017 <http://www.trykkefrihed.dk/diskrimination-skal-der-til.htm>.

reasons, based on preferences, gender and merits, but that is 'necessary, good and natural.' Aia Fog calls it established legal doctrine to treat similar similarly and different differently, and that from this comes a need for differentiation.

From this principled basis, she goes on to argue for a 'value war between Islam and western culture,' and that we must discriminate on the bases of the differences between these two universal value codes. Not just between ideas, but in everyday life, such as against Muslim claims for any kind of recognition in the public sphere of their norms or preferences. We have 'forgotten the noble art of discrimination' and must give preference to the civic rights of the constitution over universal human rights (*Ibid.*).

Fog's point of view is a discrimination argument against discrimination, and a rights argument against rights that again boils down to a preference of 'us' and 'our culture' against whatever Islam is and Muslims do. Without any regard for legal, proportionate or objective principles for discrimination or differential treatment, she presents a readiness to make discrimination a hallmark. The absolute virtue of not being influenced by personal feelings or opinions when considering and representing facts in the constitutional rule of law is completely lost in this readiness to discriminate.

VII. Challenges posed by Islam in the traditional understanding and application of democracy and rights in Europe

A. Political demands stemming from Muslim communities? More than equal treatment?

As we have discussed significant aspects of equal treatment and non-discrimination above, this section will focus on racism and hate. In legislation, Article 266B of the Danish Criminal Code is commonly referred to as the 'racism article'. It states,

> 'any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding two years.'

Political debate on an issue related to Islam and Muslims does not constitute potential discrimination, rather to the contrary. Open debate, disagreement and public scrutiny are more often than not valid sources of deliberation. It is important not to mistake disagreement or even criticism of Islamophobia for a matter of discrimination. It is not. Neither should public deliberation be mistaken for polarisation or radicalisation of the view of Muslims. Debate on Islam has not only lifted the general level of knowledge on Islam, it has also helped further an independence of a next generation of Muslim leaders who take seriously the informed conversation about their religion, and who are also critical of their parents' generation since the cartoons crisis. However, as we shall see in this final section, there are a significant number of

very explicit cases of hate crime, hate speech and Islamophobia that are inexcusable, even considering the wide freedom of speech in political deliberation.

B. Security and liberty in the light of Islam(ophobia)

As with the rest of the Criminal Code, it falls to the Danish National Police and Office of the Director of Public Prosecutions to oversee and implement Article 266B on racism. In doing so, the Danish National Police collects hate crime data and annually reports on hate crime and catalogues incidents by category and key words. In 2015, they reported 198 such hate crime incidents, including both hate speech and acts of violence. Of these 198 incidents, 60 were religiously motivated and of these 41 were against Muslims, making them the religious group mostly targeted by hate crime.[67] Mujahed Sebastian Abassi of CEDAR, who wrote the 2017 report on Islamophobia in Denmark, notes that although Muslims only represent 5% of the population, they make up 20% of registered hate crime, which corresponds to Muslims being the largest and most visible minority in Denmark.[68] The number of reported hate crimes seem to go up. In 2019, 180 of 569 registered hate crimes were religiously motivated and 109 of these targeted Muslims, again making them the religious group mostly targeted by hate crime.[69]

From 2012 to 2015, a total of 206 cases were reported to the Office of the Director of Public Prosecutions. Charges were brought in 139 of them, resulting in 42 indictments and 31 court cases. In all 31 cases, the perpetrators were convicted. In general, the ECRI and others[70] note that 'the number of cases taken up by the police and the courts is too low' and the ECRI 'encourages the authorities to further promote and facilitate such close cooperation between the police and vulnerable groups of concern to ECRI who are subjected to hate speech.'[71]

Both the ECRI and the Commissioner for Human Rights of the Council of Europe are concerned with what they see as a growing trend of hate speech and negative stereotypes, especially where Danish politics and public life is concerned.[72] The ECRI lists a number of cases of in particular Danish Peoples Party members who in recent years have made blatantly Islamophobic comments. In 2013, an MP for the

[67] Danish Police, 'Statistical report on hatecrimes', see in particular 2019, *Politi* <https://politi.dk/statistik/hadforbrydelser>.

[68] M. S. Abassi 'Denmark' in: Enes Bayrakli and Farid Hafez (eds), *European Islamophobia Report* (Islanbul, SETA, Turkuvaz Haberleşme ve Yayıncılık A.Ş., 2018).

[69] Danish Police, statistical report on hatecrimes, in particular pp. 16-20, *Politi* <https://politi.dk/statistik/hadforbrydelser>. See also *ECRI* (2017), p. 14.

[70] Many observers criticise that the number of cases taken up by the police and the courts is too low.

[71] *ECRI Report on Denmark* (2017), p. 17.

[72] *ECRI Report on Denmark* (2017), p. 15.

DPP compared Muslim women to rubbish.[73] In 2014, a Danish People's Party politician tweeted that 'On the situation of Jews in Europe, Muslims continue where Hitler ended.'[74] In February 2016, the High Court held that the latter DPP politician was in violation of the Criminal Code Article 266B, upholding the City Court's ruling that the politician had made 'outrageous and threatening statements to a population group' and that 'freedom of speech must be exercised with due respect for other human rights.'[75]

C. The connection between islamophobia and anti-immigration political movements or adoption of anti-immigration policies and party manifestos

The concept of banal discrimination as introduced by Jim Beckford in the United Kingdom is relevant to the Danish context. He defined this kind of discrimination as the routine, low-level, unthinking, and often institutional discrimination which serves as routine reminders and markers of the normal and taken for granted that keeps marginalising and alienating Muslims on a daily basis.[76] The banality of this kind of discrimination makes it very difficult to police or address by law, and when merely indirect and institutional in its banality, it may become a political tool of effective politically organised discrimination. In particular, in a Danish context, it becomes difficult to distinguish between discrimination as such, on the one hand, and a discursive and even societal move towards a delegitimisation of Muslims in the public sphere, on the other.

It is viable to look for the notion of banal, simple or 'necessary' discrimination in a number of highly politicised situations for self-validating reasons, such as fear, immigration, terrorism, and so on. This is banal in its insistence of cultural superiority. However, the banality of such thoughtless discrimination is mainstream in moral geography in recent years in Denmark. As negative confirmation bias of prejudice expectations, the power to interpret what Islam is and the threat to tighten Danish legal interpretation of the religious freedom limitation clause in the constitution have in Denmark become a negatively reinforcing discourse that continues to marginalise and disenfranchise Muslims to the extent where Dr Bielefeldt's informants speak of an 'everyday war for acceptance.'[77]

[73] Copenhagen Post, 15 July 2013.

[74] Copenhagen Post, 1 Feb 2016.

[75] 'Nyheder og domsresuméer', *Danmarks Domstole* <http://www.domstol.dk/oestrelandsret/nyheder/domsresumeer/Pages/Domiensagomforh%C3%A5nendeogtruendeudtalelseroverforenbefolkningsgruppe.aspx>.

[76] J. Beckford, 'Banal discrimination: Equality of respect for beliefs and worldviews in the UK' in: Derek Davis and Gerhard Besier (eds), *International perspectives on freedom and equality of religious belief* (Waco, Dawson Institute of Church-State Studies, 2002).

[77] Bielefeldt, 2016, p. 9.

There is an apparent discrepancy between the rhetoric, political discourse and symbolic legislation in Denmark, on the one hand, and the actual practice, verdicts and court rulings on the other. It is difficult for the Board of Equal Treatment to issue a finding in a number of potentially problematic cases, either because there is no basis to rule in the legislation or because it is impossible to establish proof. As such, many of the cases seem to confirm that access to justice and court-rulings are difficult to come by. Nevertheless, it seems also that the kind of rhetoric and political discourse that may be prevailing in some spheres of political life do not find basis with the Board of Equal Treatment.

D. Programmes for mutual understanding and inter-religious dialogue in Europe

There is currently very little in Denmark that might fall into this category. Before 2001, the Danish-Christian Study Centre was on the national budget, but the funding was quickly withdrawn as the right-wing Danish People's Party gained influence with the Liberal-Conservative government.[78]

Amongst many diverse initiatives, the Church of Denmark is hosting an annual Christian-Muslim Conversation Forum, which is a two-day leadership and networking conference attended on an individual basis by non-denominational Christian leaders and Muslim representatives from a number of Mosques and organisations. This is no government involvement.

VIII. Conclusions: Preferences concerning the state model of co-existence between the secular state and Islam – Critique [79]

In Denmark, a general regulatory paradigm of religion exists, which seeks to balance the legitimate role and place of religion in the public sphere. The evidence of this paradigm is seen in existing legislation as a general respect for religion in Denmark as well as in a regulatory framework that limits religious autonomy within public law. Significant for the Danish situation, the Church of Denmark is of great importance, and much public discourse and legislation concern this particular institution as the primary special case in law on religion. In many cases, this majority position heavily influences the status of Islam and Muslims. Rights, freedoms and permissions, as well as limitations and controls that work on Islamic communities are directly or

[78] '25 år med dialogen i centrum (Twenty-five years with dialogue at the centre)', *kristeligt dagblad*, 29 Aug 2021 <https://www.kristeligt-dagblad.dk/debat/25-aar-med-dialogen-i-centrum>.

[79] More on the top-down and bottom-up perspectives in regulation of Islam in Denmark, see pp. 131-33, in Vinding, *Annotated Legal Documents on Islam in Denmark.*

indirectly related to the general status of religion, as well as from the legal case of the Church of Denmark.

Considering the specific case of regulating Islam and Islamic communities in the context of and relationship with the Church of Denmark, as well as the state, society and culture, there seems to be a binary of enabling and disabling trends in particular in recent legislation.

As urgent topics on the legislative agenda in recent year, Islam, Islamic communities and ideas perceived to be related to certain iterations of Islam were seen as something to curtail. However, while this view of Islam is evident in much of the political motivation and the various drafting remarks, the provisions and regulations are generally made to conform to national and international principles and do not – in wording – explicitly limit specific Islamic communities.

Nevertheless, recent and often expressly politically motivated legislation may be understood as top-down regulation disabling Islam specifically, and delegitimising religion generally. In contrast, much of the general regulatory framework on the permissions and limitations on religion as well as the specific regulations of Islamic communities work to legitimise religion generally and to include and enable Muslims specifically. This is a regulatory logic that works from below, so to speak, drawing on general principles of human rights, non-discrimination and equal treatment. At the same time, some contrasting cases of this kind of bottom-up administrative practice may be understood as enabling of religious communities, including Islamic communities. From above, the political motivation for (or even political fictions in) certain legislation gave testimony to an understanding of Islam as synonymous with parallel legal orders, as anti-democratic and as something to be limited. However, from below, the concluding finding of this volume is that there is convincing evidence of the amicable regulation of religious communities, and Islamic communities and Muslims in our specific case, in everyday situations when interacting with the state, society and culture as well as in close relation to the regulations of the Church of Denmark.[80]

[80] All websites last accessed on 3 Sept 2021.

ISLAM AND HUMAN RIGHTS IN ESTONIA

Merilin Kiviorg[1]

I. Introduction: the Social Framework

Muslims have lived on Estonian territory since approximately the eighteenth century. The majority of Muslims are ethnic Tatars who arrived in Estonia during the late nineteenth and early twentieth century.[2] During the first period of independence (1918–1940) there were two registered Muslim communities in Estonia. The Tatar community established two mosques and also cemeteries, maintaining their particular Islamic cultural and religious life.[3] In 1940, the Soviet regime prohibited the activities of these communities. During the occupation, the Muslim community carried on its activities unofficially. The ethnic composition of the Muslim community changed during the Soviet period due to new arrivals from other republics of the former Soviet Union, such as Azerbaijan, Uzbekistan, Kazakhstan and other traditionally Muslim nations of the Caucasus and Central Asia. However, Tatars maintained their leading role in cultural and religious activity.[4]

In the late 1980s with a more liberal political atmosphere and the independence movement in Estonia, ethnic minorities started to organise (re-establish) cultural societies. In 1989, the Tatar cultural society re-established the Estonian Islamic Congregation. The community was registered in 1994. Currently there are two registered Muslim religious associations. The Estonian Islam Congregation has approximately 1,400 members and has quite a unique nature. In the same congregation there are both Sunnites and Shiites. In 1995, thirteen believers left the congregation and formed the

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[2] See also M. Kiviorg, *Law and Religion in Estonia* (Kluwer Law International, 2016), para 22-6.

[3] R. Ringvee, 'Islam in Estonia' in: Centrom pre európsku politiku, *Islam v Európe* (Bratislava, Centrom pre európsku politiku, 2005), pp. 242–3.

[4] R. Ringvee, *Riik ja religioon nõukogudejärgses Eestis (*Dissertationes Theologiae Universitatis Tartuensis, Tartu Ülikooli kirjastus, 2011)*,* p. 73.

Estonian Muslim Sunni Congregation. All thirteen left the Estonian Islam Congregation, not for religious reasons, but rather because of personal misunderstandings.[5] The majority of the Estonian Muslim community is still made up of individuals who came from the territory of the former Soviet Union: Tatars, Chechens, Azeris, etc. They have integrated well into Estonian society and there is no suggestion that they are associated with radical Islam. In 2004, Linnas pointed out that Islam in Estonia is liberal and has lost many of its specific features. She also notes that Estonian society is tolerant of Muslims which she attributes to the traditionally indifferent attitude of Estonians to religious matters in general.[6] The latter attitude may have nuances today due to (although relatively small in number) new arrivals and anti-migration propaganda from populist, far-right parties. Concerns have also been raised in the context of the recent hybrid 'war' waged by Belorussia against its neighbouring countries by forcing migrants (primarily from Iraq) to cross the borders to these countries.[7]

The two mosques (in architectural terms, one regular house and one apartment turned into prayer hall) established during the first independence period were destroyed in 1944. The building of a new mosque, after the collapse of Soviet Union, has encountered financial difficulties and relatively mild political opposition from some political parties. The Muslim community came into the spotlight in 2000 when plans to build a mosque received media attention. This created some reaction from political parties. A relatively small and marginal Estonian Christian People's Party (since 2006, the Estonian Christian Democrats Party until it was officially dissolved in 2017) started to collect signatures for prohibiting the planned building.[8] Reactions from other political parties were more moderate.[9] The representatives of the conservative Pro Patria Party (Isamaaliit) expressed the view that they are not against the mosque per se, however, it should not be built in Tallinn's historic city centre. They further emphasised that the mosque should not dominate the Tallinn skyline.[10] The Estonian Council of Churches, the largest ecumenical organisation in Estonia,

[5] *Ibid.*, p. 73; See also I. Au and R. Ringvee, *Usulised ühendused Eestis [Religious Associations in Estonia]* (Tallinn, Allika, 2007).

[6] R. Linnas, 'Islam Eestis (Islam in Estonia)' in: Lea Altnurme (ed), *Mitut usku Eesti* (Tartu, Tartu Ülikooli Kirjastus, 2004), p. 65.

[7] 'Is Belarus using migrants as part of a 'hybrid war' against the EU?', *Euronews*, 11 Aug 2021, <https://www.euronews.com/2021/08/11/is-belarus-using-migrants-as-part-of-a-hybrid-war-against-the-eu>; 'Mihkelson: Valgevene püüab anda Leedule karmi õppetundi', *ERR,* 3 Aug 2021, <https://www.err.ee/1608296973/mihkelson-valgevene-puuab-anda-leedule-karmi-oppetundi>.

[8] E. Varma, 'Tatarlane Timur unistab pisikesest pühakojast (Tatar Timur is Dreaming about a Small Sanctuary)', *Eesti Päevaleht*, 9 May 2002 <https://epl.delfi.ee/artikkel/50922777/tatarlane-timur-unistab-pisikesest-puhakojast>.

[9] Ringvee, 'Islam in Estonia', p. 245.

[10] 'Mośee tekitab vaidlusi (The Mosque is Provouking Debates)', *Eesti Päevaleht*, 26 Jan 2001; See also M. Huang, 'A Mosque with a View' (2001) 3/3 *Central European Review*.

stated that they had no objections against building the mosque, though they do not actively support it either.[11] The plans to build this mosque have yet to materialise, as noted, mostly because of financial reasons. However, since 2009 there has been a prayer hall in the Islamic Cultural Centre 'Turath', which serves as a mosque for the Islamic community in Tallinn. Across Estonia there are also several other converted premises for serving the religious needs of Muslims.

Before Estonia joined the EU in 2004, there were discussions on the possible influx of migrants from traditionally Muslim countries, or Muslims from other EU countries.[12] Up to now, there has been an increase, though this is only a limited number of new arrivals, especially of those who actually stay in Estonia. They are from different regions globally, and do not form any significant ethnic religious communities. There is also an interesting, relatively recent trend among ethnic Estonians and Russians to convert to Islam. According to Chief Mufti Ildar Muhhamedshin, in 2012, were approximately two to three persons who would convert to Islam each month.[13] According to some unofficial and unsubstantiated estimates there are approximately 10,000 Muslims in total in Estonia. According to the last census (2011) there are 1,508 Muslims (those aged 15 and above) in Estonia.[14] The number of people who go to regular prayers is, however, significantly smaller.[15]

Estonia does not consider itself a country of immigration. Estonia is not yet facing any major challenges related to the growing Muslim communities experienced in other European countries. However, there have been incidents, for example, of hate speech and discrimination, some of which will be discussed later on.

II. Institutional Recognition by the State

There is no difference in registration or legal recognition among religious communities in Estonia. Islamic communities can obtain legal personality according to the 2002 Churches and Congregations Act as with all other communities.[16] Moreover, the 2002 Churches and Congregations Act does not differentiate between minorities and

[11] 'Kirikud ei ole mośee rajamise vastu (Churches are not against the Mosque)', *Eesti Päevaleht*, 11 Jan 2001 <https://epl.delfi.ee/artikkel/50797001/kirikud-ei-ole-moshee-rajamise-vastu>.

[12] R. Khair Al-Din, 'Eesti Euroopa Liiduga ühinemise protsess: Moslemi vähemuse õiguste kaitse islami õiguse seisukohast' (2000) 12 *Akadeemia*, pp. 2616–28.

[13] 'Eestlannadele õpetati hidžaabi sidumist (Estonian Women were Taught How to Wrap Hijab)', *Eesti Ekspress*, 15 Nov 2012 <www.ekspress.ee/archive/article.php?id=65265616>.

[14] 'Population and Housing Census 2011', *Statistics Estonia* <https://www.stat.ee/en/statistics-estonia/population-census-2021/2011-population-and-housing-census>.

[15] R. Ringvee, 'Estonia' in: Jørgen Nielsen, Samim Akgönül, Ahmet Alibašić, and Egdūnas Racius (eds), *Yearbook of Muslims in Europe* (vol 5, Leiden, Koninklijke Brill NV, 2013), p. 229.

[16] Churches and Congregations Act, RT I 2002, 24, 135; RT I, 30 Dec 2017, 1 (last amended), <https://www.riigiteataja.ee/en/eli/ee/511012018004/consolide/current>.

majorities. It should be emphasised that in order to enjoy collective freedom of religion or belief, registration of the community is not required. However, without registration, a religious community cannot enjoy the benefits of having a legal personality.

Only twelve adults, who have active legal capacity, are required to found and register a congregation [Churches and Congregations Act, §13(1)]. The term 'kogudus' (Congregation) has been traditionally used for church congregations. However, the law gives it a broader meaning and was also amended later removing the requirement to use the word 'congregation' in the title of the organisation.[17] The latter change was initiated by non-Christian communities, mainly by representatives of indigenous religion, not by Islamic communities.[18]

As noted, there are two Islamic congregations registered in Estonia at the moment. The Churches and Congregations Act gives legal definitions of (1) churches; (2) congregations; (3) associations of congregations; (4) monasteries; and (5) religious societies. The 2002 CCA regulates the activities of only the first four. The activities of religious societies are not regulated by the CCA (as special law), but by the Non-profit Organisations Act (as lex generalis).[19] In principle, an Islamic community can choose between registering as a congregation, association of congregations (needing at least 3 congregations), as a religious society (a regular NGO), or as a foundation according to the Foundations Act (Sihtasutuste seadus).[20] For example: there are registered NGOs, such as the Islamic Cultural Centre Iqra (Kultuurikeskus Iqra MTÜ) and a foundation, Eesti Islami Keskus SA, that serve the Muslim community.

There is no direct financing of Islamic communities. Registered communities enjoy certain tax exemptions as do all registered religious communities in Estonia. Land tax is not imposed on land under the places of worship of churches and congregations [Maamaksuseadus, Land Tax Act, §4(1)(5)].[21] This exemption does not apply to the properties of secular non-profit-making organisations. Communities that are included into the list of non-taxable organisations have exemptions from Income Tax.[22]

III. Application of Shari'a (both as state law and / or Private International Law) and its Relationship to fundamental rights and human dignity

In Estonian Family Law there are currently no exemptions which recognise religious family law in Estonia. Changes in family status (such as marriage, divorce,

[17] RT I 2004, 54, 391.

[18] Petition to Check the Constitutionality of (2), (7) and (11) of the Churches and Congregation Act, Registered No. 1-14/158, 22 May 2002, Office of Chancellor of Justice.

[19] RT I 1996, 42, 811 <https://www.riigiteataja.ee/en/eli/ee/528052020003/consolide/current>.

[20] RT I 1995, 92, 1604 <https://www.riigiteataja.ee/en/eli/ee/514012021003/consolide/current>.

[21] RT I 1993, 24, 428.

[22] Income Tax Act (*Tulumaksuseadus*), RT I 1999, 101, 903.

heritage, subsistence, etc.) need to be conducted according to civil law to be legally recognised. However, application of religious family law as such is not prohibited either. There is no information available as to whether parties resort to religious family law, or to what extent they do so. From the limited information available, it can be pointed out that the Estonian version of a Muslim journal Iqra has made readers aware of the opportunities to solve family issues without the interference of state authorities. Allegedly in 2012 twelve marriage contracts (nikah) were signed under the supervision of an imam. Inheritance can be apportioned according to Islamic regulations provided it is accepted by all parties involved.[23] In the case of legal disputes, civil law applies in Estonia. In addition, laws applicable to all may set certain restrictions on the use of religious law. There have been no known cases of conflict of interests/rights in this regard.

However, Estonian law allows some exceptions in a specific case where a legal relationship falls under private international law. The Private International Law Act[24] (Rahvusvahelise eraõiguse seadus) regulates legal relationships which are connected with the law of more than one state. For example, a marriage concluded in a foreign state is deemed to be valid in Estonia if it is concluded pursuant to the procedure for conclusion of marriage provided by the law of the state where the marriage is concluded, and the material prerequisites (such as age, consent, etc.) of the marriage are in compliance with the laws of the states of residence of both spouses (§55 of the Private International Law Act). A previous marriage of a spouse does not hinder the contraction of a new marriage in Estonia, if the previous marriage has been terminated on the basis of a decision made or recognised in Estonia, even if such a decision is not in accordance with the law of the state of residence of the prospective spouse.

Although religious family law may be recognised in Estonia (in cases where religious family law is recognised by the relevant State), there is one general restriction. The Private International Law Act sets forth that a foreign law should not be applied if the result of such application would be in obvious conflict with the essential principles of Estonian law (public order). In such cases Estonian law applies (§7). For example, this would most certainly be true in cases involving child or forced marriage or polygamy. Where gender equality is at issue, it is possible that courts may consider Estonian law to take precedence, for example when ruling on subsistence, custody or inheritance. However, at the moment this is only speculative as there is no case law to rely on.

Polygamy is not recognised in Estonia. As regards children, it is possible to invite all the children of a sponsor to cohabit, including the children of a second or third

[23] Ringvee, 'Estonia', p. 201.

[24] RT I 2002, 35, 217 <https://www.riigiteataja.ee/en/eli/526062017004/consolide>; RT I, 26 June 2017, 1 (last amended) <https://www.riigiteataja.ee/akt/126062017001>.

wife, but not the wives themselves. The husband has to choose which wife he wants to join him in Estonia. Only official marriage is recognised and partners who are not officially married cannot benefit from family reunification. In family reunification cases, immigration officials check that there are no marriages of convenience. Both partners are questioned, and their neighbours can also be interviewed. An alien who applies for family reunification must have lived in Estonia for at least two years (§137 of the Aliens Act).

According to information from the Population Department, the Department of Gender Equality Commissioner and the Department of Religious Affairs of the Ministry of Internal Affairs, there are no statistics on forced marriages.[25] As the Population Department records only registered marriages, they do not have any information on other forms of marriage. The Citizenship and Migration Board does not hold any relevant statistics either.[26] There is also no debate in society or media coverage as regards these issues. One of the possible conclusions is that the Estonian population is still fairly homogeneous as regards traditions concerning marriage. Estonia has not yet become a destination for extensive new immigration. There are currently no studies or statistics available: gender studies in Estonia have focused more on equal pay for men and women, homosexuality and on domestic violence.

IV. Discrimination of Muslims (and by Muslims)

According to the Labour Inspectorate of Estonia[27] and the Gender Equality and Equal Treatment Commissioner,[28] no discrimination cases against Muslims or persons perceived as Muslims have been registered in the job market.

V. Exercise of Religious Freedom and Other Cultural Rights

There is no specific prohibition of Islamic rituals. According to current law, the slaughter of animals for religious purposes is allowed in Estonia. However, following EU Regulation no 1099/2009 the slaughter has to be carried out in slaughterhouses; before the law was amended this was not necessary. According to the regulation adopted by the Ministry of Agriculture, detailing the procedures for ritual slaughter,

[25] M. Kiviorg communication/interview with Mr Ringo Ringvee, Ministry of Internal Affairs (7 Jan 2008 at 08:54).

[26] Now renamed as Police and Border Guard Board. Communication Registered in the Citizenship and Migration Board: M. Kiviorg, Information Request No 15.6-06/11710-1, Anneli Viks, Reply No 15.6-06/11710-1.

[27] *Labour Inspectorate of Estonia,* 23 Jan 2020 <https://www.ti.ee/en> .

[28] 'Gender Equality and Equal Treatment Commissioner', *European Institute for Gender Equality* <https://eige.europa.eu/gender-mainstreaming/structures/estonia/gender-equality-and-equal-treatment-commissioner-soolise-vordoiguslikkuse-ja-vordse-kohtlemise-volinik>.

the Veterinary and Food Board has to be informed in writing before religious slaughter takes place. A supervisory official must be present in order to verify compliance with the binding animal protection rules.[29]

Only a person with the necessary skills may perform the slaughter. The carotid arteries and trachea of the restrained animal has to be cut with a sharp instrument and, immediately after the incision, the animal has to be stunned. The further handling of a slaughtered animal is prohibited until the death of the animal has been verified. In Estonia there have been no judgments regarding religious slaughter.

There have been several cases involving religious dietary requirements in prisons. For example, in 2016 there was a case where prison authorities stopped the provision of religiously acceptable meals to an inmate because he was seen buying pork meat balls in the prison shop.[30] Later, however, it turned out that the balls consisted of chicken meat that was in compliance with his religion. Although the authorities remedied the situation, the prisoner applied to the court on the grounds of violation of his religious freedom and filed for compensation. The court found his claim unfounded. Notwithstanding the result, the problematic aspect in this case was the fact that the first instance court interpreted freedom of religion to be a purely negative right, meaning no action from the state could be required. This understanding is not completely in line with international understanding of freedom of religion or belief.[31]

The Estonian school system consists mainly of public schools (municipal and state schools). The majority of schools are owned by the municipalities. Thus, the main place for education of Muslim pupils is in a public school. Confessional religious education is provided for children by Sunday and Bible schools operated by religious organisations. Additionally, religious organisations themselves can set up private educational institutions. The Private Schools Act (*Erakooliseadus*) regulates the establishment of private educational institutions at all school levels (pre-school, basic, secondary, vocational and higher education).[32] These private schools need to obtain a licence from the Ministry of Education and Research [§5(1)]. Sunday or Bible schools run by churches and congregations do not need the licence. There are only a very few private schools set up by religious organisations generally.

Religious education in public schools is a semi-voluntary, non-confessional (non-denominational) subject. It is intended to be a mixture of teaching about religions

[29] RT I, 29 Dec 2012, 53.

[30] Tartu ringkonnakohus, Case no 3-16-176, 15 Dec 2016, <https://www.riigiteataja.ee/kohtulahendid/fail.html?id=197216024>.

[31] See eg Council of Europe, *Guide on Article 9 of the European Convention on Human Rights, Freedom of Thought, Conscience and Religion*, 31 Aug 2020, pp. 19-20, <https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf >.

[32] RT I 1998, 57, 859 <https://www.riigiteataja.ee/en/eli/503062019009/consolide>; RT I, 19 March 2019, 12 (last amended) <https://www.riigiteataja.ee/akt/119032019012>.

and ethics. I call it semi-voluntary because in gymnasiums (upper secondary schools) depending on the modules the student chooses, religious education may become compulsory once chosen. It is an obligation of the school to facilitate at least two religious education courses in gymnasium.[33] If at least twelve students wish to be taught an optional course, specified in Article 11 (6) of the National Curriculum for Gymnasiums, the school has to provide it.[34] There have been no known incidents of conflict regarding pupils with Islamic backgrounds.

As to, for example, religious symbols at school, there have been no publicised incidents of conflict of interests/rights. There is very little socio-political debate going on in this regard. Religious symbols such as crucifixes have not been displayed in public schools since at least 1940. As mentioned above, Estonia does not have significant immigration from any country, including countries with a Muslim population. There are no rules prohibiting the wearing of religious garb in state schools. Both public schools and private schools have the right to establish internal rules at their schools. In today's Estonia, many private schools require school uniforms and so far this requirement has not been disputed.

There are also no rules prohibiting the wearing of religious garb by teachers, and no reports of any difficulties at this time. It is simply speculative at the moment as to how an Estonian legislature or court would react if someone (e.g., parents) disputed the wearing of religious garb in state schools either by students or by teachers. There is no prohibition on religious symbols in public spaces.

In 2015 the Ministry of Justice initiated a proposal to amend both the Penal Law (*Karistusseadustik*)[35] and Law Enforcement Act (*Korrakaitseseadus*).[36] The main aim according to the proposal was to set rules and send a clear message to foreigners about Estonian values. The proposed changes also related to wearing religious garbs.[37] One of the aims of this amendment was to introduce a blanket ban on face coverings. The law was primarily targeted towards Muslim women wearing burkas or niqabs. The amendment did not get the approval from all the relevant ministries, including the Ministry of Internal Affairs. One of the reasons was that the law amendment was felt to be too hasty, trying to solve an issue before any issue had arisen. As a matter of fact, there have as yet been no burka or niqab-wearing women in Estonia. In response to the proposed reasons of the blanket ban, the Ministry of Internal affairs pointed out that it is not right to argue that covering a face is alien to Estonia, in Estonian public

[33] RT I 14 Jan 2011, 2 <https://www.riigiteataja.ee/akt/129082014021?leiaKehtiv>; RT I, 28 July 2020, 4 (last amended) <https://www.riigiteataja.ee/akt/128072020004>.

[34] RT I 14 Jan 2011, 2.

[35] RT I 2001, 61, 364 <https://www.riigiteataja.ee/akt/73045>.

[36] RT I, 22 March 2011, 4.

[37] Justiitsministeerium, 'Karistusseadustiku ja korrakaitseseaduse muutmise seaduse eelnõu väljatöötamise kavatsus', 24 Nov 2015.

space. Quite rightly the ministry pointed to the fact that people use face coverings in cold Estonian winters and for skiing. The Ministry of Internal Affairs pointed out that in certain circumstances for security and identification reasons uncovering the face is necessary (banks, airports etc.), but a general ban does not seem to be justified on broad security arguments. Unfortunately, this law initiative has not been completely taken off the agenda.[38]

VI. Free Speech and Islam

There are no provisions specifically for dealing with 'blasphemy' or defamation. The previous (1992) Criminal Code had a provision on defamation (§129). Activities which publicly incite hatred, violence or discrimination on the basis of religion (amongst other grounds) and which result in danger to the life, health or property of a person are punishable by a fine or by detention [§151(1)]. In certain circumstances such behaviour may result in more severe punishment. This crime can also be attributable to a legal person, for example to a religious community, which can be fined. In 2013 the draft amendments to the current Penal Code envisaged broadening the applicability of criminal liability for incitement to hatred. According to this draft act, hate speech did not necessarily have to result in danger to the life, health or property of a person. The proposed amendments (the broadening of the scope of the provision) caused an intense negative response from the Estonian Council of Churches. The Council feared that any religious speech from the pulpit or otherwise concerning objection to abortion or homosexuality could have been termed as a hate crime. There was no reaction to the law by Islamic communities.

Eventually the disputed amendments were not included among the ones that entered into force on 1 January 2015. However, the debates are still ongoing. Only at the beginning of 2021 another attempt was made to change the provision. The narrow scope of the provision has been, over the years, criticised by multiple international human rights monitoring bodies (e.g. by UN Human Rights Committee in its 2019 concluding observations on Estonia) and by the European Union.[39] In Human Rights Committees' view the Penal Code does not provide comprehensive protection against hate speech and hate crimes due to, *inter alia*, the light penalties and the high threshold for the offence of incitement to hatred, violence or discrimination requiring

[38] See also M. Kiviorg, *The Legal and Social Status of Old and New Religious Minorities: Case of Estonia M. Ventura* (Comares, 2021).

[39] J. Värk, 'ERR Brüsselis: Eesti pole koos Rumeeniaga ainsana EL-is vihakõnet kriminaliseerinud', *ERR,* 16 Nov 2020 <https://www.err.ee/1159784/err-brusselis-eesti-pole-koos-rumeeniaga-ainsana-el-is-vihakonet-kriminaliseerinud>. Estonia has not transposed the Council Framework Decision 2008/913/JHA of 28 Nov 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

'danger to the life, health or property' of the victim.[40] The state provided its reasons in the latest report to the CERD Committee in 2019. This report emphasises the value of the right to freedom of speech in Estonian society. It explains the preference of settling such disputes through civil law measures (including in the court),[41] as finding an adequate balance between free speech and other rights may be tricky.[42] The report reiterates that claims to court can be brought by anyone whose rights have been infringed. This indicates the understanding that a broad definition of hate speech in criminal law may have a chilling effect on freedom of speech.[43] However, the truth is that it has been almost impossible to subsume any hateful speech under this penal code provision so far. This means that this provision is somewhat disfunctional. This has also been a reason why some of these offences have been subsumed under other provisions of the penal code, e,g, under breaches of public order when possible.

As to media, in recent years different media outlets have published opinion pieces by members of the Conservative People's Party (EKRE) of Estonia, using anti-immigration rhetoric and Islamophobic statements. For example, in one opinion piece, Jaak Madison promised to focus on 'curbing the spread of terrorism and Islam.'[44] In another article, Martin Helme spoke out against multiculturalism, using France and Sweden as cautionary examples for the spread of Islam.[45] However, most of the media coverage on Islam or Muslims focused on incidents from other countries, usually in a neutral way, though occasionally using extreme examples of crimes committed by Muslims in a sensationalist manner, for example, 'DIE, DIE, DIE! Yelled a Refugee While Stabbing the Child of His Helper.'[46]

According to the Estonian Refugee Council, there have been several cases of verbal abuse against Muslims in Tallinn, for example, on public transport, especially towards women and girls wearing a hijab.[47] There have also been cases of verbal

[40] HRCtee, Concluding Observations, Estonia, UN Doc CCPR/C/EST/CO/4 (18 Apr 2019), para 12.

[41] Some of this type of cases have also been referred to the ECtHR. See eg *Tammer v Estonia,* App no 41205/98 (ECHR, 4 Apr 2001) and *Delfi v Estonia,* App no 64569/09 (ECHR, GC, 16 June 2015).

[42] National Report, CERD, Estonia, UN Doc CERD/C/EST/12-13 (15 Oct 2019), para 106.

[43] M. Kiviorg, 'Estonia' in: Christof Heyns and Frans Viljoen (eds), *The impact of the United Nations human rights treaties on the domestic level* (The Netherlands, BRILL, forthcoming).

[44] K. Leibold, 'Jaak Madison: rahvuskonservatiivid kui uus tegus jõud Euroopas', *ERR*, 21 May 2019, <https://www.err. ee/943716/jaak-madison-rahvuskonservatiivid-kui-uus-tegus-joud-euroopas>.

[45] 'Rahandusminister Martin Helme Soome väljaandele: Eestis käib kultuurimarksistlik rünnak rahva vaimu vastu', *Lõunaeestlane*, 11 May 2019 <https://lounaeestlane.ee/rahandusminister-martin-helme-soome-valjaandele-eestis-kaib-kultuurimarksistlik-runnak-rahva-vaimu-vastu/>.

[46] ' "SURE! SURE! SURE!" karjus oma abistaja last pussitanud põgenik', *Õhtuleht*, 18 June 2019 <https://www. ohtuleht.ee/967397/sure-sure-sure-karjus-oma-abistaja-last-pussitanud-pogenik>.

[47] E. Rünne and L. Laanpere, 'Islamophobia in Estonia' in: Enes Bayrakli and Farid Hafez (eds) *European Islamophobia Report 2019* (SETA, 2020), p. 254 <https://www.islamophobiaeurope.com/2019-european-islamophobia-report-eir2019/>.

abuse in Tartu, according to the Johannes Mihkelson Centre. Furthermore, at the end of 2019, a woman wearing a hijab was spat on in Tartu. These incidents were not reported to the police.[48]

VII. Challenges posed by Islam in the traditional understanding and application of democracy and rights in Europe

A. Political demands stemming from Muslim communities? More than equal treatment?

The Muslim community in Estonia has never been politically very active. However, in 1994 the Estonian Islamic Congregation made a statement concerning the situation in Chechnya giving support to the president at the time, Dzhokhar Dudayev.[49] Ringvee also points out that several Muslims have been active in political life via their national cultural societies, while their registered religious communities tend to abstain from the political arena.[50] The Chairman of the Islamic Congregation Timur Seifullen has been the president of the Estonian Union of National Minorities. His work for national minorities was recognised by the State. He was rewarded with the Estonian State Honour in 2004 (5th Class order of the White Star).[51]

B. Security and liberty in the light of Islam(ophobia)

According to public information provided by the Estonian Internal Security Service (KAPO), the number of Muslim immigrants arriving from the so-called 'risky' countries (from the standpoint of counter-terrorism: North-Africa, the Middle East and Islamic Asian countries) is on the increase. Interest by such persons in coming to Estonia has increased due to Estonia's joining the Schengen zone at the end of 2007. There have been more cases of persons applying for an Estonian visa with the aim of entering the Schengen area and continuing from here to some other EU Member State. However, according to the Estonian Internal Security Service there has been an increase also amongst numbers staying in Estonia. The increase of the Muslim community is also attributable to new migration mostly for purposes of studying or doing business in Estonia. 'Formerly a transit country, Estonia has seen

[48] *Ibid.,* p. 254.

[49] Linnas, 'Islam Eestis', p. 62.

[50] Ringvee, 'Islam in Estonia', p. 245.

[51] V. Hansen, 'Inimõiguste instituut leinab kauaaegset juhatuse liiget ja avaldab kaastunnet perekonnale' *Inimõiguste instituuut*, 18 Aug 2020 <https://www.humanrightsestonia.ee/timur-seifullen-1950-2020/>.

a significant change in migration patterns in recent years.'[52] Migration to Estonia has been affected by the global changes since 2014, involving countries in North Africa, the Middle East and Central Asia. Some foreign Islamic groups have also expressed interest in contacts with the local community (e.g. Jamaat Tabligh and Al-Waqf Al-Islami). According to the Estonian Internal Security Service the increase in the Muslim population has contributed to the interest of radical or conservative Islamic organisations in Estonia. In its 2019/2020 report, the Service added that the increase in the population may contribute to the segregation and closeness of the community that would inhibit integration and contribute to radicalisation.[53] No unlawful activities or preaching radical Islam have been identified. Saudi sponsors have helped to finance the Estonian Islamic community.[54] 'Representatives of organisations promoting Islamic fundamentalism regularly visit Estonia, but their activities here have not achieved the desired effect. These are not internationally wanted criminals.'[55] However, there have been incidents of local individuals joining or wanting to join as fighters in conflict zones such as Syria. In comparison with some other European states, the number of wannabe ISIS fighters has been small.[56] In 2016 two men were prosecuted for facilitating terrorism, by funding or organising funding for a friend to join ISIS.[57] According to the Estonian Internal Security Service (KAPO), there were about 20 individuals associated with Estonia who are or have been in the Syria-Iraq conflict zone since 2019. As in previous years, in 2019 KAPO identified nearly 50 individuals linked to Islamic extremism or 41 terrorist organisations who either arrived in or passed through Estonia.[58] One of the most recent cases in the Supreme Court of Estonia concerned denial of international protection/refugee status to a person who claimed he was being religiously persecuted in Uzbekistan due to alleged membership in the Hizb ut-Tahrir.[59] The refusal was considered justified on national security grounds.

[52] A. Sinisalu (dir), 'KAPO Aastaraamat 2019-2020 (Annual Review of the Estonian Internal Security Service)', p. 42 <https://kapo.ee/sites/default/files/content_page_attachments/Annual%20Review_2019_2020.pdf>.

[53] *Ibid.,* [42].

[54] Ringvee, 'Estonia', p. 231.

[55] Sinisalu (dir), 'KAPO Aastaraamat 2019-2020', p. 42.

[56] *Ibid.,* [41].

[57] They committed a crime provided in § 2373 (1) of the Penal Code (financing and supporting an act of terrorism and activities directed at it). 'KAPO Aastaraamat 2016 (Annual Review of the Estonian Internal Security Service)', p. 26 <https://www.kapo.ee/en/content/annual-reviews.html> (last accessed on 8 Feb 2021).

[58] Sinisalu (dir), 'KAPO Aastaraamat 2019-2020 (Annual Review of the Estonian Internal Security Service)', p. 41 <https://kapo.ee/sites/default/files/content_page_attachments/Annual%20Review_2019_2020.pdf>.

[59] Supreme Court of Estonia, Case No 3-17-1026, 1 Oct 2018.

C. The connection between islamophobia and anti-immigration political movements or the adoption of anti-immigration policies and party manifestos

Religion is not at the forefront of political debates and does not feature as a main characteristic of any political party in parliament. There are no influential Christian parties in Estonia. Issues of morality, family values, etc. are connected to nationalism and national identity rather than religion.[60]

However, in 2019 significant changes took place in the composition of Parliament and in political directions generally. The right-wing, nationalist, populist Conservative People's Party (EKRE) improved significantly its positions. Although the Reform Party won the election, a coalition government was somewhat surprisingly formed by an unusual and uncomfortable grouping led by the Centre Party in cooperation with Conservative People's Party (*EKRE*) and Pro Patria. While in the coalition EKRE pushed forward its negative views on immigration policies, same sex unions and abortion. The party is also known for its populist statements and hate speech. Their statements on the aforementioned sensitive issues (same sex unions, abortion, migration) caused friction not only between the parties but also proved very divisive in society.

EKRE in its programme documents has expressed the view that Islam does not belong to Europe and that it is not a peaceful religion.[61] parliamentary election programme stated the following: 'We are helping to rebuild the war-affected areas by sending back refugees staying in Estonia',[62] and their European Parliament programme stated that 'Europe's rapidly growing Muslim population has put European identity and values at risk.'[63]

One of EKRE's election campaign videos for the parliamentary election that was broadcast on TV and social media showed people coming in boats and destroying the city, while the voiceover read, 'Muslim immigrants are given housing at the expense of the state.'[64]

During the campaign period, party members also published various opinion pieces in national newspapers, where they mentioned Muslims in a negative context. For example, the party chair's wife Helle-Moonika Helme stated the following: 'They

[60] L. Kalev, M.-L. Jakobson and T. Saarts, 'Eesti poliitiline kultuur: alusväärtused' (2008) 18 *Riigikogu Toimetised*.

[61] Haridus- ja Kultuuritoimkond, 'Islamipropaganda tegemine Eesti koolides on lubamatu, islam ei kuulu Euroopasse', *Estonian Conservative People's Party (EKRE)*, 9 Apr 2018 <https://ekre.ee/islamipropaganda-tegemine-eesti-koolides-on-lubamatu-islam-ei-kuulu-euroopasse/>.

[62] 'EKRE programm 2019. aasta Riigikogu valimisteks', *Estonian Conservative People's Party (EKRE)*, 5 Jan 2019 <https://www.ekre.ee/ekre-programm-riigikogu-valimisteks-2019/>.

[63] 'EKRE platform 2019. aasta Euroopa Parlamandi valimisteks', *Estonian Conservative People's Party (EKRE)*, 8 Apr 2019 <https://www.ekre.ee/ekre-programm-2019-aasta-euroopa-parlamendi-valimisteks/>.

[64] Rünne and Laanpere, 'Islamophobia in Estonia', p. 255.

are Muslims, they carry another culture that is dangerous to us. They have already done their evil deeds.'[65]

These controversies and a corruption scandal eventually led to demise of the coalition at the end of 2020.

D. Programmes for mutual understanding and inter-religious dialogue in Europe

There are no initiatives that specifically target combating anti-Muslim racism, but there are projects and campaigns targeting equal treatment of minority groups. For example, the Ministry of Social Affairs has launched a campaign entitled 'Everyone Is Different, But Equally Human' encouraging good will towards all minorities. It aims to raise awareness of equal treatment and to highlight the contributions made to Estonian society by members of its minorities.[66] The Estonian Refugee Council, the Johannes Mihkelson Centre, and the Tartu International House initiated the project 'Let's Meet!', during which they organised 45 different events all around Estonia bringing together beneficiaries of international protection, foreigners living in Estonia, and the local population. The project aimed to challenge the stereotypes surrounding 'otherness' and give everyone the chance to discover new cultures and make personal connections.[67]

The government has developed a policy paper 'Strong Civil Society 2021-2024'.[68] Part of this paper is devoted to freedom of religion and envisages the promotion of cooperation between different religious communities. There is also 'Integration Programme 2021-2024' that mentions freedom of religion and non-discrimination. No community is specifically mentioned.[69,70]

[65] T. Kruus, 'Moonika Helme: kui mees teenib korralikult, siis naine ei peagi käima orjatööl', *Eesti Päevaleht*, 9 March 2019 <https://epl.delfi.ee/lp/moonika-helme-kui-mees-teenib-korralikult-siis-naine-ei-peagi-kaima-orjatool?id=85529945>.

[66] See also 'Kampaania „Kõik on erinevad, kuid sama palju inimesed', *Ministry of Social Affairs*, 24 Jan 2020 <https://www.sm.ee/et/sama-palju-inimene>.

[67] 'Saame tuttavaks', *Estonian Refugee Council*, Oct 2017 - March 2019 <https://www.pagulasabi.ee/projektid/saame-tuttavaks-kohaliku-tasandi-koostoouritused-rahvusvahelise-kaitse-valdkonnas>.

[68] 'Kodanikuühiskonna programm „Tugev kodanikuühiskond" 2021–2024', *Siseministeerium*, <https://www.siseministeerium.ee/sites/default/files/kodanikuyhiskond/kodanikuuhiskonna_programm_2021-2024.pdf>.

[69] 'Sidusa Eesti arengukava 2021-2030', *Kultuuriministeerium* <https://www.kul.ee/kultuuriline-mitmekesisus-ja-loimumine/strateegilised-dokumendid/sidusa-eesti-arengukava-2021-2030>.

[70] All websites last accessed on 13 Oct 2021.

ISLAM, HUMAN RIGHTS, AND STATE POLICY IN FINLAND

Matti Kotiranta[1]

I. Introduction: the social framework

A. Numbers of Muslims, both old and new immigrants (the existence or absence of Mosques, the presence of Muslims in the state parliament and regional councils)

Followers of Islam constitute the largest non-Christian movement in Finland. *Islam forms both an old and a new minority in Finland.* The roots of Islam in Finland stretch back at least two centuries, to the 19th century. Invariably, the first Muslims were soldiers serving in the Imperial Russian Army in Finland when the country was still an autonomous Grand Duchy of Russia. A more permanent Muslim community started to form as early as the 1870s, when Tartars began to move from Nizhni Novgorod to Finland. The Muslims living in the country were granted Finnish citizenship shortly after independence in 1917, while in 1923 they gained the right to register as a religious community. The first registered Islamic community, the Finnish Islamic congregation, was established two years later, in 1925, and was known initially as the Mohammedan Parish of Finland. Tartars are often seen as a positive example of Islamic integration into Finnish society and are less preoccupied by their own status than other Muslims. Traditionally, Tartars have also been relatively well educated and affluent. They have also actively participated in interreligious dialogue and have established good relations with Judaism. However, in relation to other Muslims, the Tartars maintain a certain distance and do not accept the more recent arrivals as members of their community. By the early 1990s, however, only a thousand or so Muslims mainly of Tartar origin were still living in Finland.[2]

[1] Professor at the University of Eastern Finland.

[2] For closer information, see T. Pauha, S. Onniselkä and A. Bahmanpour, 'Kaksi vuosisataa suomalaista Islamia (Two hundred years of Finnish Islam)' in: Ruth Illman, Kimmo Ketola, Riitta Latvio

In recent decades, however, the situation has been undergoing rapid change, since the number of Muslims in Finland has been increasing considerably. The principal reason for this change has been that, since the early 1990s, immigration from the Muslim world has grown. The Muslims now living in Finland represent many different backgrounds. In geographical terms, Muslims have arrived in Finland with a new generation of immigrants from Africa, the Middle East, and also Southeast Asia. *Initially, Islam was regarded in particular as a new religious minority.* The first major group of arrivals was the Somalis who first arrived in Finland as refugees in the early 1990s. Between 1990 and2011, the number of Muslims in Finland increased tenfold, and is currently estimated to now number some 65,000–70,000. Arriving at a precise number is, however, difficult, since few of the Muslims have organised themselves into registered religious groups. Nevertheless, registrations have visibly increased in the first part of the 21st century (1990, 810; 2000, 1,199; and 2015, 10,088).

Because the large-scale arrivals of Muslims into Finland occurred later than in many other European countries, developments have been slower than elsewhere. However, there are now signs of a difference between generations with regard to religious practice. In recent years, for example, a number of young Finnish Muslims have set up their own associations and communities whose purpose is to specifically meet the religious needs of young people.

The Islamic community as a distinct entity has so far not been active in Finnish politics, although state authorities have maintained links with them. In contrast, however, a number of individual Muslims have become actively involved in politics and city administrations, primarily in southern Finland, in Helsinki[3], Espoo, and Vantaa, and in some of the other main cities. This, in turn, has had an impact on other smaller religious communities such as the Roman Catholic Church, the Free Churches, and the Jewish communities, which have played a less prominent role historically in Finnish politics.

B. Muslim minorities in Finland (distinction between minorities and immigrant communities)

There are several independent Islamic religious communities that have been registered as religious communities. The oldest of these – as mentioned above – is the *Finnish Islamic Congregation* (Suomen Islam-seurakunta), which was founded in 1925.[4] Until 1963 it was called the *Mohammedan Parish of Finland*. In 2018 its of-

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and Jussi Sohlberg (eds), *Monien uskomusten ja katsomusten Suomi [Finland – a country of many religions and beliefs],* (Finland,. Kuopio, Kirkon tutkimuskeskuksen verkkojulkaisuja 48, 2017), p. 104–15.

[3] Finland's first Muslim female deputy mayor, city councilor, and former MP of the Social Democratic Party, Mrs Nasima Razmyar, is responsible for culture, sports, and youth.

[4] Registered as a religious community on 24 April 1925.

ficial membership was 479[5], all of whom were Tartars. Other nationalities are not accepted, since the use of their own language was – and remains – an important part of their identity. The congregation carries out no missionary work amongst other Finns. The community has a mosque in Järvenpää and prayer rooms in Helsinki, Kotka, and Turku and employs its own imam. The Tatar Mosque in Järvenpää is Finland's only custom-built mosque, while all of the other buildings are prayer rooms.

The second registered community that should be mentioned here is the *Islamic Community of Finland* (Suomen Islamilainen Yhdyskunta), founded in 1987.[6] With an official membership in 2018 of 1,772[7], it is also the largest immigrant Muslim community in Finland. Its membership is mainly Arabic, but it also includes Finnish converts. The community has a mosque in Helsinki and maintains a Qur'anic school teaching both Arabic and Somali.

The third registered Muslim community is the *Islamic Diyanet Community of Finland* (Suomen Diyanet Yhdyskunta – Finlandiya Diyanet Cemaati), which was registered as a Religious Community in 2016.[8] Its official membership in 2018 was 433.[9] The community includes several prayer and mosque communities located around Finland, the most significant of which are the prayer rooms in Vantaa, Pori, Turku, and Lahti. In cooperation with the Embassy of the Republic of Turkey, the Islamic Diyanet Community has three official Imams in Finland who have previously held international positions in Islamic religion and development before coming to Finland. In addition to prayers, Islamic holidays, ordinations, and funerals, the community offers instruction in the Qur'an and religion, both in Turkish and in Arabic. The majority of the members of the community come from Turkey, Finland, and Iraq.

In total, there are 40–80 actual mosque communities in Finland, at least ten of which are situated in the city of Helsinki (2008) and 30 in the Helsinki Metropolitan Area (2015). Most mosques operate multilingually, but English is the dominant language and also, increasingly, Finnish. In their religious publications the language used is Arabic.

Until now, most of the mosques have been established by members of the same national background, but the majority of mosque associations are now members of associations that have united within umbrella organisations. In the Helsinki area there now exist the Helsinki Islamic Center (founded in 1995), with 2,888 members (2018)[10], and the Islamic Center of Finland (founded in 1994), which in 2018 had 387

[5] See <http://www.uskonnot.fi> => Suomen Islam-seurakunta.

[6] Registered as a religious community on 20 Feb 1987.

[7] See <http://www.uskonnot.fi> => Suomen islamilainen yhdyskunta.

[8] FPRO (PRH), <https://yhdistysrekisteri.prh.fi/advancedSearch>. Registration number 900.442, Registration date 26 Oct 2016.

[9] See <http://www.uskonnot.fi> => Suomen Diyanet Yhdyskunta.

[10] See <http://www.uskonnot.fi> => Helsinki Islam Keskus.

members, mainly of Pakistani origin.[11] In addition, there are at least five other Islamic communities in the metropolitan area, each with its own prayer room.

II. Institutional recognition by the state

A. Legal form of Islamic communities

In the Finnish context, three different types of legal person can be distinguished in religious associations:

1. *The Evangelical Lutheran Church*. Its status under public law is guaranteed in the constitution (§76).
2. *The Finnish Orthodox Church*. In the new constitution there is no direct provision for the Finnish Orthodox Church to regulate its position in society. In this respect the legislative status of the Orthodox Church differs from that of the Lutheran Church. The Orthodox Church is the subject of a new law concerning the Orthodox Church, 2007 (985/2006).
3. *The registered religious communities*.

In Finland, Islamic communities belong to the so-called registered religious communities. Those Muslim organisations that have not enrolled in the register of associations kept by the National Patent and Register Board are mostly structured as registered associations following general association law. If the religious association (or any other body) is not registered, it cannot receive competent legal person status nor gain rights and obligations. Persons acting on behalf of such an unregistered body become personally responsible for all of their commitments.

The local mosque community is the smallest organisational unit that would usually be structured, in private law, as an association.

B. Financing Islamic Communities

Since the beginning of 2008, the registered religious associations – among them Islamic communities – have received financial aid from the government to support their activities. The Ministry of Education and Culture grants state subsidies to registered religious communities on a computational basis according to their number of members. This aid is based on the State Aid Act.[12] The purpose of the aid is to support religious freedom by improving the opportunities for the recognition and practice of religion. In 2018 a total of EUR 524,000 was used for grants, and 30 religious communities received such grants.[13]

[11] See <http://www.uskonnot.fi> => Suomen Islam-Keskus.

[12] Valtionavustuslaki (Act on Discretionary Government Transfers) 688/2001. See, <https://www.finlex.fi/en/laki/kaannokset/2001/en20010688.pdf>.

This aid cannot be granted to religious communities functioning in the form of an association (non-profit organisation) nor to local or branch communities of registered religious communities.

Because this revenue is neither business nor real estate income, it is exempt from income tax.

1. *Stance of the state towards the Islamic communities (state neutrality): constitutional guarantees*

Religious equality is made explicit in several provisions of the Finnish Constitution. This also applies to the Islamic faith. Article 6 (2) of the Constitution contains a list of certain prohibited grounds involving discrimination. It specifically mentions religion and belief.

Article 6 of the Constitution reads:

(1) Everyone is equal before the law.

(2) No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, *religion, conviction*, opinion, health, disability or other reason that concerns his or her person.[14]

(3) Children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development.

(4) Equality of the sexes is promoted in societal activity and working life, especially in the determination of pay and the other terms of employment, as provided in more detail by an Act.

While the general equal treatment clause in Article 6 section 2 of the Constitution also covers matters that relate to religion, special equal treatment provisions are laid down in Article 11 (1–2), which focus only on questions of religion. Article 11 of the Constitution reads:

(1) Everyone has the freedom of religion and conscience.

(2) Freedom of religion and conscience entails the right to profess and practise a religion, the right to express one's convictions and the right to be a member of or decline to be a member of a religious community. No one is under the obligation, against his or her conscience, to participate in the practice of a religion.

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[13] See <https://minedu.fi/documents/1410845/4935909/2019+uskonnolliset+yhdyskunnat/2ec67db4-d499- 05ae-1765-444e9fe42f2e/2019+uskonnolliset+yhdyskunnat.pdf> (last accessed on 17 Aug 2020). Previous years, see 'Yleisavustus rekisteröityjen uskonnollisten yhdyskuntien toimintaan', *Opetus Ja Kulttuuriministeriö,* <https://minedu.fi/avustukset/avustus/-/asset_publisher/rekisteroityjen-uskonnollisten-yhdyskuntien-toiminta>.

[14] *Italics mine*.

Although 'religion' and 'conviction' are specifically mentioned as prohibited grounds for differential treatment, the Constitution does not contain specific definitions of religion or belief. Neither preparatory work nor case law defines these concepts more specifically. Instead, the Freedom of Religion Act (453/2003) defines a 'religious community' for the purposes of that act. As noted earlier, the term 'religious community' refers to the Evangelical Lutheran Church, the Orthodox Church and registered communities (such as Islamic communities) under the Act.

The relationship between Articles 6 and 11 can be expressed as follows. The first of these Articles is concerned with equality: no one shall, without an acceptable reason, be treated differently from other persons on the grounds of religion or conviction. The second concerns the right to profess and practise religion, the right to express one's convictions, and the right to be a member of a religious community, as well as the right to decline to be a member of any religious community.

In sum, it can be stated that the general equal treatment clauses (§6 and §11) of the Constitution form a part of *the general principle of state neutrality in religious matters, in terms of both equality and also parity*. It includes a prohibition on arbitrariness and the requirement that similar treatment be given in similar cases. This also affects the Islamic Faith. The general equality clause also applies to the legislature. The law cannot arbitrarily place people or groups of people at an advantage or disadvantage. This touches also on religious faith or religious opinions, as well as on non-religious and anti-religious opinions and convictions.

C. The institutionalised bodies that communicate with the Government (e.g., Islamic Council, NGO's etc.)

The *Islamic Community of Finland*, mentioned above, is part of the Federation of Islamic Organisations in Europe and also has ties to the Muslim World League. The FIOE is considered to be the European organisation representing the Muslim Brotherhood.[15]

The *Islamic Council of Finland* (Suomen Islamilainen Neuvosto, SINE) was established in November 2006 and has been coordinated since then by the Office of the Ombudsman for Minorities. The aim of the authorities was to establish an umbrella organisation for Islamic communities and associations that would act as a liaison body with the authorities.[16] This goal has also been shared by the Muslim community, although the communities and organisations outside SINE have founded an alternative Islamic umbrella organisation that has decided to use the old name of the

[15] See 'Federation of Islamic Organizations in Europe', *The Global Muslim Botherhood Daily Watch,* <https://www.globalmbwatch.com/federation-of-islamic-organizations-in-europe/>.

[16] See <http://www.uskonnot.fi> => Suomen Islamilainen Neuvosto ry.

Islamic Federation of Finland. Some Muslim organisations also actively participate in inter-religious dialogues.

III. Application of Shari'a (both as state law and / or private international law) and its relationship to fundamental rights and human dignity

In principle, the Finnish state is sovereign and thus determines for itself which legislation is observed in its territory. Shari'a law plays no role in Finland. However, Finland has signed and ratified all important and relevant international treaties concerning human rights and freedom of religion. In common with the other Nordic countries, Finland has principally adopted a dualistic model with regard to the relationship between international agreements and the country's internal legislation. The Constitution also confirms Finland's positive attitude towards international cooperation. The principles laid down in the Constitution and established practices arising from those oblige the Finnish Parliament both to approve international agreements that are binding upon Finland and to grant them force of law to the extent that they contain provisions that 'are legislative in nature'.

Some of the legal relationships of Muslims living in Finland are so international that the case law provisions have become relevant in legal proceedings concerning them. As a general rule, however, living in Finland is already a sufficient basis for applying Finnish law, and by no means does the family relationship of all Muslims living in Finland contain any "international element". The couples may be Finnish citizens born in Finland who have entered into marriage in Finland and who live together in Finland. Below, I shall explore Islamic family law and Finnish family law in more detail (Chapters A–D).

A. Family law

The rules of Islamic family law differ in many respects from Finnish family law.[17] It is also assumed in Finland that the values associated with the Muslim family are somewhat different law has traditionally been considered to include family formation, i.e., *engagement (khítba)*, *marriage* (*nikah*), and *divorce (talaq)*. Themes closely

[17] K. Kouros (2007) has emphasised in her study *Suomessa asuvien muslimien suhtautumisesta perhe-arvoihin ja perhelainsäädäntöön* [*About the attitudes of Muslims living in Finland on family values and family law*] (Ihmisoikeusliitto ry:n selvitys, 2007) that 'In Islamic law as a whole, Muslim lawyers treat Islamic family law as part of interpersonal legal action (*mu'ámalát*) as opposed to *Ibádát*, the teleological-legal provisions that define the relationship between man and God and religious rituals. The word shari'a signifies the way and reflects the guiding nature of Islamic law. In addition to the legal norms recognizable to Western legal systems, the legal works include, for example, detailed washing instructions for different situations or instructions regarding the dishes to be served at the wedding ceremony'.

related to the previous ones have also been considered custody and care of children (*hadána* and *wilaya*), maintenance (*nafaqa*), breastfeeding / nursing relationship (*radá*) and kinship in general (*nasab*).[18]

In addition, family law has been considered to include procedural rules on inheritances: inheritances and wills (*wasaya* and *mawarith*).[19] Moreover, family law issues contain the rules relating to community life cover, *inter alia*, criminal offences, concluding commercial and rental agreements, paying taxes and making a profit.

In the following, I shall examine the relationship between the aforementioned Islamic family entities and Finnish law:

1. *Marriage, Engagement, Bridal vows (Mahr or Sadaq) and Cohabitation*

Finnish law (the Finnish Marriage Act 234/1929)[20] does not define Islamic marriage. The provision on the recognition of international marriage – which Finland complies with – is based only on validity in the country where the marriage was contracted, without requiring a special procedure under Finnish law.

However, pursuant to section 18 of the Finnish Marriage Act, it must be ensured that the examination of the obstacles to the marriage has been submitted in accordance with the provisions of the Marriage Act. According to these regulations (*sections* 11–13), engaged couples must certify that there is no legal impediment to the marriage, such as a previous valid (even 'purely' Islamic) marriage.

In addition, the engaged partner must state in writing whether he or she has previously entered into a marriage or registered partnership. If the information available to the barrier researcher does not show that the previous marriage or registered partnership has been dissolved, the engaged partner must provide the barrier researcher with a certificate or other special explanation. At present, the engaged couples are not explicitly asked whether they have a valid Islamic marriage, but the law is not likely to prevent the register office (Maistraatti) from asking this question (sic!).[21]

As regards marriages between Muslims and non-Muslims, Finnish law only states that the Marriage Act does not restrict the right to marry on the basis of religious beliefs. Such a delimitation is not possible from a fundamental rights perspective, as the Finnish Constitution prohibits discrimination on religious grounds. However, under Islamic law a Muslim woman cannot marry a non-Muslim man (based on the great *Al-Mumtahina*). A Muslim man can marry a non-Muslim woman who belongs to the 'people of the book' (Jews and Christians), but it is his duty to introduce Islam

[18] See <http://www.uskonnot.fi> => Suomen Islamilainen Neuvosto ry.

[19] Kouros, *Suomessa asuvien muslimien suhtautumisesta perhe-arvoihin ja perhelainsäädäntöön.*

[20] The Finnish Marriage Act 234/1929, AL = MA. In English, <https://finlex.fi/en/laki/kaannokset/1929/en19290234_20011226.pdf>.

[21] *Ibid.,* s 12 (2).

to his wife and set a good example (based on the great Al-Maida). A wife does not necessarily have to convert to Islam. Although Islamic law is not in force in Finland, in practice the requirements of the Qur'an regulate the marriage of Muslim men and women.[22]

The bridal money (*Mahr* or *Sadaq*) is based on verses 4 and 20 of the Qur'an of the Qur'an (Nisa'). According to them, the bridal vows are a mandatory part of the Islamic marriage contract. The amount of money is not defined in the Qur'an.[23] Bridal money is a concept that is foreign to Finnish law! Apparently, no lawsuit concerning bridal money has been filed in Finnish courts so far, so one can only guess whether the Finnish court would dismiss the lawsuit as unfounded or whether the lawsuit could be examined from the point of view of general contract law doctrines.

Islamic law does not recognise *Cohabitation* and is not generally considered acceptable to Muslims. Sexual intercourse is only allowed in marriage. In this regard, Islamic law only allows sexual intercourse in marriage, sexual integrity (*virginity*) is required in principle for all first-time marriages. If a person has committed adultery and suffered the resulting punishment according to Islamic law, the offence is no longer considered an obstacle to marriage.

In contrast, the cohabitation of persons of the same sex was agreed by the Finnish Parliament in 2001, gaining the same legal status as marriage (having reached the age of 18). In accordance with this law (950/2001), which came into force on 1 March 2002, persons of the same sex were permitted to formalise their partnerships by contracting a civil marriage. The main differences between marriage and registered partnership concern the presumption of paternity, adoption (9§, P 1–3), and the use of each other's surnames (§ 8, P 4). Another difference in the 2002 law was that, unlike a heterosexual marriage, a partnership registration cannot occur in a church, and for marriage no residency or citizenship requirements apply.

Under the amendment to the Marriage Act, since 1 March 2017 persons of the same sex have been able to enter into marriage (HE 104/217).[24], while abolishing at the same time, the registration of partnerships. Along with the amendment, persons in a registered partnership can change their partnership into a marriage by making the relevant joint declaration at the local register office.[25]

[22] Kouros, *Suomessa asuvien muslimien suhtautumisesta perhe-arvoihin ja perhelainsäädäntöön*, p. 57.

[23] Finnish translations of the legal verses of the Qur'an are by Jaakko Hämeen-Anttila. For further information, see J. Hämeen-Anttila, *Introduction to the Qur'an*. (2nd corrected edn, Helsinki, Gaudeamus, 2006).

[24] See www.finlex.fi => 104/2017.

[25] For the concepts of family, cohabitation of couple, and marriage, see further at http:www.stat.fi => Quality description, families 2017.

2. *Divorce*

According to Chapter 5 of the Finnish Marriage Act, disputes and legal issues in the family must be resolved primarily through negotiations between the parties and resolved by mutual agreement.

Spouses have the right to divorce after a half-year cooling-off period or with no time for reflection, if they have lived apart for the past two years without interruption (Marriage Act § 25). Divorce is initiated by an application to the court, either alone or jointly. The fact that a Muslim woman living in Finland does not receive an Islamic separation is not a problem from the point of view of Finnish law: in any case, a woman receives a divorce granted by a district court.

However, for a Muslim woman, this can be of great importance. If she wants to follow her religion, she cannot be considered divorced, and the Muslim community will not consider her divorced until she has been granted an Islamic divorce. This, in turn, means, among other things, that she cannot enter into a new (Islamic) marriage and that her ex-husband can still interfere in her life in many ways. Travelling to or from an Islamic country can prove problematic because in some Muslim countries a husband can restrict a wife's freedom of movement, even preventing her from leaving the country.

Ms Kristiina Kouros has pointed out, in her study *On the attitudes of Muslims living in Finland to family values and family law 26* that the provisions of Islamic law relating to divorce are complex and there are differences in interpretation between the different schools. According to Islamic law, divorce should be used only as a 'last resort'. Disagreements between spouses (*shíqáq*) should in principle be settled with the assistance of close relatives. Divorce rules are gender-specific and, as a general rule, divorce is essentially a unilateral right of a man and a simple measure of form, while for women the right to divorce is already very limited and the process complex – unless otherwise agreed. It is clear that neither spouse should seek a divorce. Ms. Kouros states:

> '*Legally, there are generally two types of divorce (talaq): revocable divorce and irrevocable divorce. Shia Muslims only recognize irrevocable divorce. A revocable divorce takes place either by the husband pronouncing the word talaq once, followed by a waiting period during which the husband can "take his wife" again without a new marriage contract and thus without the wife's consent. The recapture of a wife can occur in many ways (intercourse, friendly treatment, explicit withdrawal of the talaq). Another option is for the husband to repeat the talaq three times during the three menstrual cycles, with the divorce taking effect on the third occasion.*
>
> ...

[26] Kouros, *Suomessa asuvien muslimien suhtautumisesta perhe-arvoihin ja perhelainsäädäntöön*.

> *Today, tafriq divorce, which is granted in court at the wife's request, is also fairly widely accepted.…*
>
> *In all of the above cases, the divorce is followed by a waiting period for the woman, the so- called iddat (three menstrual cycles or a time determined from the calendar), which is intended to ensure that the woman is not pregnant by her husband. This is relevant to the paternity of a potential child and the legal consequences that follow. In the case of an irrevocable divorce, the woman must spend the waiting period in the family home. A woman can remarry only after a sufficient period of time has elapsed from the divorce and after the possibility of pregnancy is thus ruled out. As such, remarriage is considered desirable for both men and women.'*[27]

When looking at the relationship between Finnish family law and Islamic family law, it is noteworthy that the rules of private international law and procedural law are able to solve some problematic situations by showing which legislation is followed in any situation when it comes to international legal relations.

Part V of the Finnish Marriage Act (234/1929) contains provisions in the field of private international law. The provisions of the Marriage Act on international matters exist, although at least two of them have not been applied in practice in any actual cases.

A marriage contracted abroad is generally valid in Finland if it is valid in the state where the marriage was contracted (section 115 AL[28] [MA], Addition (20.2.2015/156)).

- As a general rule, a divorce case can be investigated in Finland if either spouse is domiciled in Finland (section 119 AL [MA]).
- The official prosecutor may bring an action for the divorce of spouses in certain cases if the marriage has been contracted in violation of the prohibition provisions of Finnish law (close kinship, polygamy) and if the marriage was performed by the Finnish marriage authority and either spouse is domiciled in Finland.
- It is not a condition that the marriage has been performed by the Finnish marriage authority if the marriage was entered into during the validity of the previous marriage and when both spouses are domiciled in Finland (section 119 AL [MA]).
- A provision of the law of a foreign state must be disregarded if its application would lead to a result contrary to the principles of the Finnish legal order (Article 139 AL [MA]).

[27] Kouros, *Suomessa asuvien muslimien suhtautumisesta perhe-arvoihin ja perhelainsäädäntöön,* pp. 63–4.

[28] The Finnish Marriage Act 234/1929, AL = MA. In English <https://finlex.fi/en/laki/kaannokset/1929/en19290234_20011226.pdf>.

As regards marriages among Muslims living in Finland, it is important not only to view the material provisions of the Marriage Act, but also who performs them and what rights and obligations the law imposes on a priest/a district court official, Judge or its Registrar. Pursuant to section 113 of the Finnish Marriage Act, the Minister of Foreign Affairs may, on application, authorise a diplomatic representative of a foreign state in Finland to marry foreigners in Finland in accordance with the formal provisions of that state law, at least one of whom is a citizen. The Ministry of Education, on the other hand, may grant an application to a priest/rabbi/imam of a foreign ecclesiastical congregation operating in Finland for the right to marry persons, at least one of whom is a citizen of that state.[29]

This is no longer the case for those who have moved permanently to Finland. For them, Finnish legislation cannot meet the needs, let alone the wishes, of all Muslims.

B. Succession / inheritance law

From the point of view of Finnish law, the provisions of the inheritance arch are gender-neutral and thus men and women are on an equal footing with each other. To the extent that the estate can be decided by will, the testator may give preference to the beneficiaries testators on the basis of sex.

The Qur'an (Women's Surah An-Nisa', verses 11–13) contains specific provisions on the right to inherit, which is not recognised in Finnish law. In the Qur'an, inheritances are determined by kinship so that, as a rule, women in the same kinship receive half of the share received by men.[30]

C. Collective Labour law

Churches and religious [Muslim] communities are also in a special position in the sphere of collective labour law because their specific religious needs are protected by the freedom of religion and consequently by the right to self-determination. The state is in principle also not allowed to intervene in the internal organisational structures and set-up of the religious communities in the field of collective labour law.

D. Shari'a and the rights of children and women

As stated above, Shari'a law plays no role in Finland. However, the rights of children and women become relevant when it comes to custody of children, maintenance obligations or visitation rights in divorce.

[29] The Finnish Marriage Act 234/1929, s 113. See <https://finlex.fi/en/laki/kaannokset/1929/en19290234_20011226.pdf>.

[30] See Hämeen-Anttila, *Introduction to the Qur'an*.

According to Finnish law, custody of a child may be determined on the basis of the relationship between the parents at the time of the child's birth, a court decision or an agreement between the parents. In matters concerning custody, visitation and maintenance of a child, the Act on Child Custody and Right of Access (361/1983)[31] provides for each separately. In the event of divorce, the parents can agree on these issues within the limits set by law. In the event of a dispute between the parents, the court will issue a decision based on law. Herein lie the main rules on custody, visitation and maintenance of children, even though the questions posed to Muslims only concern divorce. .

Directly from the child's birth, both parents are the custodians of the child if they were married to each other at the time the child was born. If the mother was not married, she is the sole guardian of her child. Even after the confirmation of paternity, the mother remains the sole parent of the child, unless the parents agree otherwise on the custody of the child or the court issues a decision on the custody of the child if necessary.

The court may decide that custody of the child is entrusted to both parents jointly. If the parents do not live together, the court may decide that the child should live with one or the other parent. Custody of a child can also be entrusted to one parent alone. The court may also decide that the child has the right to keep in touch and meet with a parent with whom the child does not live. As a general rule, a child has the right to meet regularly with a parent with whom he or she does not live. If necessary, the meetings are organised in a supervised manner, and official assistance from the police can be provided to ensure that they are carried out if the other parent objects.

All of the above is common to all Finnish citizens, regardless of their religious orientation.

IV. Discrimination of Muslims

A. Labour law

1. *Muslim immigration and Muslims in labour markets*

Immigration to Finland has increased since the early 1990s. In 2015, about 230,000 foreign citizens lived in Finland. As indicated above, there were very few Muslims in Finland before the 1990s (1990, 810; 2000, 1,199), when immigration from the Muslim world increased due to war and conflict in Africa (Eritrea and Somalia) and the former Yugoslavia. Thereafter, Muslims have arrived in Finland with a new generation of immigrants from Africa, the Middle East (Iraq), Afghanistan, and

[31] Act on Child Custody and Right of Access (361/1983; amendments up to 352/2019 included) <https://www.finlex.fi/en/laki/kaannokset/1983/en19830361.pdf>.

Southeast Asia. Although most of the Muslim immigrants are of working age, little is known about their working lives.

Thus, one can only talk about the working life of Muslims on a very general level and in relation to other immigrant populations, which is a very diverse group. According to the most recent Finnish study, *Immigrants in the labour market – a study of the careers of those who moved to Finland in different years* (ILM, Finnish Centre for Pensions, 2016),[32] several background factors play a significant role in immigrants' employment. Immigrants from Estonia and Western and Southern Europe enjoyed the best employment opportunities. Moreover, their working lives lasted the longest and their earnings increased during their stay in the country. The *worst off in the labour market were the immigrants from the Middle East and Somalia, whose religious background was mostly Islamic.* According to the aforementioned study, the regression analysis, based on the time spent in Finland, increased the probability of employment and the time for which pension accrues, regardless of gender. This is true for all countries, *except the Middle East and Somalia*.

Economic conditions also affect attitudes towards immigrants. Numerous attitude surveys have found that the attitudes of Finns towards foreign jobseekers and those with a Muslim background have become more favourable. However, during the recession of the 1990s, the attitude was clearly more negative than in other years under review. Attitudes have become more positive, especially in the post-recession period.[33] The attitude of the general population towards immigrants can affect the position of immigrants in the labour market.

According to the ILM study, business cycles together with attitudes and changes in labour market policies may have an impact on the labour market outcomes of different migration cohorts. As immigration has increased, various measures have been taken to promote the integration and employment of immigrants. The Immigrant Integration Act entered into force in 1999. It affected immigrants who had arrived in Finland in May 1997 at the earliest. Among other things, the law also obliged Muslim immigrants to participate in drawing up integration plans. Integration plans have been

[32] H. Busk, S. Jauhiainen, A. Kekäläinen, S. Nivalainen and T. Tähtinen, *Maahanmuuttajat työmarkkinoilla – tutkimus eri vuosina Suomeen muuttaneiden työurista (Immigrants in the labour market – a study of the careers of those who moved to Finland in various years)* [*1995, 1996, 2000, 2001, 2005 and 2006*], [Helsinki, Eläketurvakeskuksen tutkimuksia (Studies by the Finnish Center for Pensions), 2016].

[33] M. Jaakkola, *Tutkimuksia [research]: Maahanmuuttajat suomalaisten näkökulmasta. Asennemuutokset 1987–2007 [Immigrants from the perspective of Finns. Attitudinal changes 1987–2007],* [Helsinki, Helsingin kaupungin tietokeskus (Helsinki City Information Center), 2009].

estimated to have had a positive effect on the transition of immigrants to the labour market and employment.[34]

In the light of the available research data, it seems that Muslims in general are not discriminated against in the labour market. It is, rather, that the need for a skilled and Finnish-speaking workforce has meant that those who have recently immigrated into Finland are doing poorly.

2. *Legal framework – Labour Law and the Individual's Rights in the Workplace*

For the large majority of employees in the labour market, the normal state labour law applies (collective labour agreements). The collective agreement system in its current form in Finland was developed in the public sector in the 1970s. These agreements were made in the national, municipal, and church sectors (for the Evangelical Lutheran Church of Finland and the Orthodox Church of Finland up until 2005).

The purpose of the agreement system is to improve working conditions and to ensure job security. The collective agreement for appointments represents the minimum and maximum agreements possible, while the agreement for other positions represents the minimum agreement possible. The conditions of service are set out in these agreements, and the salaries, holidays, leave, and compensation for all those holding Church offices or other positions are also determined through these collective agreements.

Registered religious communities – such as Muslim communities – which are governed by civil law, buy services related to work security from Palta, a member of the Confederation of Finnish Industries. Palta has collective agreements for a variety of working conditions, and what is noteworthy about Palta is that it was able to agree universally binding labour decisions on behalf of religious communities.

B. Application of EU law in Finland

1. *Religious non-discrimination, Directive 2000/78, and its relationship to Finnish Labour Law*

Finnish labour law has closely followed Directive 2000/78/ EC of 27 November. This can be read in Article 8 of that directive, where the Council of the European Union states that the European Council met in Helsinki on 10 and 11 December 1999 and adopted the Employment guidelines for 2000. The directive emphasises "the need to foster a labour market favourable to social integration by formulating a coherent

[34] M. Sarvimäki and K. Hämäläinen, 'Integrating Immigrants: The Impact of Restructuring Active Labour Market Policies' (2016) 34/2 *Journal of Labour Economics*, pp. 479–508.

set of policies aimed at combating discrimination against groups such as persons with disability. They also emphasise the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force."[35]

Article (24) of the Directive refers to the Final Act of the Treaty of Amsterdam: 'The European Union, in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that *it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States* and that it equally respects the status of philosophical and non-confessional organisations. With this in view, *Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity*.'[36]

In Finland, these obligations under labour law, especially with regard to Religious Freedom, non-discrimination and Employees' Rights in the Workplace also affect all religious minorities, including Muslims.[37]

The following national laws protect religious freedom and [Muslim] employee rights in the Finnish workplace:

I. Section 11 of the Finnish Constitution defines religious freedom as a basic right:

> 'Everyone has freedom of religion and conscience, implying the right to profess and practise a religion, the right to express one's convictions and the right to be a member of or to decline to be a member of a religious community.'
> 'No one shall be under any obligation to participate in the practice of a religion against his or her conscience.'

II. Chapter 3, section 8 of the Non-Discrimination Act (1325/2014) comprises the prohibition of discrimination. The statute also implicitly covers employee salaries and the acknowledgement of their religious conviction in the workplace:

> 'Nobody may be discriminated against on the basis of their age, origin, nationality, language, religion, belief, opinion, political activity, trade union activity, family relationships, state of health, disability, sexual orientation or other personal characteristics. Discrimination is prohibited, regardless of whether it is based on a fact or assumption concerning the person him/herself or another.'

[35] Council Directive 2000/78/EC of 27 Nov 2000 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0078&from=EN>.

[36] *Italics mine.*

[37] For further detail, see M. Kotiranta, 'Religious Assistance in Public Institutions: Finland' in: Ringolds Balodis and Miguel Rodrígues Blanco (eds)*, Religious Assistance in Public Institutions – Assistance spirituelle dans les services publics* (Granada, Comares, 2016), pp. 105–17.

> 'In addition to direct and indirect discrimination, harassment, denial of reasonable adjustments as well as an instruction or order to discriminate constitute discrimination as referred to in this Act. (1325/2014).'

Discrimination means:

1. the treatment of a person less favourably than the way another person is treated, has been treated or would be treated in a comparable situation (direct discrimination);
2. that an apparently neutral provision, criterion or practice puts a person at a particular disadvantage compared with other persons, unless the said provision, criterion or practice has an acceptable aim and the means used are appropriate and necessary for achieving this aim (indirect discrimination);
3. the deliberate or de facto infringement of the dignity and integrity of a person or group of people by the creation of an intimidating, hostile, degrading, humiliating or offensive environment (harassment); and
4. an instruction or order to discriminate.

III. Section 6 of the Constitution, which also considers non-discrimination, was used as the basis for another separate equality act called the Act on Equality between Women and Men (609/1986), where gender equality was promoted, particularly in working life.

However, section 2 of the abovementioned act contains restrictions on the applicability of this law to the church and other religious communities. Thus, there is recognition of the fact that it cannot be applied directly to many aspects of the religious observances of the Evangelical Lutheran Church, the Orthodox Church, and other religious groups (on account of restrictions on the priesthood, the nature of religious observances, and confessions, to name just a few of the reasons).

IV. In Chapter 2, section 2 of the Employment Contracts Act (55/2001) it is stated that 'the employer shall not exercise any unjustified discrimination against employees on the basis of religion'

Later in the same section of the Act, reference is made to both the Non-Discrimination Act and also the prohibition of discrimination:

> Provisions on the prohibition of discrimination based on gender are laid down in the Act on Equality between Women and Men (1325/2014). The definition of discrimination, prohibition on sanctions and burden of proof in cases concerning discrimination are laid down in the Non-Discrimination Act (21/2004). (23/2004).

Equality and the prohibition of discrimination are governed by the Non-Discrimination Act (1325/2014), whereas the prohibition of discrimination based on *gender* is covered by the provisions of the Act on Equality between Women and Men (609/1986).

V. The employee's position is further governed by the Working Hours Act (605/1996), Annual Holiday Act, Occupational Safety and Health Act (738/2002), and also other acts concerned with national and municipal civil servants' rights.

Occupational health and safety issues in Finland are considered to take precedence over the rights of the employee. The labour laws oblige the employer and employees to follow safety regulations and instructions. It is possible, for instance, that *such instructions would not allow a Muslim employee to wear a scarf if that person is working with machinery and wearing a scarf might well be injurious to health*. Another common example: it is obligatory to wear a helmet when working in the construction industry.

2. *Gender, sexuality and religion*

When an employee is hired, the starting point of the agreement or contract is that gender, sexual orientation, and religious beliefs will not affect the recruitment process.

The employer is obliged to recognise an employee's religious beliefs (such as the Muslim Faith) to a reasonable degree and also their potential need to practise their religion in the workplace. The notion and degree of 'reasonable' depends on the employer, the workplace, and the trade being practised, as well as the ways of practising a variety of different religions. This also takes into consideration the right of the Muslim worker to be absent from his or her workstation.

Regarding religious communities and beliefs other than the major Churches, it must be stated that in Finland, on the basis of religious beliefs, *one can either refuse employment completely or refuse to perform any part of a job*. One can also refuse to do work for a specific period of time (such as Ramadan). An employee could also, for example, request permission to use a veil or make a similar type of request. This, in turn, raises the question of when an employer has the right to dismiss an employee, and also the problem of when an unemployed person might lose his or her unemployment benefits if they refuse a job offered to them.[38]

The definitions of freedom of religion and of conscience were also discussed in 1995 in the context of the Constitutional reform. The Government's bill (309/1993) was somewhat vague in advocating 'systems dividing work'.

The provision universally advocates a system of separation that avoids placing an obligation on anyone to execute tasks that contradict his or her beliefs. For exam-

[38] There is, for example, a precedent from 2002. The Act on Employment Insurance 30 May 2002/1290 stated briefly: The job seeker has a valid reason to refuse employment if the employment is against his or her religion or conscience.

ple, the conflicts occurring between the freedom of religion or conscience and tasks required in an office *have to be resolved on a case-by-case basis*. As a consequence, the regulation will not lead to a universal right to refuse the obligations of an office on the basis of religious beliefs.

Separate from that is still the question of whether offices in the public sphere should have stricter regulations than in private corporations. In principle, the core activities of the state and municipalities are secular; specific laws prohibiting discrimination broaden freedom of religion and at the same time restrict the right of the employer to dismiss an employee. In Finland, there is no strict difference, although fundamental rights are regarded as restricting individual relationships to a certain degree.

3. *Examples of Case Law regarding Muslims and Religiously Dictated Dress Codes in the Workplace*

Discrimination in the Finnish workplace is monitored by occupational health and safety inspectors working out of the regional state administration offices. A handful of cases involving religious headdress and clothing have thus far been tried in Finnish courts. *For example, the uniforms of security guards and police officers are regulated by laws and decrees, and religious headdress is not a part of the uniform.* This neutral uniform easily limits the access of those who use headdress, such as Sikhs and female Muslims, to positions normally requiring them.

The Justice Chancellor and the Ombudsman monitor the activities of the authorities in Finland, and hence are able to adopt a stance on whether a dress code is constitutional. Before cases can actually reach them, however, a complaint must first be entered, and subsequently the court will reach a decision. Another way for the situation to be changed is to have a Member of Parliament introduce a bill on the matter at hand.

Of all of the regional state administrative offices only one, in southern Finland, has handled a total of four cases dealing with religious headdress and clothing. Of these, three concerned the use of the veil and one the wearing of a turban.

A hotel manager in Turku defended his/her decision to ban the use of the veil to preserve ‘the neutrality of the hotel reception’, meaning that the veil might detract from the customer service provided.

At the end of March 2014 the Helsinki District Court fined a manager employed by the clothing retailer Guess for discrimination because he/she had dismissed an employee who wore the veil. Citing a number of reasons, in the manager’s opinion the veil did not suit the image of the store. The District Court ruled that the employee was placed at a disadvantage without cause because of her use of the veil.

This ruling was the first of its kind in Finland to involve religious headdress, and hence it will serve in the future as a precedent and also as a guide for employ-

ers. Thus the message is simple: an employer must permit the wearing of religious headdress in the workplace unless there is a valid reason, such as occupational safety, that prevents it.

As previously mentioned, occupational health and safety issues overrule employees' rights. An example of this kind of case occurred in 2006, when a prosecutor claimed that a restaurant manager was not guilty of discrimination when he refused to let a female Muslim wear her veil during a customer service internship. The manager justified hisdecision by citing arguments connected with image and also occupational safety. The student was given clear instructions on the dress code for the kitchen and dining room; the same veil could not be used during the cooking as during the serving of the food. He further justified the decision by stating that the customers wanted their waiters to use a specific uniform. The student did not remove her veil. Instead, she left the establishment.

V. Exercise of religious freedom and other cultural rights

A. Legal framework for the establishing and functioning of mosques

In the largest cities of Helsinki, Espoo, Vantaa, Turku, Jyväskylä, Tampere and Vaasa there are prayer rooms located in urban spaces.[39] The Tatar Mosque in Järvenpää is Finland's only custom-built mosque, while all of the other buildings are prayer rooms. In 2016–2017, a project was underway in Finland to build a large mosque. The project was scheduled to launch an international architectural competition in the spring and summer of 2018. The project was approved by city officials but was not supported by the Urban Environment Board. The Board justified its unanimous decision, *inter alia*, on the grounds that there were too many unanswered questions regarding the origin of the funding. The estimated cost of the project was EUR 110–140 million, most of which would have come from countries of the Persian Gulf . Bahrain emerged as the fundraising organiser, who would have coordinated the funding and borne the cost of the training of the imams of the mosque.[40] Funding would reportedly have come from Saudi Arabia and Arab businessmen representing the most conservative interpretation of Islam. Foreign funding raised questions in the public forum, as it was feared that it might bring radical Islamic thinking to Finland.[41]

[39] See, 'Espoo', *Islamopas* <https://www.islamopas.com/moske.html#1>.

[40] K. Kuokkala, 'Uhriutuminen on kehno tapa lobata suurmoskeijaa – poliitikot ällistyivät puuhamiehen teatraalisesta poistumisesta kesken paneelin (Sacrifice is a poor way to lobby the Grand Mosque – politicians were amazed at the theatrical departure of a businessman in the middle of the panel)', *Helsingin Sanomat*, 15 May 2017 <https://www.hs.fi/kaupunki/art-2000005211011.html>.

[41] A. Lehtonen, 'Helsinki pyytää turvallisuusselvitystä suurmoskeijan rahoituksesta – huolena mahdolliset kytkökset ääri-islamiin (Helsinki is asking for a security report on the funding of the Grand

Following a negative decision by the Urban Environment Board in December 2017, the applicants, the Finnish Muslim Association, the Finnish Muslim Women and the Forum for Culture and Religion FOKUS, announced that they had withdrawn their land reservation application. They stated that they intended to examine the reasons for the decision of the City Environment Board and would consider reserving the land at a later date.

The basic principles of fundamental rights apply to relations between religious communities and individuals. For the religious communities this presupposes that the general law has been interpreted and applied in a way that is compatible with the values expressed in the fundamental rights guaranteed by the Constitution. *In Finland, however, there is no straight application of fundamental rights that would directly impose a wider obligation on religious communities*. Only religious communities such as the Lutheran and Orthodox Churches as legal entities governed by public law are required to respect fundamental rights when exercising sovereign power delegated to them by the state, such as the right to levy church taxes or other issues related to the public service status of their officials.

From a fundamental rights perspective, everyone has the right to express their religion and convictions in an appropriate manner in accordance with their own religion. General law – in particular collective labour law and individual rights in the workplace, criminal law (religious peace), marital law, and medical deontology – clarifies these conditions and must also be interpreted and applied in light of the relevant fundamental rights.[42]

In the context of Finland, *the disruptive behaviour of religious communities towards non-religious individuals is relatively marginal*. Evening bells on Saturdays at 6 pm and the ringing of church bells every Sunday at 10 am are generally understood to be part of the Finnish national tradition. In contrast, the rights of Islam in relation to the values of the mainstream culture have been the subject of some debate in the media; in particular, right-wing populist circles have raised the question of whether the state's flexibility with regard to Islam goes too far. Their actions have led to some criminal offences, including incitement to religious hatred.[43]

One special issue has touched upon the Muslim call to prayer (Azaan) by the Muezzin from the minaret of a mosque.[44] So far, no minarets exist at the places of

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Mosque – concerned about possible links to extremist Islam)', *Iltasanomat,* 5 Jan 2017 <https://www.is.fi/kotimaa/art-2000005033248.html>.

[42] For further detail about the relationship between human rights and criminal policy, see E. Pirjatanniemi, 'Haastavatko ihmisoikeudet Suomen kriminaalipolitiikan? (Do Human Rights Challenge Finland's Criminal Policy?)' (2011) 2 *Oikeus,* pp. 154–74.

[43] For further detail, see Chapter VI. *Free speech and Islam*.

[44] See, R. Salminen and S. Nironen, 'Kuuluuko rukouskutsu Helsingissä, jos moskeija rakennetaan? Ja 9 muuta kysymystä', *Yle*, 8 Dec 2017 <https://yle.fi/uutiset/3-9968587>. See also, 'Muslimit

worship of the Muslim communities in Finland, but it can be assumed that the possible construction of minarets and the incorporation of Muezzin calls would also raise the question of their legitimacy in Finland. These issues have caused problems in Switzerland and Sweden, for example. In a referendum the Swiss decided in 2009 not to build minarets as part of mosques.[45]

B. Ritual Slaughter and Other Religious Food Requirements Ritual Slaughter

Ritual slaughter is permitted in accordance with freedom of religion. In general, for the sake of animal protection the Finnish Animal Protection Act prohibits slaughtering without previous stunning of the animal. The minimum standards for killing and slaughtering are laid down in the Animal Protection Act, the Animal Welfare Regulation, the Ministry of Agriculture and Forestry's decision on animal protection requirements for the killing of farm animals of mammalian and bird species and its amendment, and the decision and its amendment produced by the Ministry of Agriculture and Forestry regarding the animal welfare requirements applicable to animal slaughter.

In early 2013, Council Regulation (EC) No 1099/2009 concerning the protection of animals at the time of slaughter, i.e., the application of the termination regulation, came into force in Finland. The Closure Regulation 'lays down rules for the slaughter of animals reared or kept for the production of food.'[46]

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haluavat rukouskutsun raikaamaan kaikille – Imaamin huuto kuumottaa naapureita', *Suomen Uutiset,* 15 Mach 2018 <https://www.suomenuutiset.fi/muslimit-haluavat-rukouskutsun-raikaamaan-kaikille-imaamin-huuto-kuumottaa-naapureita/>.

[45] See, 'Sveitsi kieltää minareettien rakentamisen', *Yle*, 29 Nov 2009 <https://yle.fi/uutiset/3-5963403>.The fact that the people voted this way in Switzerland despite the appeals of the government and most parties is a sign of great distrust in Islam. In the religious history of Sweden, the first Friday Muezzin call was made on 26 April 2013 from the loudspeakers of a Muslim mosque minaret in Fittja, a suburb of Stockholm in Botkyrka. For further details, see 'Flera moskéer: Mobilapp lika effektivt som böneutrop', *Expressen*, 7 Aug 2018, <https://www.expressen.se/nyheter/flera-moskeer-mobilapp-lika-effektivt-som-boneutrop/>. See also, A. Minadis, 'Muslimien rukouskutsut herättävät huolta Ruotsissa – lupahakemuksesta virisi kiivas keskustelu', *Kotimaa*, 16 March 2018 <https://www.kotimaa24.fi/artikkeli/muslimien-rukouskutsut-herattavat-huolta-ruotsissa-lupahakemuksesta-virisi-kiivas-keskustelu/>. Since then, Sweden has also pushed the boundaries of how Islam is seen and heard. The controversy over allowing a prayer call on Fridays seems to have been resolved in a surprising way: a phone app has replaced the Muezzin call.

[46] The Council Regulation also obliges animals to be protected against avoidable pain and suffering during their slaughter and related activities. The preamble to the regulation states, among other things, that: 'The slaughter of animals may cause pain, distress, fear, or other forms of suffering to the animals even under the best available technical conditions. […] any person involved in the slaughter of animals should take the necessary measures to avoid pain and minimise the distress and suffering of animals during the slaughtering or killing process, taking into account the best practices in the field and the methods permitted under this Regulation' (para 2).

In order to prevent avoidable pain, distress, and suffering, and thus a prerequisite for a successful cessation event, emphasis is placed on the importance of advance planning and the appropriate training of personnel.

Muslim Halal meat is slaughtered by cutting the animal's throat swiftly with a knife. This permits a special type of slaughter for religious reasons where bleeding is initiated simultaneously with the stunning of the animal. In practice, in accordance with Finnish legislation, halal meat is slaughtered in Finland only by stunning the animal first before bleeding. Many Islamic communities accept this practice. According to the animal protection legislation, a veterinarian inspector must always be present when slaughter is carried out in accordance with a specific method of slaughter for religious reasons.

The Animal Welfare Act contains a provision on religious slaughter and the Animal Welfare Regulation contains a whole chapter on how such slaughter is to be conducted. There is also a penalty provision contained in the law.[47]

In light of the evidence found, it does not appear that there are any precedents for religious slaughter in Finland.

C. Religious Food Requirements in Schools and Public Institutions States Schools

In the Finnish legal system, school authorities must do what is possible to meet the dietary needs of religious students. Meals are made available in accordance with the curriculum (National Board of Education): 'School meals take into account the health, social and cultural significance of meals.'

Diets deviating from the basic diet at school:

> 'The pupil is in a safe learning environment at school and is offered school meals as part of pupil care. Sometimes, for example, health reasons require eating that is different from the actual menu. The special needs of a child with allergies, ethics, or religion are taken into account when planning his or her schoolwork and meals. The planning and implementation is based on the operating principles of the municipality or school.'[48]
>
> How, the special needs of religion are taken into account depends on the guidelines of the various municipalities. In large cities such as Helsinki, faith-related school meals are prepared in connection with special diets. A Muslim halal meal or a Jewish kosher meal will not be delivered separately.
>
> Parents of each student must fill in a card for the school nurse stating allergies and special diets. Muslim parents *do not necessarily state directly the special needs ac-*

[47] For further detail, see Animal Protection Act, s 14 (585/2013); Animal welfare crime; s 14a (14 Jan 2011); Aggravated animal welfare offences; s 15 (14 Jan 2011); Minor animal welfare offences.

[48] 'Kouluruokailu kuuluu kaikille', *Opetushallitus Utbildningsstyrelsen* <https://www.oph.fi/fi/koulutus-ja-tutkinnot/kouluruokailu-kuuluu-kaikille>.

cording to religion, but report food restrictions: 'no pork, no cutting of skin, and no food made of blood'.

Regarding the observance of Ramadan, the instructions of imams in Finland are that students do not have to observe fasting in schools during Ramadan. Problems usually arise, however, from the fact that older students want to follow Ramadan.

In large cities teachers are provided with guidelines outlining what teachers should consider for religious minorities (Muslims, Jews, etc.). The instructions of the City of Helsinki Education Department[49] put it in the following way:

SCHOOL MEALS

According to the Qur'an, a Muslim cannot eat pork or its derivatives (ham, cold cuts, etc.) or any blood dishes. Beef, mutton, chicken and turkey, which are commonly used in Finland, are allowed. For some families, the way meat is slaughtered can become a problem. Some Muslims eat nothing but the so-called halal meat slaughtered by draining blood from a carcass and reciting a Muslim prayer during the procedure. 'There is a passage in the Qur'an that says that eating meat slaughtered by Jews and/or Christians is allowed, and many Muslim families use ordinary Finnish beef, mutton, chicken and turkey.

Additives that may contain porcine substances (e.g., gelatin) are sometimes a problem. The fat in the additive can be checked with the manufacturer if the Muslim family is fastidious in this matter. There are no resources or obligations for staff or service providers to review school food additives. The guardian or student can verify the matter with the manufacturer. Some products have already been reviewed, such as ice creams from Valio that contain only herbal additives. Many Muslim families follow the interpretation that in the process of making the additive, substances derived from pigs have decomposed and combined with other substances so that they are no longer a prohibited substance within the meaning of the Qur'an.

Schools offer a varied, complete and guided school meal that covers part of a young person's daily nutritional needs. School meals complement home-based meals. Meals are arranged in the school restaurant as a self-service, allowing the student to prepare their own meal. School lunch is served daily from 10 a.m. to noon. The meal includes hot food, salad, grated or fresh, crispbread and Lei fat. Milk, buttermilk and water are available as food drinks. The menus (basic and vegetarian menus) are revolving and last for six weeks.

Approximately 70 % – 80 % of the main dishes on the basic menu are suitable for Muslims as such. The suitability of dishes for Muslims is clearly and illustratively marked on school menus. If the main course at school is pork-based, there is an alter-

[49] See I. Kuukka, *Muslimioppilaiden eriyttämistä koskevia linjauksia* (Helsinki, Opetusvirasto Perusopetuslinja) <http://achiaro.mbnet.fi/docs/muslimioppilaat_hki.pdf>.

native hot meal available to Muslim students, based on basic and vegetarian options. If for some reason the available option does not satisfy the student, the meal can be supplemented with bread, milk, salad and grated salad.

The need for a Muslim diet is indicated by the guardian on a special diet form. The form is returned to the school nurse or class teacher. Participation in fasting is one of the five basic pillars of the Islamic religion. The holy month of fasting, Ramadan, takes place at a slightly different time each year. Usually, pre-adolescent children do not fast, but this varies depending on the family. Some children may fast as early as primary school, some practise fasting one or two days a week. In many families, internship days are on the weekends so that schoolwork does not suffer. It has been found to be a good practice for the guardian or student himself to inform the kitchen in advance whether he intends to fast and whether there are any interruptions in the fast. Students in the upper grades should be reminded to report.'[50]

D. **Public institutions**

Religious food requirements are respected in public institutions. As stated in the Order of Criminal Sanctions Authority (Food Service and Diets, Dnro 8/004/2015), prison authorities must ensure that prisoners are able to follow their religious communities' nutritional rules. Departures from the basic prison diet on the grounds of religious or other legitimate beliefs will be decided by a supervising prison officer or security officer.

Article 6.2.1. of the Order of Criminal Sanctions Authority, Dnro 8/004/2015, Subsection 1, states:

> 'The prisoner's own declaration of his religion constitutes a justification for a special diet based on religion. The demands of religion regarding diet are taken into account on the basis of what is commonly known about them within a given religion.'

However, the prisoner's special wishes cannot be considered as religious claims. Subsection 2 states:

> 'It should be possible to provide a given religious diet by means of the normal prison food procurement procedures and contracts. No special products will be available at the expense of the prison that cannot be obtained from the usual places of purchase used by the prison.'

Subsection 3 emphasises that the basic diet of the prison should be followed as much as possible. In the prison kitchen, meals that differ from the basic diet offered to prisoners of different religions must be recorded. As far as possible, a diet that is

[50] See <http://www.uskonnot.fi> => Suomen Diyanet Yhdyskunta and Helsinki Islam Keskus.

based on religious grounds will follow the nutritional recommendations of the Finnish Nutrition Advisory Board.

Hospitals must also respect religious food requirements. Special diets based on enhanced diet, altered diet, or illness, allergy, or religious reasons will be followed as required. However, there is no specific legislation in this field, although some large hospital districts have provided guidance on how religious needs can be catered for when meals are being designed.

With regard to the Finnish Defence Forces, the General Service Regulations 2017 include a brief annexe on 'specific issues of religious practice'. It explicitly mentions Judaism and Islam, but the principles also apply to other religions. Here, religious diets 'also seek to take ethical diets into account.' During Ramadan, Muslims must be given the opportunity to dine between sunset and sunrise. Muslims are also given the opportunity to pray during the breaks in their military service.

E. **Education of Muslim pupils**

The basic right to education and culture in Finland is recorded in Articles 16 and 17 of the Constitution.[51] Public authorities must secure equal opportunities for every resident in Finland (not simply Finnish citizens) to receive education even after the completion of compulsory education and to develop themselves, irrespective of domicile, sex, economic situation, or linguistic and cultural background.[52]

According to current legislation, freedom of faith in the sense of positive tolerance also provides for the state to offer the opportunity for *all pupils in state schools to have the right to receive education according to their own religion*. The state is required to provide for the religious needs of all pupils in upper secondary schools or vocational upper secondary education and training. This also directly affects students with a Muslim background.

Religious and ethical teaching has been organised as required by the new law of Religious Freedom (456/2003, 6§), with the positive content of religious freedom as the right to receive religious instruction as specifically provided for.

The right to receive teaching 'according to the pupil's own religion' in *State schools* is anchored in the definitions of international treaties and declarations on the

[51] See the Constitution of Finland (in English) <https://www.finlex.fi/en/laki/kaannokset/1999/en19990731>.

[52] In addition, the public authorities are obliged to provide for the educational needs of the Finnish- and Swedish-speaking population according to the same criteria. Approximately 5,5 per cent of the population have Swedish as their mother tongue. Both language groups have the right to receive education in their own mother tongue. Regulations on the language of instruction are stipulated in legislation concerning the different levels of education. The entirely Swedish-speaking Province of Åland has its own educational legislation. <http://www.oph.fi/english/education/overview_of_the_education_system>.

relationship between religious freedom and education. According to these definitions, everyone has the right, among other things, to learn and teach their own religion or belief. Secondly, parents or custodians have the right to decide on a child's religious education corresponding to the child's level of development. Thirdly, everyone should be provided with equal societal conditions for learning and studying their own religion or equivalent view of life (ethics).

There are only a few *private schools* in Finland. Compared with the total number of schools, the proportion of licensed private schools is small, and the majority of them are not based on religion or supported by a particular religion. Licences have also been granted for a few comprehensive schools that are based on religious faiths. For example, the English school in Helsinki is a Catholic foundation. There are 17 Christian schools and two other faith-related schools. *None of these have a Muslim background*.

There is no law or regulation in Finland that forbids the wearing of a religious garment (e.g., scarves or a hijab). Nor is there any legislation that grants permission to use a hijab. Until now there has been no case in either the local or upper courts concerning the wearing of hijabs or burqas (a black garment totally covering the female body, including the head and face) in the basic schools or upper secondary schools. Nor has the question of religious garments been discussed by the Finnish National Board of Education. Consequently, the Board has not issued official instructions to schools.

F. ***Exemptions from other courses – Co-educative Physical Education***

Objections on the basis of religious convictions to participating in co-educational Physical Education classes is not permitted. Elementary school students in Finland participate in the basic education laid down by the Basic Education Act and Decree. Section 11 of the Act contains a list of the subjects provided in primary education.

The law does not recognise the possibility of not participating in basic education because of religious or ethical beliefs. In the case of disagreement, the content of a given subject has to be agreed with the child's guardian, and the school will provide the guardian with a range of solutions that may be feasible according to the day-to-day organisation of the school. In other words, the school has the final say.

Primary school student teachers receive the undergraduate education provided by the Basic Education Act and the Decree, where section 11 of the Act contains a list of the subjects to be followed in primary education.

The Finnish National Agency for Education (Opetushallitus) and the Education Division of the City of Helsinki recommends that 'the school is permitted to follow flexible teaching arrangements and to vary its teaching within the stated limits'. Thus, the City of Helsinki has the following guidelines for Muslim exercise:

> 'When using the shower, Muslim students can be treated flexibly so that they may be permitted to take their shower a little earlier than the other students. In some schools, Muslim students may also be permitted to use a separate shower cubicle, subject to availability at the school.'
> 'The physical exercise itself must be undertaken in appropriate clothing. The clothing should not prevent the student from moving freely, and within the framework of the Muslim dress code it is possible to find appropriate footwear and other accessories that can be used for physical exercise classes.'

Some Muslim parents have agreed that girls may swim while wearing a long T-shirt. This must, however, always be agreed in advance with the swimming bath, since not all swimming baths permit long T-shirts for swimming.

G. Religious education of Muslims (in private or public institutions and non-formal education)

In Finland basic religious education takes place in state schools – primary and secondary schools – according to 'one's own religion (e.g., the Islamic Faith)' as previously stated. Private [possibly Muslim] schools are permitted to contribute their specific educational, religious, and philosophical approaches to the general state school system. Private schools have the freedom to organise – within the defined boundaries of the school laws – according to their own convictions.

With regard to Muslim religious education in University, this is still a fairly new practice in Finland. *University studies are non-denominational and open to all*, with no requirement of membership of a church or religious community. Finnish Muslims, however, have in several contexts expressed their concern to secure trained imams.[53] This would mean a guarantee that an imam and spiritual workers have a proper knowledge of Islamic studies sciences.

The teaching of Islamic theology began at the University of Helsinki, Faculty of Theology in the Autumn of 2018. Bachelor's studies in Islamic theology are open to all applicants and may be followed by a Master's degree. The aim was to launch the full programme of study in Autumn 2019.

The purpose of studies and research is to have a multidimensional understanding of both Islamic texts and practical Islam. 'We strive to develop a research-based curriculum and study that will provide students with a multidisciplinary understanding of Islamic textual tradition and its complex role and meaning in contemporary Muslim life. It combines both textual research and ethnographic approaches,' says a lecturer in the discipline, Mrs Mulki Al-Sharmani,[54] the first holder of such a post.

[53] R. Latvio, S. Mustonen and I. Rantakari (eds), *Imaamit Suomessa. Imaamikoulutusselvitys 2013 [Imams in Finland. Imam training survey 2013]*, (Helsinki, Kulttuuri- ja uskontofoorumi FOKUS ry, 2013), p. 38.

There is no reliable research data on the internal activities of Muslim communities in terms of education. In any case, family relationships and especially parenting according to the Islamic tradition are themes where the opinion of Muslims living in Finland is related to problems and contradictions vis-à-vis mainstream population and its norms.

H. **Free speech and Islam**

In recent decades, Islam and Muslims have been accused of threatening freedom of speech after Muslims around the world protested against the 12 caricatures of the Prophet Muhammad published in 2005 by the Danish newspaper *Jyllands Posten*, which depicted Muhammad as a terrorist. The caricature sparked widespread protests in Denmark as well as in many Muslim countries. This was followed by a serious attack by the Islamist terrorist organisation Al-Qaeda on 7 January 2015, when armed men attacked the delivery of the French satirical magazine *Charlie Hebdo* in Paris. Attackers armed with machine guns killed 12 people, eight of whom were employees of the magazine.

Following this turmoil, the threat posed by Islam and Muslims to freedom of expression has come under scrutiny around the world. Islam and freedom of speech were seen as incompatible with each other. Islamic critics argued that the increase in Muslim immigration into Europe would erode the cornerstone of Western democracy, freedom of speech.

In Finland, the fundamental norms regulating free speech are established in the Constitution, in section 12 of the Constitutional Act ('Freedom of expression and the right of access to information') and in section 11 of the same Act ('Freedom of religion and conscience').

The wide scope of the Freedom of Expression Act also regulates religious communications. It has a large field of application in the sense that, on the one hand, freedom of expression is not bound to any particular method of communication (neutrality as to its instruments).[55]

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[54] 'News of the University of Helsinki', 23 July 2018 <https://www.helsinki.fi/en>.

[55] In addition, through the Constitutional Act, the regulations dealing with freedom of expression are applied to all kinds of communication technology, both those currently used and those to be introduced in the future. On the other hand, the scope of the Freedom of Expression Act has been understood to include all kinds of data, opinions, and other messages, irrespective of their content or purpose (neutrality as to content and purpose). Moreover, with regard to the scope of the Freedom of Expression Act, it is essential that no distinction is made in Finland between political, *religious*, artistic, scientific, commercial, entertainment-related, or other messages. Instead, the regulations are applied to all forms of communication. [Italics mine]

Religion enjoys also considerable protection in Finnish criminal and procedural law. The current Criminal Code (766/2015)[56] no longer protects God's honour (as did the Criminal Code of 1889/1894) but, rather, religious convictions and feelings, and religious peace. *Religious peace means religious order, related to the general category of 'law and order'*.[57] The offence of a breach of the sanctity of religion was reformed in 1998.[58] One common provision of Criminal Law (563/1998), Chapter 17, applies today[59] in the case of both blasphemy against God (Article 10, P 1) and blasphemy against sacred beliefs (Article 10, P 2).[60] *It is noteworthy that religion has emerged alongside other 'racist motives' in the Criminal Code*, and hence the punishment can be increased if a person has been motivated by an act of religion or belief.[61]

In Finland, the debate over Islam and Muslims regarding freedom of expression began, especially after Dr Jussi Halla-Aho, a member of the Finnish Parliament

[56] See The Criminal Code of Finland (39/1889, amendments up to 766/2015 included) <https://www.finlex.fi/en/laki/kaannokset/1889/en18890039_20150766.pdf>.

[57] See K. Nuotio, 'Religion in the Criminal Law of Finland' in: Matti Kotiranta and Norman Doe (eds), *Religion and Criminal Law. Religion et Droit Pénal* (Leuven, Peeters 2013), p. 65. Following the 1999 law reform, 15 people have been convicted of violating the religious peace in Finland. The offence is punished by a fine or by imprisonment for a maximum of six months.

[58] For more on the reform of the Finnish criminal code, see K. Nuotio, 'The reform story of the Finnish penal code: Ideological turns and waves of modernization' in: Kay Goodall, Margaret Malloch and Bill Munro (eds), *Building Justice in Post-Transition Europe?: Processes of criminalisation within Central and Eastern European countries* (Abingdon, Oxon: Routledge, 2012), pp. 78–93. See also K. Nuotio and T. Lappi-Seppälä, 'Crime and Punishment' in: Pia Letto-Vanamo, Ditlev Tamm and Bent Ole Gram Mortensen (eds), *Nordic Law in European Context* (Berlin, Springer-Verlag, 2019), pp. 179–99.

[59] As Prof. Kimmo Nuotio has stated, the fact, that 'the provisions have been placed in Chapter 17 on Offences against Public Order (563/1998), which means that these provisions have finally lost their position as the opening chapter of the criminal code, as well as their separate nature as offences with a religious content. The specific offence of violation of the sanctity of religion requires intent on the part of the perpetrator, meaning that as the requirement of culpability one form of so-called *dolus* must be present.'

[60] Nuotio (2013, 66) emphasises that 'this structure arose because at a very late stage parliament amended the government bill by reintroducing God as a figure into the provision. The original proposal, which was prepared as part of a larger law reform project, had not provided for such a distinction – the idea being that protection of the Christian God would fall under a single formula. Both the law committee and the constitutional committee of parliament shared this view. The law committee was explicit in mentioning that the penal legislation also needed to be acceptable from the point of view of those who do not share a belief in God (see, Report of the Law Committee, 3/1998; Report of the Constitutional Committee 23/1997).' Nuotio, 'Religion in the Criminal Law of Finland', pp. 67–8.

[61] See Chapter 6 of the Criminal Code, s 5 – *Grounds for increasing punishment (564/2015)*. Other sections of the Criminal Code *directly related* to religion are as follows: Chapter 11, s 8 – *Ethnic unrest* (578/1995); Chapter 11, s 10 – *Ethnic agitation* (511/2011) nowadays also refers to incitement against a group of people and also mentions religion; Chapter 17, s 11 – *Prevention of worship* (563/1998) and Chapter 17, s 12 – *Breach of the sanctity of a grave* (563/1998).

(Finns Party), and a fundamentalist Finnish politician known for his anti-immigration writings, was convicted in the district court for blogging and insulting Islam and humiliating the people. The judgment was handed down at the Helsinki District Court 2012 on the grounds of violations of religious peace and agitation against the people.

It is remarkable, however, that Muslims themselves have barely taken part in the discussions, but the issue has been dealt with mainly by the Finnish media, Finnish online chatters and – in the case of Halla-Aho – the Finnish judiciary. The verdict that Dr Halla-Aho received was not influenced in any particular way by the Muslims themselves. The Muslim communities apparently raised not a single public objection to his allegations, nor have they demanded that the writing be removed or appealed to the authorities to investigate the matter. The matter had been examined solely in a police investigation, prosecution, and the judgment of a district court in the light of the provisions of the Finnish Penal Code on religious peace in force.

What was special about the news and analysis of the verdict received by Dr Halla-Aho in the Finnish media was that *it was quite generally interpreted that the verdict would mean that Islam should not be criticised at all*. However, the verdict itself stated that the convicted person would have had the right to make objective criticism of Islam and Muslims on, for example, the relatively weak position of women in Islam. Thus, the judgment does not mean that Islam should not be criticised in the same way as other religions, but above all it meant that the sacred institutions of Islam are also protected in Finnish law, like any of the sacred institutions of Christianity or any religion. A completely different question is whether blasphemy and violation of the religious peace should be decriminalised.

The most recent, and in fact a very similar, case concerns Mr Sebastian Tynkkynen, a member of the Finnish Parliament (Finns Party), who was responsible for indicting a group of people in the Oulu District Court on 3 October 2019. The charge brought by the Prosecutor General applies to text and an image published on Tynkkynen's Facebook page in March 2016. Tynkkynen's publication allegedly contains images of the perpetrators of the terrorist attacks, and includes the statement that 'they have one thing in common: they all serve Allah'. The public prosecutor considered this expression against the law. The Prosecutor General justified the charge by stating that 'Tynkkynen's view of the Islamic group of people is deliberately racist and disparaging hate speech that is generally directed towards all Muslims and is self-defining and even religiously intolerant vis-à-vis Muslims. The prosecutor also emphasised that Tynkkynen's Facebook page had 11,000 followers.[62]

[62] For further information, see Helsingin Sanomat (HS), 4 Oct 2019. For more on the legal regulation of hate speech in Finland, see K. Nuotio, 'Vihapuheen rikosoikeudellinen sääntely (Regulating Hate Speech as a Crime)' in: Riku Jonni Petteri Neuvonen (ed), *Vihapuhe Suomessa* (Helsinki. Edita, 2015), pp. 139-64.

Violation of religious peace in the Finnish Criminal Code protects not only Islam and Muslims and the things they hold sacred, but all registered religious communities, their members, and the things they hold sacred. Dr Halla-Aho's or Mr Tynkkynen's verdicts would hardly have been different even if they had insulted another saint, or Jesus, Moses or Buddha, instead of Muhammad/Allah.

I. Challenges posed by Islam in the traditional understanding and application of democracy and rights in Europe

1. *Political demands stemming from the Muslim communities and/or Members of the same?*

Religious communities in Finland are free to participate in the democratic process. No statutes or case law exist with respect to the involvement of churches and religious communities or members of the clergy in political life. Hence, there is no obstacle to members of the clergy participating in politics in Finland. Similarly, churches and religious communities can and do participate in public debate; the way in which such participation takes place varies between the different religious denominations and religious communities.

The Islamic community as a distinct entity has not, thus far, been active in Finnish politics, although the state authorities have maintained contact with them.[63] Instead, some individual Muslims have become actively involved in politics and city administration, primarily in southern Finland, in Helsinki, Espoo, and Vantaa, and in some of the other main cities.

The various political parties represented in the Finnish Parliament have no confessional basis, apart from one, the Christian Democratic Parliamentary Group, which, as of 3 May 2018, had 5 Members of Parliament. Since Parliament has two hundred members in total, elected for a term of four years, the Christian Democrats can be seen to play a relatively minor role in Finnish politics.

The political participation of the religious communities – which also affects Islamic communities –is based on a broad understanding of freedom of religion, as guaranteed in Article 11 of the Constitution and by the *Electoral and participatory rights* guaranteed by Article 14.

[63] The Islamic Council of Finland (Suomen Islamilainen Neuvosto, SINE) was established in November 2006 and was coordinated initially by the Office of the Ombudsman for Minorities. The aim of the authorities was to establish an umbrella organisation for Islamic communities and associations, thus providing a liaison body with the authorities. This goal was also shared by the Muslim community, although the communities and organisations outside SINE founded another Islamic umbrella organisation that used the old name of the Islamic Federation of Finland.

2. *The public/private nexus of religious manifestations in Europe (is European Islam pushing / challenging the boundaries between private and public – compare with Christianity?)*

The Muslim community in Finland is very moderate, and Finnish Muslims respect Finnish secular law and practise compliance with it.

The biggest single grievance from a Muslim perspective is contained in family law and it can be seen that European Islam is to some extent also testing the boundaries between private and public law. However, in Finland the legislator has explicitly stated that Islamic family law cannot be applied to Muslims in Finland.[64]

By comparison – as is well known – Muslims both in Europe and Canada have called for the application of Islamic family law for Muslims. In some countries, Muslim groups have taken steps to establish their own Islamic family court or conciliation body. At the extremes, there are strategies aimed at assimilation, on the one hand, and others that focus on segregation, on the other.[65] In Britain, the Islamic Shari'a Council has, without official status, mediated Muslim family affairs since 1982.[66] In Greece and Spain, Islamic family law is directly applicable to Muslims, subject to certain conditions and restrictions. The German Muslim Council, for its part, has issued a declaration on German-Muslim relations,[67] in which the Council affirms

[64] In Romano-Germanic systems based on Roman law, such as in a significant part of Europe and also in Finland, legislation is written and compiled into Collections of Laws and Court Decisions. This written law is the primary source of law. The drafting of the law and the case law have an interpretative effect, but if the application of the law is to be changed, the law itself must be changed, i.e., a new law must be drafted to replace the old one. Religious legal systems, such as Islamic or Jewish law, are not considered comparable to the previous ones, and some legal scholars even dispute completely the nature of their legal system. For further detail, see G. Moursi Badr, 'Islamic Law: Its Relation to Other Legal Systems' (1978) 26/2 *The American Journal of Comparative Law*, (Proceedings of an International Conference on Comparative Law, Salt Lake City, Utah, 24–25 Feb. 1977), pp. 187–98. See also Kouros, *Suomessa asuvien muslimien suhtautumisesta perhe-arvoihin ja perhelainsäädäntöön*, p. 6.

[65] M. Rohe, 'Application of Shari'a rules in Europe – scope and limits' (2004) 44/3 *Die Welt des Islams*.

[66] More precisely, the Muslim community in Britain has been working to apply Islamic family law since the 1970s. After the government rejected a proposal for a separate legal system within the Muslim community, an alternative procedure for resolving Muslim family law disputes was developed: the Islamic Shari'a Council (ISC) has provided professional mediation to Muslim couples since 1982. The ISC applies the rules of Islam, which most Muslims, according to a 1989 survey, also want. For further detail, see M. Boyd, 'Dispute resolution in family law: protecting choice, promoting inclusion', 2004 <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf> (last accessed on 22 Feb 2021).

[67] See especially C. Troll, 'Eine "Islamische Charta" für Deutschland' (An "Islamic Charter" for Germany), *Bundeszentrale für politische Bildung*, 11 Feb 2003 <https://www.bpb.de/veranstaltungen/dokumentation/129993/eine-islamische-charta-fuer-deutschland>. Thesis 11 is of central importance: "Muslims recognize the constitutional and democratic basic order of the Federal Republic of Germany

that Muslims respect German secular laws. In Canada, Islamic family law was to be applied through a conciliation procedure permitted by Canadian law, but the initiative dried up.[68] Due to the Finnish legal system and partly due to the relatively small population of Muslims in Finland, there is no prospect of Greek or Spanish practices being applied in the implementation of the Family Code.

International research has generally shown that Islamic family law is the core of Muslim identity, but this has not received unequivocal support in Finnish research. In a survey of Muslim families (2007),[69] the majority of respondents supported anti-Islamic law (secular law) response options on at least some key questions and a significant proportion on many – and even all – content issues. The very high value of the family, on the other hand, came to the fore, for example, through the fact that divorce was taken very seriously. In Finland, however, opinions contrary to Islamic law did not lead to any of the respondents questioning their identity as Muslims.

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guaranteed by the Basic Law, including party pluralism, the active and passive right of women to vote and freedom of religion".

[68] When the question of the application of Islamic law in conciliation became topical in Canada, it also brought deep concern about the content of Islamic law – even when it concerned an interpretation of the law. According to Faisal and Ahmad Kutty, Canada's current legal system allows parties to civil, family and religious disputes to choose an alternative method of resolving their dispute within a religious or other frame of reference of their choice in a more sensitive and culturally acceptable way. The proliferation of alternative solutions will also greatly benefit the general public, as it will reduce the burden on the judiciary and save tax money. See F. Kutty, 'The Myth and Reality of Shari'a Courts in Canada, A Delayed Opportunity for the Indigenization of Islamic Legal Rulings', 2011 <https://www.researchgate.net/publication/228136261_The_Myth_and_Reality_of_'Shari'a_Courts'_in_Canada_A_Delayed_Opportunity_for_the_Indigenization_of_Islamic_Legal_Rulings>.

[69] For further detail, see Kouros, *Suomessa asuvien muslimien suhtautumisesta perhearvoihin ja perhelainsäädäntöö*, pp. 64–73. A total of 75 Muslims living in Finland responded to this survey, a majority of whom were women (67 %). The nationality of the respondents was not set as a criterion, and thus the respondents were not asked about it, but the survey was presented to Muslims permanently residing in Finland. Thus, the respondents included persons born in Finland with an immigrant background, immigrants who had lived here for a short or long time, and Finns who had converted to Islam. According to the number of respondents, the country/countries of origin were: Iraq 17, Somalia 11, Iran 9, Turkey 4, Afghanistan 3, Indonesia 2. There was one respondent from each of the following countries: Ghana, Kosovo, Ethiopia and India. The rest of the respondents, 25 in number, did not indicate their country of origin.

The mean age of the respondents was 31 years and the standard deviation was 11 years (between 68 % of the respondents). The youngest respondent was 17 years old and the oldest 67 years old. Seven respondents did not indicate their age. With regard to marriage, there was a slight majority of respondents, 57 percent. Both female and male respondents were living in marriage. Five respondents did not declare their marital status. *Ibid.,* [20, 21].

3. *Security and liberty in the light of Islam (Islamophobia)*

a. *Are there any special challenges when it comes to Muslims? Radicalisation and security – comparison with other religious or non-religious challenges to security*

One particular issue that has touched the public and political debate directly or more loosely is related to the immigration of Muslims into Finland –and more concretely, with regard to the possibility of religiously motivated Islamist terrorism amongst asylum seekers who had come to Finland from conflict areas.

In recent years, there have been numerous terrorist incidents with a religious aspect in Belgium, France, Germany and the United Kingdom, all leading to lively public and political debates as to how the EU and its member states should deal with extremism and prevent radicalisation. After the Westminster Bridge attack (22 March 2017) and the London Bridge and Borough Market attacks (3 June 2017), this debate has also been taken up in Finland. In public debate, violent religious extremism is seen in Finland as mainly connected with Islam. In part, this also concerns so-called extreme right-wing groups that hold strong anti-immigration sentiments.

Violent, extremist Islamist thinking is not widespread in Finland, and the risk of organised radical Islamist terrorism is low. However, the possibility of a terrorist attack cannot be completely discounted. The first Islamist terrorist attack to take place in Finland (in Turku) occurred on 20 August 2017, carried out by an individual actor who had been radicalised over a very short period of time. The Muslim community in Finland is very moderate, and on several occasions it has condemned the use of religiously justified violence. However, the Syrian conflict and the Finns who participated in it have reinforced some extremist Islamist thinking in Finland and the threat of terrorist attacks has increased in people's minds. The ideological support from some Muslim circles for terrorist organisations has not directly increased the risk of violence in Finland, but it has increased the fundraising and recruiting of members for foreign terrorist organisations, mainly from the larger cities of southern and western Finland. In addition, suspicions of the presence of terrorist infiltrators among asylum seekers who have come to Finland from conflict areas has slightly increased.[70]

One key issue in the debate over radical Islam has been whether the state should adopt a stricter approach to Islamic radicalisation, i.e., towards individual actors or small groups motivated by radical Islamist propaganda or terrorist organisations encouraging them. The Finnish Security Intelligence Service (Supo) has addressed this public concern by screening around 350 target individuals in Finland.[71] Another area of public debate is the concern over how the various Muslim congregations relate to

[70] For further detail, see M. Kotiranta, 'Securitization of Religious Freedom: Religion and the Limits of State Control in Finland' in: Merilin Kiviorg, *Securitization of Religion and the Limits of State Control in Europe* (Comares editorial, 2020), pp. 199–218.

the right of religious freedom in Finnish society. In other words, do Muslims have a different understanding of what is meant by religious freedom without any reservation in favour of the Quran or Shari'a law? This topic is discussed in greater detail, above, from the perspective of Islamic and Finnish family law (III. *Application of Shari'a and its relationship to fundamental rights and human dignity*).

In Finnish society most policies tackling radicalisation and extremism are non-legislative. The main resource employed is the strengthening of information and knowledge exchange between national and local officials, and between the various networks of professionals. In order to prevent terrorism and eliminate breeding grounds for terrorist acts, measures to eradicate poverty and to enhance good governance and respect for democracy and human rights are necessary. These objectives are pursued by the government's migration policy programme, which was set up on 14 June 2017. The programme also aims at tackling radicalisation by means of an effective migration policy in order to combat extremism and terrorism.

A glance at Finnish legislation gives the impression that legislators do not have any interest in entering into conflict with the constitutional norm of religious freedom while combating extremism and (religiously motivated Muslim) terrorism. The reasons for prohibitions are not related to religious beliefs but only to violations of the criminal law. A new chapter (Chapter 34a) on terrorist offences was added to the Criminal Code in February 2003, and contains provisions on the punishment imposed for offences committed with terroristic intent, the preparation of such offences, directing a terrorist group, facilitating the activities of a terrorist group and the financing of terrorism. The law was updated with supplements on 3 April 2014, 1068/2014 (HE/2014) and 2 June 2016, 919/2016 (HE 93/2016). None of these laws concerns religious beliefs.[72]

b. *The impact of Islamophobia on the commitment of the Finnish State to fundamental rights*

Islamophobia has had no effect on the Finnish state's commitment to fundamental rights. As indicated earlier, Finland has signed and ratified all important and relevant international treaties concerning human rights and freedom of religion.

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[71] According to Supo, the number of targeted individuals has increased, especially in the last few years and by about 80 % since 2012. 'This trend is likely to continue as a consequence of radicalisation and the detection of new networks. In addition to the increase in number, the links between targeted individuals and terrorist activity are also more direct and more serious than before. An increasing number of them have taken part in an armed conflict, expressed willingness to participate in armed activity, or received terrorist training.' See 'Terrorist threat assessment', Finnish Security Intelligence Service, 14 June 2017, <http://www.supo.fi/counterterrorism/terrorism_threat_assessment> (last accessed on 17 Aug 2020).

In Finland the minimum basic rights are determined by international human rights agreements,[73] as interpreted by organisations governed by international treaty such as the European Court of Human Rights (ECtHR) and the UN Human Rights Committee. Both the European Convention on Human Rights (ECHR)[74] and the International Covenant on Civil and Political Rights (ICCPR-agreement) are considered legal norms and may take precedence over national legal norms because of the minimum level of rights stipulated.[75] However, as a matter of Finnish constitutional law, international human rights obligations binding upon Finland feature as a means of protecting minimum standards of rights. Hence, the level of protection of fundamental rights cannot be lower than that provided by international human rights treaties, although this does not prevent Finland from also providing more stringent protection.[76]

The Finnish legislator does not have any interest in entering into a conflict with the constitutional norm of religious freedom. This applies to both churches and all registered communities, such as the Islamic communities. The possible reasons for prohibitions are not related to religious beliefs but only to violations of criminal law.

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[72] For further information, see Kotiranta, 'Securitization of Religious Freedom: Religion and the Limits of State Control in Finland', pp. 199-218.

[73] For greater detail, see M. Scheinin, *Ihmisoikeudet Suomen oikeudessa [Human rights in Finnish law]* (Helsinki, Suomalainen Lakimiesyhdistys, 1991); J. Viljanen, *The European Court of Human Rights as a Developer of the General Doctrines of Human Rights Law* (Tampere, 2003) *Diss.;* I. Boerefijn, 'International human rights in national law' in: Catarina Krause and Martin Scheinin (eds), *International Protection of Human Rights: A Textbook* (Turku, Åbo Akademi University Institute for Human Rights, 2012), pp. 577–99.

[74] See T. Ojanen, 'Räppänä raollaan Eurooppaan – Euroopan unionin perusoikeudet Suomen oikeudessa (Hatch open into Europe – EU fundamental rights in Finnish law)' in: Tuuli Heinonen and Juha Lavapuro (eds), *Oikeuskulttuurin eurooppalaistuminen: Ihmisoikeuksien murroksesta kansainväliseen vuorovaikutukseen* (Helsinki, Suomalainen Lakimiesyhdistys, 2012). See also S. Greer, *The European Convention on Human Rights – Achievements, Problems and Prospects* (Cambridge University Press, 2006); J.-F. Akandji-Kombe, *Human rights handbooks, No. 7. Positive obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights. Council of Europe* (Belgium, 2007).

[75] For further detail, see T. Ojanen and M. Scheinin, 'Kansainväliset ihmisoikeussopimukset ja Suomen perusoikeusjärjestelmä' in: Pekka Hallberg, Heikki Karapuu, Tuomas Ojanen, Martin Scheinin, Kaarlo Tuori and Veli-Pekka Viljanen, *Perusoikeudet [Fundamental rights]* (2nd revised edn, WSOYpro, 2011), pp. 171–95; Ojanen and Scheinin, 'Kansainväliset ihmisoikeussopimukset ja Suomen perusoikeusjärjestelmä'. See also T. Ojanen, 'Perus- ja ihmisoikeudet Euroopan unionissa (Fundamental and human rights in the European Union)' in: Timo Koivurova and Elina Pirjatanniemi, *Ihmisoikeuksien käsikirja* (Helsinki, Tietosanoma, 2013); T. Christiansen and C. Reh, *Constitutionalizing the European Union* (Palgrave, Macmillan, 2009).

[76] For greater detail, see T. Ojanen, *EU-oikeuden perusteita [The Basics of EU law]* (Helsinki, Edita, 2016).

4. *The connection between islamophobia and anti-immigration political movements or the adoption of anti-immigration policies and party manifestos*

A critical migration policy and islamophobia in Finland have been publicly disseminated within political parties only in the case of the Finns Party (Perussuomalaiset) and certain right-wing populist movements.

It should be noted, however, that religion – such as the Islamic faith – also enjoys considerable protection in Finnish criminal and procedural law. As mentioned earlier, religion has emerged alongside other 'racist motives' in the Criminal Code, and hence the punishment can be increased if a person has been motivated by an act of religion or belief.

In very recent years (2012, 2019) there have been two significant cases in Finland related to anti-immigration policies and discriminative motifs. Both cases, the Finns Party and their connection under criminal law, have been discussed above, in Chapter IV (The cases involving Dr Halla-Aho and Mr Tynkkynen).

5. *Endeavours of Finnish Muslims to understand interreligious dialogue in Europe*

The endeavours of Finnish Muslims to achieve understanding and interfaith dialogue in Europe remain quite limited. As stated, the main actor has been *The Islamic Council of Finland* (Suomen Islamilainen Neuvosto, SINE), which was established in November 2006 and which has acted as a liaison body with the authorities. These goals have also been shared by the Muslim community, although the communities and organisations outside SINE have founded an alternative Islamic umbrella organisation that has decided to use the old name of the Islamic Federation of Finland.

Some Muslim organisations also actively participate in inter-religious dialogues. *The Islamic Council of Finland* is part of the Federation of Islamic Organisations in Europe and also has ties to the Muslim World League. The FIOE is considered to be the European organisation representing the Muslim Brotherhood, but the extent of the progress of such endeavours remains unknown, since no detailed public information has been made available.

VI. Conclusions: Main preferences of the Finnish State concerning the model of co-existence between the secular state and Islam – Critique

In terms of the church-state systems prevalent in Europe, Finland differs from most of the other EU countries. There is no strict separation between the secular state and the churches and religious communities (such as the Muslim communities) to the extent to which the state and the religious communities would respect the positionality and independence of their opposite numbers.

However, the legal basis of the Finnish system of the existing church-state relationship is structured by several basic principles, amongst which *neutrality, tolerance, parity,* and *pluralism* may be regarded, from a legal point of view, as the most prevalent. Openness to religion on the basis of fundamantal rights is a dominant feature of the system.

Neutrality means non-intervention, i.e., the state is not allowed to undertake any decisive action in the affairs of religious communities. In the Finnish Constitution there is no comprehensive act related to this issue that would explicitly state that 'Every religious community regulates and administers its own affairs independently within the framework of the general law that applies to all', as is case, for example, in the German *Grundgesetz* or Constitution.[77]

Article 11 section 2 of the Finnish Constitution states only that 'Freedom of religion and conscience entails the right to profess and practise a religion, the right to express one's convictions and the right to be a member of or decline to be a member of a religious community'.

Neutrality also includes *positive neutrality*. This concept obligates the state to actively support religion (to give purpose) and to provide the space that religion needs in order to flourish. It makes it possible, for example, for the state to include religious needs in planning law. This is clearly observable in the Religious Freedom Act (2003), which reads:

> 'The purpose of the registered religious community is to organise and support the individual, communal, and public activities of the recognition and practice of religion, based on the creed, the scriptures, or other well-established foundations of action.
> The community must fulfil its purpose with respect for fundamental and human rights.
> The purpose of the community is not to seek economic profit or otherwise to organise economic activities. The community cannot organise activities for which an association under the Association Act (503/1989) cannot be established or for which the association can only be founded subject to authorisation.'

This kind of positive neutrality prevails throughout the official discourses of the state authorities and not solely in the law. It is actively supported, with respect for both fundamental and human rights, and also implemented by the courts and state authorities.

The principle of *tolerance* obliges all state authorities to respect the various religious and non-religious confessions and beliefs and at the same time to create an atmosphere of positive tolerance in society, at both State and individual levels.

[77] G. Robbers, 'Germany' in: Rik Torfs (ed), *International Encyclopaedia of Laws: Religion* (Alphen aan den Rijn, Wolters Kluwer, 2013), p. 61.

Parity means the obligation to treat all religious communities equally. In the Finnish Constitution there is no explicit differentiation in the ways in which the state should treat the various religious communities.

Equal treatment is, nevertheless, a key feature in the Religious Freedom Act (453/2003), and it is closely linked to the prohibition of discrimination based on religion or belief contained in Article 6 (paragraphs 1 and 2) of the Constitution.[78]

In the Finnish system, it follows, *equal treatment finds its critical point in the case of the two national* – Lutheran and Orthodox – *churches* that have, in the course of the country's history, gained a special position and different status *under public law* compared with the other religious communities. This status is also guaranteed through a constitutional differentiation in their legal status, i.e., by Article 76, which maintains the *status quo* concerning the Evangelical Lutheran Church. In parallel with the Lutheran Church, the legal status of the Orthodox Church in relation to the state has remained as it was previously in the Orthodox Church Law (985/2006).

Regarding *pluralism*, the Religious Freedom Act, passed in 2003, deals with various issues related to state and church, and aims to make all Christian churches and other religious communities more equal in society. In addition, the dominant status of the Evangelical Lutheran Church of Finland has been reduced by this law, which has created a parity that has to provide an adequate basis for dealing with the social phenomena affecting the whole range of religious communities.

Despite the multitude of religions, confessions, and non-confessional concepts of life, every human being in Finland has –the full constitutional freedom of religion or belief.

Thus, in general, there is no reason for any favouring or disfavouring state action, since adherence to a particular religion cannot, by law, exist as such.

A new challenge has, however, become visible with respect to the integration of the Muslim population, with their specific needs, where, at the same time, there is a need to support those Islamic communities and associations that function as a liaison body with the authorities.

The most important single problem area is Islamic Family Law and its scope in Finland. According to a study made by the Finnish League for Human Rights (*Ihmisoikeusliitto ry*, Kouros 2007), family relationships, and especially childrearing, are the themes that Muslims living in Finland believe face the most problems and

[78] (1) 'Everyone is equal before the law'. The word 'everyone' in para 1 indicates that freedom of religion is the right of every individual within the Finnish legal system, regardless of nationality.

(2) 'No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, *religion*, conviction, opinion, health, disability or other reason that concerns his or her person'. This prohibition, among other matters, is accompanied by an obligation on the part of the public authorities to treat all religious communities and worldviews in a balanced manner.

contradictions.[79] Numerous cases of polygamy and forced marriages are also evident. In recent years cases of forced marriages have indeed occurred in Finland. According to a study prepared by the Institute of Criminology and Legal Policy 2017, there are no exact figures related to the number of forced marriages, but it is clear that they do happen. In practice, such marriages are conducted, for example, by exerting pressure on an under-age girl living in Finland to be sent abroad to marry a man who may have been completely unknown to the girl previously. This may happen, for example, when a girl travels to visit the home-country of her family.[80]

Forced marriage is defined as a violation of human rights in a number of international treaties, including the Istanbul Convention on the Prevention of Domestic Violence. Finnish law on the fostering of causing forced marriages can currently be punished as trafficking in human beings or as coercion. Finnish law does not, however, recognise a separate criminal offence of forced marriage, unlike, for example, in Swedish and Norwegian law.

The Council of Europe and various human rights organisations have criticised Finland's current legislation as insufficient. Most recently, in early September 2019 the Council of Europe's Expert Group on Violence against Women and Domestic Violence (GREVIO) strongly recommended in its report that Finland should consider separate criminalisation of forced marriages,[81] a recommendation that the Ministry of Justice is currently investigating. In addition, initial steps have been taken towards implementing a more comprehensive reform of the Finnish Criminal Code in order to base the criminal offence of rape on the absence of consent rather than the use of force.

The realisation of religious freedom and cultural rights and those that will guarantee the realisation of fundamental and human rights, even for vulnerable individuals, is paramount here. Improving the position of Muslim women in both Muslim countries and Finland without reference to the Islamic religion as such would be prohibited; highlighting, in particular, the positive aspects of Qur'an, which offers rules emphasising gender equality, contributes to the establishment and legitimacy of practices that do not violate women's rights.

In the Finnish context it is encouraging that, according to a study conducted by the Finnish League for Human Rights (2007), it was hoped that family life would

[79] For further information, see Kouros, *Suomessa asuvien muslimien suhtautumisesta perhearvoihin ja perhelainsäädäntöön,* pp. 89–93.

[80] For further information on the types of forced marriage detected in Finland, see 'Forced marriages', *Ihmiskauppa* <http://www.ihmiskauppa.fi/en/human_trafficking/forms_of_human_trafficking/forced_marriages>.

[81] See Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), *Baseline Evaluation Report Finland*, 2019 <https://rm.coe.int/grevio-report-on-finland/168097129d>.

be, above all, peaceful, balanced and respectful among Muslim respondents. These values are common to Finnish and Islamic culture. A common set of values based on a balanced and respectful attitude can also create a bridge between Finnish law and Islamic law, although there are no preconditions *per se* for the application of Shari'a law in Finland.[82]

[82] All websites last accessed on 22 Sept 2021.

ISLAM AND HUMAN RIGHTS IN FRANCE

Anne Fornerod[1]

I. Introduction

Historically, the presence of Muslims on French territory dates back to the Middle Ages, mostly located in Southern France.[2] The 19th century colonial period concerning the Maghreb countries represents a critical period, whose social, political and legal consequences are still tangible today. Later, the waves of immigration during the 20th century increased the Muslim presence in metropolitan France[3]. Although history and reality are more complex,[4] and the immigration of 'Muslim' faith people is still an ongoing process, it is generally considered that the 1970s were marked by a significant moment of lasting immigration of people from Muslim countries and especially from former colonies.

In France, statistics on religious affiliation are legally not possible. However, various studies provide – varying – data[5] and according to the Home office, between

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[2] See H. Laurens, J. Tolan and G. Veinstein, *L'Europe et l'islam, quinze siècles d'histoire* (Paris, Odile Jacob, 2009); B. Étienne, *La France et l'Islam* (Paris, Hachette, 1989).

[3] About Islam in the Overseas territories of France (French-administered territories outside Europe, mostly remains of the French colonial empire), see: 'Rapport d'information fait au nom de la mission d'information sur l'organisation, la place et le financement de l'Islam en France et de ses lieux de culte', no 757, *Sénat*, 5 July 2016, p. 25 ff <http://www.senat.fr/rap/r15-757/r15-7571.pdf>. The situation in Mayotte is noteworthy: it became an overseas department in 2011 and Muslims are estimated to form nearly 95% of the Mahoran population.

[4] For details and nuances on this period, see, among many other references, G. Noiriel, *Le creuset français. Histoire de l'immigration (XIXe-XXe siècle)* (Paris éditions du Seuil, 1988); M. Cohen, 'Regroupement familial : l'exception algérienne (1962-1976)' (2012) 95/4 *Plein droit*, pp. 19-22.

[5] According to a 2016 Senate report, 'the differences in approach on this subject explain the sometimes substantial differences between the estimates put forward, which vary widely between 4 and

2.1 and 5 million people claim to be Muslims, while there are about 2 million practising Muslims.[6] There are approximately 2,500 mosques, mainly located in large urban areas.[7]

French Islam is characterised by the diversity of geographical origin of its followers (mainly from the Maghreb, sub-Saharan Africa and Turkey), which has an influence on its organisation and institutional recognition. At first sight, such a statement would make any further investigation of relations between Islam and French law seem superfluous. In other words, would the challenge to integrate the now second-ranking religion in France into the legal framework be achieved?

It has, however, also been argued that the public authorities' attitude towards Islam relies de facto on management and includes 'important areas of legal uncertainty, or areas outside law'.[8] With regard to the years of focus on Islam-related issues in media, social and political spheres, the question arises as to how these issues are addressed in the legal field. It is hardly conceivable that a religion—with institutions and practices—would stand apart from and outside the legal framework designed for religious groups and practices. The question is then not so much to establish whether but how and where the law applicable to Islam shows variations and differences, in comparison with other faith groups.

II. Institutional Recognition by the State

A. Legal form of Islamic communities

Since the Act of 9 December 1905, the French legal system of relations between the State and religious communities has been characterised by separation. The state does not recognise any religious groups, which belong to private law. However, the 1905 legislation introduces a specific type of association: the religious association

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7 million people. This amplitude simply reflects the fact that the estimate of the number of Muslims in France does not describe the same reality depending on whether it concerns only practicing Muslims or sociological Muslims." 'Rapport d'information fait au nom de la mission d'information sur l'organisation, la place et le financement de l'Islam en France et de ses lieux de culte', *Sénat.*

6 'Rapport d'information fait au nom de la délégation aux collectivités territoriales et à la décentralisation sur le financement des lieux de culte', no 345, *Sénat*, 17 March 2015, <http://www.senat.fr/rap/r14-345/r14-3451.pdf>, p. 24. According to a 2016 Pew Research Centre study, the estimated size of Muslim population in France amounts to 8, 8% of the population that is nearly 6 million persons: 'Europe's Growing Muslim Population. Muslims are projected to increase as a share of Europe's population – even with no future migration', *Pew Research Centre*, 29 Nov 2021 <https://www.pewforum.org/2017/11/29/europes-growing-muslim-population/>.

7 Data from the Sénat, 'Rapport d' information fait au nom de la délégation aux collectivités territoriales et à la décentralisation sur le financement des lieux de culte', p. 25.

8 F. Messner, P.-H. Prélot and J.-M. Woehrling, *Traité de droit français des religions* (Paris, Litec, 2013, no 696).

(*association cultuelle*), which is above all characterised by its exclusively religious purpose, understood as relating to worship only (Article 19 of the1905 Act). In general, due, among others, to the enlarged role played by the community in Muslims' life, including social and cultural activities, Islamic communities do not meet this legal condition and rely on the 1901 Act, that is of a general regime of associations.[9] The restrictive purpose of religious associations sometimes leads Islamic groups to creating both types of associations in order to give a legal basis to all the activities carried out by the community.[10]

The law reinforcing the respect of the principles of the republic of 24 August 2021 modified these provisions by now demanding that, in parallel with the usual declaration provided for in Article 5 of the law of 1 July 1901 on the contract of association, a religious group declares its religious status to the representative of the State in the county (*département*). Yet, 'the representative of the State in the department may, within two months of the declaration, oppose the association benefiting from the advantages' reserved to religious associations' in case 'the association does not meet or no longer meets the conditions laid down in articles 18 and 19 of this law or for a reason of public order' (Article 19-1 of the 1905 Act).

B. **Financing Islamic communities**

In addition to private sources of funding (internal and external donations), Islamic communities may in some cases receive public funding.

Concerning the former, funding from foreign states in France represents only a minor part of the total funding for Islamic communities, which is mostly provided by donations from the faithful. Although there is no rule preventing Islamic communities from receiving support from foreign states, the law 'reinforcing the respect of republican principles' of 24 August 2021 aims to better control them in order to limit the alleged ideological influence of these states on the organisation of these communities (Article 19-3 of the 1905 Act).

The rule governing the public financing of Islamic communities lies in Article 2 of the 1905 Act on the separation of Church and State, which prohibits state support for faith groups. Moreover, Article 19 of the same Act specifically prohibits public subsidies going to religious associations.

There are, however, several exceptions to this prohibition. A 'noticeable exception appears in the 1905 Act itself in Article 2, which pertains to chaplaincy in various

[9] 'Rapport d'information fait au nom de la délégation aux collectivités territoriales et à la décentralisation sur le financement des lieux de culte', *Sénat*, p. 27.

[10] See 'Rapport d'information fait au nom de la délégation aux collectivités territoriales et à la décentralisation sur le financement des lieux de culte', *Sénat*, pp. 25 and 53.

public services',[11] namely in schools,[12] prisons, hospitals and the army. In addition, state support, which is almost exclusively indirect, consists in tax exemptions – but for religious associations only – and in exceptions to Articles 2 and 19 regarding the building of places of worship (see below).

C. Institutional relationships between Islamic communities and the Government

The French Council for the Muslim Faith (*Conseil Français du Culte Musulman*, hereinafter CFCM) is the institutionalised representative body of Islam in France. It receives political, not legal, recognition,[13] but, due to the growing importance of the Islamic community in France, it meets the need 'for public authorities to have a Muslim representative body likely to address and discuss the main aspects of Muslim religious practice.'[14] The creation of the CFCM and of the various Regional Councils for the Muslim Faith (*Conseils Régionaux du Culte Musulman*, hereinafter CRCMs) follows a years' long complex process initiated in 1990 by the then Minister of Home Affairs to set up a unique representative body for Islam.[15] Since 2003, their creation and the renewal of their members are based on elections within local communities. The CFCM brings together the CRCMs, several federations of associations managing places of worship and associations managing places of worship directly affiliated to the CFCM. The CFCM is, however, regularly beset by internal disagreements and its representativeness is often questioned by Muslims themselves.

In addition, a specific structure is noteworthy:

> 'the operation of the foundation for Islamic charities (*Fondation des œuvres de l'Islam de France*) was created by the decree of 25 July 2005 under the common legal status of public interest organisation with the aim of improving conditions for religious practice and providing a framework for fundraising and management.'[16]

Like the CFCM and the CRCMS, it is however regularly subject to internal tensions.

[11] A. Fornerod, *Annotated Legal Documents on Islam in Europe: France* (Leiden, Brill, 2016), p. 18.

[12] Chaplaincies in State-run schools are, however, overwhelmingly Catholic.

[13] See M. Zeghal, 'La constitution du Conseil Français du Culte Musulman : reconnaissance politique d'un Islam français?' (2005) 129 *Archives de sciences sociales des religions* pp. 97-113 <http://assr.revues.org/1113>.

[14] Fornerod, *Annotated Legal Documents on Islam in Europe: France*, p. 9.

[15] See, among others, A. Boyer, *Le droit des religions en France* (Paris, PUF, 1993), p. 229.

[16] Fornerod, *Annotated Legal Documents on Islam in Europe: France*, p. 11; See 'Rapport d' information fait au nom de la délégation aux collectivités territoriales et à la decentralisation sur le financement des lieux de culte', *Sénat*, pp. 25 and 53.

The Government has regularly been monitoring the structuration of Islam representation. In early 2021, it oversaw the drafting by the CFCM of a *Charter of principles for Islam in France*, as a step prior to the creation of a national council for imams, intended to train imams.[17] In a context marked by several years of terrorism, this initiative, like the above-mentioned 'separatisms' law of 2021, aims to distance Islamic communities from the influence of foreign states. While the National council for imams started drafting this in March 2021, a section of the members of the CFCM refused to sign the *Charter*, triggering a deep crisis.

III. Application of Shari'a

While the application of Shari'a rules in state law is quite limited, courts handle religiously-based personal law in international private law cases, be it for children or women.

A. Children

In general, religion and children falls within parental authority whose aim is – or should be – the best interests of the child (Article 371-1 of the Civil Code). It expressly appears only in Article 1200 of the Civil Procedure Code, which provides that while implementing educational assistance measures decided by the judge in charge of children's affairs, the religious or philosophical convictions of the minor or of their family must be taken into consideration. Moreover, courts occasionally refer to Article 14 of the Convention on the Rights of the Child, which specifically confirms the right of the child to freedom of thought, conscience and religion. The issue of religious education of children generally relates to parents' divorce procedure when there is a dispute over choices made by one of them. Case law, however, overwhelmingly involves parents – and children – belonging to a Christian faith and to cults.

The main issue in private international law concerns the recognition of *kafala*. In French law, it is defined as a commitment to take care of a minor without creating parentage. This is governed by Articles 370-3 to 370-5 of the Civil Code, which were added in 2001 in order to take into account foreign legislation, such as Algerian and Moroccan laws. Article 370-3 provides that adoption is impossible when it is prohibited by foreign law, unless the child was born and lives in France. In addition, the administrative memo from the Ministry of Justice on the legal effects of the legal

[17] See F. Dhume and F. Lorcerie, 'La Charte des principes pour l'Islam de France interroge', *The conversation*, 18 Feb 2021 <https://theconversation.com/la-charte-des-principes-pour-lislam-de-france-interroge-155309>.

placement of children of 22 October 2014 provides that a *kafala* lawfully granted abroad directly enters the French legal order.

B. **Marriage and divorce**

French law regulates civil marriage only, and it must be conducted before a religious union. No legal effect is recognised for a religious marriage. Article 433-21 of the Penal Code imposes a six-month prison sentence and a fine 0f 7,500 euros on religious leaders who hold a religious marriage before a civil one. In addition, bigamy is prohibited under Article 147 of the Civil Code, which makes it impossible to marry again before a first marriage is dissolved.

Foreign legislation determined by personal religious status will have effects in the domestic legal order, provided that it does not run counter to the national *ordre public*. As an example, Article 4 of the French-Moroccan convention on the status of persons and family of 27 May 1983 explicitly states that the law of one of the states may be set aside only if it is incompatible with *ordre public.*[18] This, in general, limits the applicability of foreign law based on personal status.

Regarding marriage, it derives from the old but still valid *Caraslanis* case (Court of Cassation, 22 June 1955), where the husband was Greek orthodox that a civil marriage of foreigners contracted in France is valid, provided that it abides by French formal rules, irrespective of the foreign law requirements regarding religious marriage.

Substantive legal rules on marriage (like age or consent to marriage) are determined by Article 202-1 of the Civil Code, which provides that 'the qualities and conditions required to be able to marry are governed, for each of the spouses, by their personal law.' Again, this applies provided that foreign law in this field does not contradict French *ordre public*.

Moreover, polygamous marriage involving a French national contradicts *ordre public* and cannot be recognised in the French legal order, but a polygamous marriage celebrated abroad is valid when it is authorised by the personal law of both spouses.

As with marriage, divorce follows rules involving conflict of law in cases with an international element. The issue of divorce in private international law leads to consider that of repudiation (*talaq*), considered to be contrary to *ordre public*.

The position of the Court of Cassation consists in refusing to give effect in France to foreign judgments recognising repudiation, as it considers that the wife is deprived of a right equivalent to the husband's right to dissolve the marriage (Court of Cassation, 17 February 2004, no 01-11549).

[18] Convention entre la République Francaise et le Royaume du Maroc relative au statut des personnes et de la famille et à la coopération judiciaire, <https://www.diplomatie.gouv.fr/IMG/pdf/Convention_Maroc.pdf>.

IV. Discrimination

Pursuant to the Penal Code which provides a general definition of discrimination:

> 'any distinction made between persons on the basis of their origin, sex, family status, pregnancy, physical appearance, surname, place of residence, state of health, disability, genetic characteristics, morals, sexual orientation or identity, age, political opinions, trade union activities, membership or non-membership, whether real or assumed, of a particular ethnic group, nation, race or religion, shall constitute discrimination. (Article 225-1)'.

Various branches of law refer to the principle of non-discrimination – or the principle of equality –, ranging from labour law in the first place to different rules applying to the daily life of Muslims.

As regards the issue of discrimination in the workplace, a core principle lies in the currently in-force preamble to the Constitution of 1946 which declares:

> 'Everyone has the duty to work and the right to obtain employment. No one may be prejudiced in his or her work or employment because of his or her origins, opinions or beliefs.'

The principle of non-discrimination on grounds of religion apply to both the private and the public sectors. Regarding the latter, the Act of 13 July 1983 on the rights and duties of civil servants protects civil servants' freedom of thought and the principle of equal access to public employment. This Act consequently prohibits distinctions based on, among others, religious opinion (Council of State, 10 April 2009, *El Haddioui,* no 311888).

In the employment private sector, the principle of non-discrimination is entrenched in the Labour Code (Article L. 1132-1). Nevertheless, Article L. 1133-1, implementing EU Directive 2000/78, makes difference in treatment possible where it 'constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.' For example, the dismissal of a Muslim employee, whose clothing was held incompatible with the image of the company and who was in regular contact with customers (in a women's fashion store), is justified (Court of appeal of Saint-Denis de la Réunion, 9 September 1997, *Société Milhac Nord v. Meraly*, no 1997-930234). Moreover, as of 2016, a company's internal regulations:

> 'may contain provisions enshrining the principle of neutrality and restricting the expression of employees' beliefs if these restrictions are justified by the exercise of other fundamental rights and freedoms or by the needs efficient running of the business and if they are proportionate to the aim pursued. (Article L. 1321-2-1 Labour code).'

These provisions should be interpreted in the light of subsequent case law. The Court of cassation, following the decision of the Court of Justice of the European

Union (14 March 2017, *Asma Bougnaoui et Association de défense des droits de l'homme (ADDH) contre Micropole SA*, Affaire C-188/15), held that:

> 'the prohibition of the employee to wear an Islamic headscarf in her contacts with customers was only the result of an oral order given to an employee and aimed at a specific religious sign, which resulted in the existence of discrimination directly based on religious beliefs (22 November 2017, no 13-19.855).'[19]

Outside the workplace, case law covering various domains shows that Muslims are likely to face discrimination – or to feel discriminated against. Courts rely on the general principle of equality[20] or on a specific text prohibiting distinction based on religion.[21]

Besides the usual case law, decisions by the protection of rights body, the *Défenseurs des droits*[22] are worth noting as they highlight various potentially discriminatory situations. For example, it examined the prohibition of a woman from holding a stand at a Christmas market organised by a municipality because she was wearing a veil[23] and it received an application about discrimination against people of the Muslim faith due to the lack of halal meals in some public hospitals.[24]

V. Exercise of religious freedom and other cultural rights

A. Legal framework for the establishment and functioning of mosques

In addition to some general rules in urban planning legislation, the legal framework for the establishment and functioning of mosques is still – indirectly – determined by the 1905 Act.

On the one hand, any building project should abide by general urban planning legislation. For example, pursuant to Article L. 421-1 of the urban planning Code, a

[19] See also Court of Cassation, 14 April 2021, no 19-24.079: in the absence of a neutrality clause in the company's internal regulations, the prohibition on the employee – a saleswoman – wearing an Islamic headscarf constituted discrimination based directly on her religious beliefs.

[20] For example, as a religious community, Muslims are protected against discrimination through the principle of equality in access to places of worship (see Council of State, 19 July 2011, no 313518, *Ville de Montpellier*).

[21] It is, for example, the case of the law pertaining to funerals. Pursuant to Articles L. 2213-7, L. 2213-9 and L. 2213-13 of the General Code for Local Government, the mayor, who is in charge of ensuring funerals, cannot make any distinction or recommendation based on the belief or religion of the deceased.

[22] It replaced the former equality body the HALDE (*Haute Autorité de Lutte contre les Discriminations et pour l'Égalité*) in 2011.

[23] Décision 2020-152 du 10 juillet 2020 relative à l'interdiction faite à une femme de tenir un stand au marché de Noël organisé par une commune en raison du port d'un voile.

[24] Décision 2019-148 du 4 juillet 2019 portant recommandation relative à la différence de traitement entre patients de confessions différentes en raison de l'absence de distribution de repas halal dans certains hôpitaux publics.

building permit should be issued in the case of a mosque or prayer house project. Such a project should also comply with local town planning (Article L. 123-1 of the urban planning Code), which includes, among other things, rules on the height of buildings or parking areas (Article L. 123-1-2 of the urban planning Code). Moreover, places of worship are included in the category of buildings open to the public (*Établissements recevant du public*, ERP) and should accordingly abide by safety rules regarding fire risk (administrative order of 25 June 1980).

On the other hand, the establishment and functioning of mosques is in part determined by the 1905 Act which provides at the same time that the Republic 'guarantees the free exercise of religion' (Article 1) and that public funding for religious groups is prohibited (Article 2). Moreover, subsidies are provided to religious associations only for repair on their places of worship, excluding their construction. This latent contradiction between Article 1 and the others is compounded by a situation of de facto inequality between religious groups as regards places of worship ownership. Indeed, for historical reasons,[25] the publicly-owned Catholic Church's buildings which date from before 1905 are maintained with public funds and due to their older settlement, Protestant and Jewish denominations inherited a larger estate than other more recently arrived faith groups. Over time, the scheme put in place in 1905 led to a discriminatory situation with regard to other religious groups in need of places of worship, notably Islam.

Specific legislation was then passed with the aim to facilitate the building of new places of worship, and benefits mosques and Muslim prayer houses. The Act of 29 July 1961 (now Articles L. 2252-4 and L. 3231-5 of the General Code of Local Government) allows cities (*communes*) and counties (*départements*) to guarantee loans contracted by religious groups (religious associations only) for the funding of the building of places of worship in. In 2006, the emphyteutic lease mechanism (Article L. 451-1 of the Rural Code) was expressly extended 'with the view to assign a building of worship open to public to a religious association' (Article L. 1311-2 of the General Code of Local Government).

B. **Prohibition of Islamic rituals (slaughtering and halal food)**

Ritual slaughtering is protected in French law in the name of freedom of religion (Council of State, 5 July 2013, no 361441, *Œuvre d'assistance aux bêtes d'abattoirs*). It is regulated by the Rural and Maritime Fishing Code, which provides an exception to the obligation to stun animals before slaughter where stunning turns out to be

[25] See A. Fornerod, 'The places of worship in France and the public/private divide' in: Silvio Ferrari and Sabrina Pastorelli (eds), *Religion in public spaces. A European perspective* (Farnham, Ashgate, 2012), pp. 323-36.

incompatible with ritual slaughter requirements (Article R. 214-70). However, this exception is subject to strict conditions regarding slaughterhouses, and persons or bodies entitled to practise ritual slaughtering. Among other things, the slaughterhouse should be able to ascertain that ritual slaughter is required by commercial needs. Concerning the latter, individuals carrying out ritual slaughter must be authorised by religious authorities and previously approved by the Minister of Agriculture, upon recommendation of the Minister of Home Affairs (see ECHR, GC, 27 June 2000, *Cha'are Shalom Ve Tsedek v. France,* case, App no 27417/95).

Regulation of Islamic food is twofold. First, due to the principle of state neutrality, public authorities cannot

> 'define the criteria of *halal* food, which are established by religious groups themselves. However, using the *halal* label when the products do not comply with this definition amounts to misleading commercial practice in the sense of Article L. 121-1-1 of the Consumer Code.'[26]

Second, Islamic food amounts to an issue for public authorities when they face public services users' claims. This is the case in particular for prisoners and pupils. Regarding the former, the Code of Criminal Procedure provides that, where possible, food should be made available which meets philosophical or religious requirements (Article R. 57-6-18). It can therefore be 'refused to regularly distribute menus composed of 'halal' meat to detainees of the Muslim faith' when

> 'the administration provides all detainees with pork-free menus as well as vegetarian menus, and detainees can ask to be provided, on the occasion of the main religious holidays, with menus in accordance with the requirements of their religion' (Council of State, 10 February 2016, no 385929).

Catering in public schools is regulated in the same vein: as it is not a compulsory public service, providing meals compatible with religious requirements is therefore neither a constraint nor prohibited by the principle of laïcité (Council of State, 11 December 2020, no 426483, Commune de Châlon-sur-Saône). In practice, public schools generally meet such claims by providing replacement meals (without pork).[27]

C. **Education of Muslim pupils**

In public schools, there is no religious education course. The school attendance obligation of pupils (Article L. 511-1 of the Education code) provides no express

[26] Fornerod, *Annotated Legal Documents on Islam in Europe: France*, p. 132.

[27] In an official report issued in March 2013 on state schools catering in general, it was stated that religious claims relating to food do not amount to a priority issue. Report of the *Défenseurs des droits* <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/rapport_-_legal_acces_des_enfants_a_la_cantine_de_lecole_primaire_0.pdf>, p. 14.

exception for religious reasons (Article L. 131-8 of the Education code). This was ruled by case law: such absences are possible provided that they are compatible with the performance of the tasks inherent in their studies and with respect for public order in the school (Council of State, 14 April 1995, no 125148, Consistoire central des israëlites de France). In the case of Muslim pupils who refused to attend sports lessons, it was held that the wearing of the Islamic veil for religious reasons and preventing them from attending sports courses did not amount to a legitimate reason for avoiding the school attendance requirement (Council of State, 27 November 1996, no 170209, Époux Wissaadane et Époux Chedouane).

D. Religious education of Muslims (in private or public institutions and non-formal education)

Apart from religious education courses provided in the few Muslim private schools, religious education of Muslims falls within the initiative and responsibility of families, children being generally given this education within Islamic communities.

VI. Free speech and Islam

Although French law does not punish blasphemy,[28] various criminal offences potentially bring limits to freedom of speech on religious issues. Incitement to religious discrimination or religious hatred or violence, defamation of religions and insult are regulated by the old but currently in force and regularly revised Freedom of the Press Act of 29 July 1881. This Act provides for a wide range of media, on which offences are based, including 'printed text', 'drawing', 'image' or electronic media (Article 23), while Article 24 criminalises incitement to discrimination, hatred or violence against a person or group of people because of their origin or their belonging or non-belonging to, among others, a religion. The most high-profile case followed the publication of several cartoons representing Muhammad by the weekly newspaper *Charlie Hebdo* – and previously published on 30 September 2005 by the Danish newspaper Jyllands-Posten. Several associations decided to sue the newspaper on the basis of Article 33 of the 1881 Act which provides that 'any offensive expression, contemptuous term or invective, which does not contain the imputation of any fact, is an insult.' The Court eventually held that the cartoon did not constitute an insult justifying, in a democratic society, a limitation of the free exercise of freedom of speech (First Instance Court of Paris, 22 March 2007, no 2007-327959).

[28] 'Législation comparée. La répression du blasphème', *Sénat,* Jan 2016 <https://www.senat.fr/lc/lc262/lc262.pdf>.

VII. Challenges posed by Islam

A. The public/private facets of religious manifestations

At first sight, the public/private divide relating to the expression of religious beliefs has sharpened under the influence of Islam. This is most probably due to the issue of the Islamic headscarf, which has become a regular topic of debate from the early 1990's, culminating in the passing of the well-known 2004 Act, prohibiting the wearing in public schools of symbols or clothing denoting religious adherence, and the 2010 Act which prohibits the concealing of the face in a public space ('the background to the provision makes very clear that the full-face veil worn by some Muslim women was its main target').[29] Muslim dress code has been for years the main topic of discussion when religion in a public space was the issue. It is not yet over as was shown in the burkini affair in 2016 and again in June 2022.[30] Still, upon closer examination, cases involving Muslim practices reveal an already existing tendency to relegate the expression of religious beliefs to the private sphere. The French case law dealt with the crucifix in various cases, but it was the 'nativity scene' judgment which established the applicable rules. The debate was no less intense when it came to the installation of nativity scenes in the public space. Notably, in a ruling of November 2016, the Council of State set the conditions for lawful nativity scenes.[31] It had to decide whether a Christmas crib is a religious sign or emblem whose installation in a public place is forbidden under the Act of 9 December 1905.[32]

The singularity of Islam, however, becomes palpable when it comes to handling security in the context of fight against terrorism.

[29] L. Vickers, 'S.A.S. v France: The French Burqa Ban and Religious Freedom', *E-INTERNATIONAL RELATIONS*, 10 Sep 2014 <http://www.e-ir.info/2014/09/10/sas-v-france-the-french-burqa-ban-and-religious-freedom/>.

[30] Council of State, 26 Aug 2016, no 402742, 402777, *Ligue des droits de l'homme et autres - Association de défense des droits de l'homme collectif contre l'islamophobie en France*, and, more recently, Council of State, 21 June 2022, no 464648, *Commune de Grenoble*.

[31] Idem: Council of State, Ass., 9 Nov 2016, no 395122, *Fédération départementale des libres penseurs de Seine-et-Marne.* The Nativity scene is not, according to this judgement, necessarily a religious emblem: 'a Nativity scene is a representation subject to a plurality of meanings.' It certainly has a 'religious character' for it illustrates 'a scene which makes part of Christian iconography.' But, it is 'also an element part and party to the decorations and illustrations which traditionally accompany, without a particular religious significance, festivals of the winter solstice.' Nativity scenes in institutional public spaces should first and foremost be considered illegal unless they have a 'cultural, artistic or festive character', which four criteria will determine: the context of an installation, its particular conditions, its existence or lack of local usage and finally the location chosen for the Nativity scene's installation.

[32] More precisely, Art 28 of the 1905 Act provides that 'It is forbidden, in the future, to erect or affix any religious sign or emblem on public monuments or in any public place whatsoever, with the exception of buildings used for worship, burial grounds in cemeteries, funerary monuments, as well as museums or exhibitions.'

B. Security and liberty in the light of Islam(ophobia)

The link between Islam and the challenge of balance between security and liberty has been undeniably marked by the terrorist attacks of November 2015 and the counter-radicalisation measures passed thereafter. The law of 20 November 2015 was passed to amend the 1955 Act establishing a state of emergency. Several types of measures can be taken on this basis : administrative searches, including searches of places of worship, house arrests and the closure of meeting places. In order to justify such measures, the intelligence services and then the administrative judge, scrutinise various elements such as, in the first place, relations with people suspected of terrorist acts or radicalisation, the dissemination of messages calling for jihad or support for terrorism on social networks, or, in particular, the attending of associations and mosques promoting radical Islam.

The end of the state of emergency does not, however, mean the disappearance of those measures. They are no longer based on the Act of 3 April 1955, but Act No 2017-1510 of 30 October 2017, reinforcing internal security and the fight against terrorism, contains various provisions likely to allow the continued surveillance of individuals, places of worship and associations. For example, pursuant to the provisions of Article L. 227-1 of the Internal Security Code, a prefectoral decree ordered the closure of the Marseilles mosque As Sounna, on the grounds that 'this place disseminates ideas inciting hatred and discrimination contrary to republican principles, likely to provoke the committing of acts of terrorism.'[33]

VIII. Conclusions

At first sight, the French system of relationships between Church and State meets the conditions likely to ensure a – satisfying – place for Islam, through the core importance of the constitutional principle of laïcité to handle religious issues. However, in his 2018 report, the Special Rapporteur on Freedom of Religion or Belief of the United Nations warns 'against the use of "doctrinal secularism", which risks reducing the space for religious or belief pluralism in practice.'[34] The fact is, for years now, laïcité has been promoted – and enshrined in law – not only as a legal principle implying the neutrality of the State and equality between faith groups, but also as a societal value, which, as such, would require religious neutrality from individuals.[35] Such an approach is implicitly based on the idea of an incompatibility between reli-

[33] Council of State, 31 Jan 2018, no 417332.

[34] Special Rapporteur on Freedom of Religion or Belief, 'Report on State-religion relationships and their impact on freedom of religion or belief', *OHCHR*, 28 Feb 2020, para 89, <https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/ReportStateReligionRelationships.aspx>.

[35] The 2021 law 'reinforcing the respect of republican principles' follows this line.

gious affiliation and membership of the community of citizens. In the case of Islam, religion is often confused with origin, leading to associating Muslims with an element of 'alienness'. Hence,

> 'the French nationality of a majority of the Muslim faithful does not seem to substantially reduce the effects of this perception of Islam, which then translates into questioning the very possibility of a successful articulation between the status of citizen and that of Muslim. The debates on communitarianism as an indicator of the failure of integration are an expression of this.'[36]

This could explain why Islam, while it shares the temporality of a late settlement on French soil as other denominations, still stands apart.[37]

[36] A. Fornerod, 'L'Islam, le juge et les valeurs de la République' (2018) 6 *Revue du droit des religions*, p. 44.

[37] All websites last accessed on 22 Sept 2021.

ISLAM AND HUMAN RIGHTS – REPORT FROM GERMANY

Matthias Pulte[1]

I. Introduction

There has been sporadic Islamic life in Germany since the 18th century. However, the Muslims who came to Potsdam primarily as prisoners of war returned to their homeland after their imprisonment in 1739. The next historical event of legal relevance was the pious foundation of the *Berlin Islam Institute* in 1927. It ceased to exist in the 1930s, but was followed by two Islamic institutions, the Islam Institut (*Ma'ahad-ul-Islam*) zu Berlin e. V., founded 2 February 1939 and the *Islamischen Zentral-Institut* zu Berlin e. V., founded 22 February 1941. Both institutes ceased to exist during the Second World War.[2]

In the mid-1970s, when thousands of guest workers came to Western Germany mainly from Anatolia, a Muslim community emerged in the industrial areas of this country. The initial belief of most German politicians was that they would leave at the time of their retirement at the latest and that they would leave together with their families. Therefore, the integration of this community into German society did not play a significant role in politics until 11 September 2001. This became problematic in terms of sociology of religion and religious law when it became apparent that the immigrant Muslims would remain permanently, would start families and that the second and third generations of Muslims were now living in Germany. The proportion of Muslims with a Turkish migrant background has fallen from 67.5 percent (2011) to 50. 6 percent (2015). Although Turkey is still the main country of origin, every

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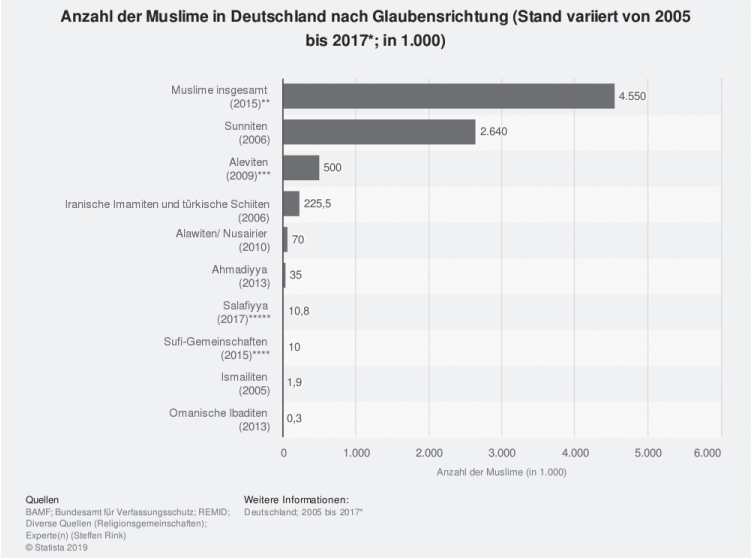
[2] T. Lemmen, *Islamische Organisationen in Deutschland* [Electronic ed: Bonn, FES (Friedrich-Ebert-Stiftung) Library, 2000], pp. 15, 67 ff.

second Muslim now migrates from another country. New Muslim immigrants come mainly from regions of origin that have been poorly represented in Germany up to now: the Middle East, South/Southeast Asia, Central Asia/CIS and Africa south of the Sahara. Most Muslims of Turkish origin have been living in Germany for some time. Today there are a large number of Islamic institutions and associations. In this context, it should be noted that the number of members of these institutions and associations as well as the number of Islamic believers can only be estimated. This is usually done by referring to the nationality of the immigrant. Statistically speaking, this is no more than an approximation.

Due to the regions of origin of the new immigrants, however, it can be assumed that Sunnis continue to be by far the largest religious denomination (approximately 75 %), followed by Alevis with a proportion of approximately 13 % and Shiites with a proportion of approximately 7 %.[3] In the following figure, the data from different state organisations are combined to render the affiliation of Muslims in Germany to a certain confession.

Number of Muslims in Germany according to religious denomination (status varies from 2005 to 2010; in 1,000s):



[3] Statistics on: 'Islam in Deutschland', *Bundesministerium des Innern, für Bau und Heimat*, <https://www.bmi.bund.de/DE/themen/heimat-integration/staat-und-religion/islam-in-deutschland/islam-in-deutschland-node.html>.

We can observe similar developments in other European countries. Islam is becoming a religion rooted in the Occident. Whether it will become a Western religion or not is a matter of debate.[4] Things have changed over the decades in the German Muslim community. The Muslim community is no longer perceived only as Turkish and Sunni. Following several migration movements, many other Islamic denominations have established themselves in Germany. This was more or less a publicly unnoticed development. Since 9/11, the plurality of Muslim life in Germany has come to the public's attention. At the same time, a growing Islamist radicalisation, especially among the youth, has been observed, leading to excesses of violence. This development has raised the question of the constitutional loyalty of Muslims and their mosque communities.[5] The question of the relationship between Islam and human rights became increasingly clear as a problem of social and legal integration. The Muslim communities gave and still give rather ambiguous answers to this question. The Cairo Declaration repeatedly emphasises the openness of Muslims towards the West as a guarantee of the compatibility of Islam with liberal orders.[6] On the other hand, it can also be said that with the exception of Saudi Arabia, all the Islamic states have signed the UN Declaration of Human Rights. However, one has to differentiate here between theory and reality. According to reports by Human Rights Watch, the concept of individual human rights is barely respected in any of the Islamic communities or Islamic countries.[7] Since the majority of imams who preach the faith and doctrine in German mosques are not trained here, they come from their home countries with ideas of human rights which they pass on to the believers in Germany. Even today, it is still a matter of fact that most imams are either imported from foreign countries or are self-proclaimed preachers. Only a minority of imams holds an academic degree in Islamic theology from a university in Germany or elsewhere in the Western World. Most of those imams who come from Muslim countries either hold a degree from an Islamic institution or they have studied a secular science.[8] Therefore, there is often a lack of theologically sound discussion on the relationship between Islam and human rights. Consequently, the question of how Muslims in Germany relate to the human rights guaranteed by the constitution is of great importance for the ability of Islam and the third or fourth

[4] O. Roy, *Der islamische Weg nach Westen* (BpB Schriftenreihe 500, Bonn, 2006), p. 33.

[5] Ministerium für Inneres und Kommunales des Landes Nordrhein-Westfalen (ed), *Extremistischer Salafismus: Ursachen, Gefahren und Gegenstrategien* (Düsseldorf, 2015), pp. 8-10.

[6] Cairo Declaration on Human Rights in Islam, Art 1, 2, 10 <http://hrlibrary.umn.edu/instree/cairodeclaration.html>.

[7] 'Islam und Menschenrechte – Dossier. Religionsfreiheit / religiöse Minderheiten im Islam' *Humanrightswatch* <https://www.humanrights.ch/de/ipf/menschenrechte/religion/dossier/spannungsfelder-/religionsfreiheit-minderheiten/> (last accessed on 10 Oct 2020).

[8] Roy, *Der islamische Weg nach*, p. 211.

generations of Muslims living here to integrate. However, this question cannot be answered uniformly. On 3 October 2010, the former Federal President Christian Wulff put forward the thesis that Islam as a religion belongs to Germany.[9] It seems to have been a somewhat hasty and roughly sketched idea, even if sect. 4 GG opens the door for such a development and even if it is true that Germany is a country of religious plurality. Wulff's thesis did not go unchallenged. The German Interior Minister Horst Seehofer contradicted this most clearly in 2018:[10] not 'Islam as a religion' belongs to Germany, but without doubt 'Muslim people living here'. As a result, it is not Islam that is protected by the constitution, but the Muslim people who live here according to their faith.

A religion can only be seen as an integral part of a pluralistic society if that religion unequivocally recognises the values of the society concerned. The relationship between religion and human rights is an important factor. Many Muslims in Germany have also recognised this. After the shock of 9/11, the Central Council of Muslims adopted an Islamic Charter in 2002, which has been the subject of debate ever since. This charter can be seen as an attempt by an association of various Muslim groups in Germany to signal loyalty to the constitution. It remains to be seen, however, who the Central Council of Muslims speaks for and the degree of (self) commitment of its declarations.[11] Regardless of this, the Islamic Charter is a key document for assessing the relationship of Muslims in Germany to human rights. For this reason, its analysis is central to this report.

II. Institutional recognition of Islamic organisations by the state

In Germany, hundreds of Islamic organisations are recognised by the state. The great majority are mosque communities, followed by several umbrella organisations depending on the confession and/or the nationality of those who have established and financed the particular mosque. The legal form is diverse and depends on the free decision of the respective organisation. German State law, based on neutrality and parity in religious affairs (sect. 140 GG and sect. 137 WRV), offers a variety of legal forms to all religions that want to participate in public life and act as a legal entity here.

[9] 'Wulff-rede im wortlaut: Der Islam gehört zu Deutschland', *Handelsblatt*, <https://www.handelsblatt.com/politik/deutschland/wulff-rede-im-wortlaut-der-islam-gehoert-zu-deutschland-seite-3/3553232-3.html?ticket=ST-12783281-vtdUYlSGwzSwRZJDbOvl-ap5>.

[10] 'Seehofer: Der Islam gehört nicht zu Deutschland', *Süddeutsche Zeitung,* 15 March 2018 <https://www.sueddeutsche.de/politik/integration-seehofer-der-islam-gehoert-nicht-zu-deutschland-1.3908644>.

[11] G. Cermak, 'Islam und Menschrechte', *Institut für Weltanschauungsrecht,* <https://weltanschauungsrecht.de/Islam-Menschenrechte>.

A. Legal form of Islamic communities

There exists a variety of legal forms of Islamic community in Germany. With regard to religious organisations, we have to distinguish in general between corporations under public law *sui generis* (Körperschaft des öffentlichen Rechts = K. ö. R.).[12] and organisations under private association law (eingetragener Verein = e. V.). The legal form of corporation under public law provides the institutions legal privileges other legal forms do not offer. These are the right to collect taxes, the right to appoint religious officials (Religionsbeamte) besides the clergy, the right to establish parochial law, the inability to file for bankruptcy and the right to have their own commentaries.[13] While most Christian organisations are registered as corporations under public law, the overwhelming majority of Islamic organisations are organised as private associations (e. V.). The legal basis is sect. 140 GG, sect. 137 IV WRV, §§ 21 ff. BGB. The associations are either organised independently or have joined associations at the state or federal level that in turn have come together to form umbrella organisations.[14] The reason for this development is not to be found in a certain preference of the German legal system for one or another form of registration for non-Christian religions, but rather in the way Islamic institutions are organised according to their self-understanding.

In order to be registered as a corporation under public law *sui generis* (K. ö. R.), a religion is required by law to establish ecclesiastical structures similar to those of the Christian churches on the basis of its legal concept. Regarding the Islamic communities, this seems to goagainst their nature and tradition.[15] From a legal point of view, there is a qualitative difference between the two forms of registration. An academic proposal to establish a new legal form, which could be an intermediate legal form between a private and a public organisation, was rejected in this academic discussion.[16] In addition, however, it should be borne in mind that, according to Islamic theologians and legal scholars, an institutionalisation comparable to a church is essentially against the Islamic tradition and the nature of Islam.[17]

[12] Regarding the special legal form of public corporation sui generis see: M. Pulte, *Grundfragen des Staatskirchen- und Religionsrechts* (Würzburg, Mainzer Beiträge zum Kirchen- und Religionsrecht 1, 2016), pp. 144-51.

[13] Pulte, *Grundfragen des Staatskirchen- und Religionsrechts*, p. 150.

[14] Deutscher Bundestag-Wissenschaftliche Dienste, *Islamische Organisationen in Deutschland* [Berlin, WD 1 - 3000 - 004/15, 2015] (Draft).

[15] C. Waldhoff, *Neue Religionskonflikte und staatliche Neutralität, Neue Juristische Wochenschrift* (Beil, 2010), pp. 90-3 (92).

[16] H. Weber, 'Änderungsbedarf im deutschen Religionsrecht?' (2010) NJW, pp. 2475-2480 (2480).

[17] H. Mohagheghi, 'Neue Religionskonflikte und staatliche Neutralität. Erfordern weltanschauliche und religiöse Entwicklungen Antworten des Staates? Eine muslimische Perspektive' (2011) 2 *Ethik und Gesellschaft Religionsprojektionen* <http://www.http://www.ethik-und-gesellschaft.de/ojs/index.php/

To date, the only Islamic organisation registered as a corporation under public law (K. ö. R.) is *Ahmadiyya Muslim Jamaat Deutschland KöR* (AMJ). The state of Hesse granted this legal status to this Islamic confession in 2013.[18] Some Turkish associations and umbrella organisations (e.g. *Ditib*) have long been applying for the status of a corporation under public law. So far, these requests have not been approved. There is no official statement on this problem, but the general political problems between Germany and Turkey in addition to the persistent allegations of intelligence activities by imams from DITIB-mosques against 'Gülen-movement members may justify this reluctance by the public authorities.[19] For this reason, all other registered Islamic organisations are organised according to private law as private associations. The number of mosque associations in Germany can only be estimated because it cannot be clearly determined what is subsumed under the term 'mosque association'. Accordingly, the Federal Administration estimates between 2,350 and 2,750 registered mosque associations or communities. The inaccuracy is due to the fact that the Alevi communities cannot be clearly assigned in the calculations. Their houses of prayer are not necessarily seen as mosques. It has to be noted that the Alevites form the second largest Islamic community in Germany.[20]

B. **Financing of Islamic communities**

The financial basis of most mosque communities is a pious foundation (*Waqif*) which was created for the construction and maintenance of the mosque building and additional real estate. In many cases the religious servants are paid by the foundation too. If there is no foundation in the background, the mosque community finances itself via membership fees. However, it is hardly possible to make reliable statements here, as there are no reliable data on the amount and structure of financial support for Islamic institutions.[21] In general, we have to distinguish three general bases of finance:

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eug/article/view/2-2011-art-4>, first published: Deutscher Juristentag e.V. (ed), *68 Deutscher Juristentag, Sitzungsberichte – Referate und Beschlüsse, Thesenpapier Nr. 5* (Berlin, 2010), p. 36.

[18] N.N., 'Erstmals in Deutschland, Muslimische Vereinigung als Körperschaft des öffentlichen Recht anerkannt', *Legal Tribune Online*, 14 June 2013 <https://www.lto.de/recht/nachrichten/n/ahmadiyya-muslim-jamaat-koerperschaft-anerkannt/>.

[19] 'Ditib-Spionage: Bundesanwaltschaft stellt Ermittlungen gegen Ditib-Imame ein', *Zeit-Online*, 6 Dec 2017, <https://www.zeit.de/politik/deutschland/2017-12/ditib-spionage-ermittlungen-einstellung-bundesstaatsanwalt-guelen-anhaenger>.

[20] M. Rohe, *Das Islamische Recht: Geschichte und Gegenwart* (3rd edn, München, Verlag C.H.Beck, 2011), p. 17; J. Kandel, 'Islamische Organisationen im Überblick', *Bundeszentrale für politische Bildung*, 22 Dec 2004.

[21] Deutscher Bundestag-Wissenschaftliche Dienste, *Finanzierung von Moscheen bzw. „Moscheevereinen"*, [Berlin, WD 10 - 3000 - 028/18, 2018] (Draft).

- Income from the community and (external) donations,
- Public funds,
- Financial support from abroad.

A special situation is the finance of the Turkish Islamic communities. Here we find an association named *DITIB*, 100 percent dependent on the Turkish Ministry of Religion. The *DITIB* is the largest Islamic organisation in Germany in terms of its associated 'mosque associations'.[22] The *DITIB* receives its financial and personnel support from the Turkish administration in Ankara with all the above-mentioned problems.

C. Stance to the state of Islamic communities

The stance towards the state of Islamic communities is diverse and depends not only on the type of religious teaching but also on extrinsic factors. In 2015, the Scientific Service of the German National Parliament (Deutscher Bundestag) published a document about Islamic organisations, asking for some key positions regarding compatibility with the constitutional system here. The organisational structure, the networking among one another and, as selected indicators, the attitude of the communities towards religious freedom and the position of women in religion and society are essential here.[23] The Scientific Service reviewed 20 Islamic umbrella organisations of national or regional importance. The result has to be seen as differentiated. There is a wide range of positions of proximity and distance towards the German secular state. Although organisations may declare the recognition of local rule of law principles in their statutes, it is not clear whether this declaration reflects the reality of the thinking and behaviour of members of these communities.[24]

D. Institutionalised bodies in communication with the state

In Germany, we have to distinguish between Islamic institutions communicating with the national government and those communicating with 16 state administrations. The number of Muslim organisations in Germany is hardly manageable. Experts estimate more than 2,000 that are at least registered as a private legal body (e. V.). A document by the Scientific Service of the National Parliament counts 16 Islamic

[22] 'Information of the Bundesministerium des Innern, für Bau und Heimat, „Islam in Deutschland" ', <https://www.bmi.bund.de/DE/themen/gesellschaft-integration/staat-und-religion/islam-in-deutschland/islam-indeutschland-node.html> (last accessed on 12 Oct 2020).

[23] Deutscher Bundestag-Wissenschaftliche Dienste, *Islamische Organisationen in Deutschland*, p. 6.

[24] Deutscher Bundestag-Wissenschaftliche Dienste, *Islamische Organisationen in Deutschland*, p. 5 sq.: '*The points of the respective Islamic religious understanding that may be critical for the Western understanding of democracy and the rule of law are not or only occasionally brought up openly, but are mostly treated in a glossing over, trivializing or evasive way'*.

organisations which can be referred to as umbrella organisations. A large number of other associations are of regional importance. Often they are an amalgamation of several mosque communities of the same denomination.[25] The main national organisations are:

1. Koordinationsrat der Muslime (KRM)
2. Zentralrat der Muslime in Deutschland e. V. (ZMD)
3. Islamrat für die Bundesrepublik Deutschland (IRD)
4. Türkisch-Islamische Union der Anstalt für Religion e. V. (türk. Diyanet İşleri Türk İslam Birliği; DITIB)
5. Verband der Islamischen Kulturzentren e. V. (VIKZ)
6. Liberal-Islamischer Bund e. V. (LIB)
7. Islamische Gemeinschaft Deutschland e. V. (IGD)
8. Islamische Gemeinschaft Milli Görüş (IGMG)
9. Union der Türkisch-Islamischen Kulturvereine in Europa e. V. (türk. Avrupa Türk-Islam Birliği; ATIB)
10. Islamische Föderation in Berlin (IFB)
11. Islamische Föderation Bremen (IFB)
12. Deutsche Muslim-Liga e. V. (DML)
13. Alevitische Gemeinschaft Deutschland e. V. (türk. Almanya Alevi Birlikleri Federasyonu; AABF)
14. Muslimische Jugend in Deutschland (MJD)
15. Islamischer Verein für Wohltätige Projekte (IVWP)
16. Verband der Islamischen Vereine und Gemeinden e. V. (Islami Cemaat ve Cemiyetler Birligi; ICCB).

This overview shows that there are no structures comparable to the Christian churches that can make legally binding agreements with the state. I see this as a major obstacle to the slow integration of Islamic communities and the Muslim population in Germany. It is therefore up to the Muslims themselves to contribute to integration. This also relates to the acceptance of the possibilities and limits of legal organisation and participation prescribed by the legal system.

III. Application of Shari'a

In Germany, the state legislator exclusively erects the binding laws in this society. Shari'a law is not accepted. Due to religious neutrality and parity, the state accepts Islamic law only for the internal affairs of the Islamic communities. Nevertheless, some exceptions from general law transgress this basic line of legislation: the exemption from

[25] Deutscher Bundestag-Wissenschaftliche Dienste, *Islamische Organisationen in Deutschland*, p. 6.

Article 4a Animal Welfare Act,[26] which gives Islamic and Jewish butchers permission to slaughter animals according to religious rites, approved by the Bundesverfassungsgericht.[27] The Islamic marriage law, which allows polygamy, can be seen as a second exemption from general law. In this case, the German legislator changed the civil marriage law (Personenstandsgesetz) which stated in sect. 69 PStG (old version from 1875[!]) that a religious wedding ceremony is only allowed if the civil marriage has already been held before. In 2009 the legislator abolished this prescription. Now a religious wedding can be celebrated without prior civil marriage and as a legal consequence without recognition by the state.[28] This legislation was heavily criticised. Opponents argued that the amendment to the law of 2009 favoured both forced and multiple marriages. In particular, children would be married religiously and these marriages would only be legitimised by the state later, after they had reached adulthood, or not at all.[29] In 2017, the legislator reacted with another reform of this act. Section 11 (2) of the PStG prohibits

> '*a religious or traditional act aimed at establishing a permanent bond comparable to a marriage between two persons, one of whom has not yet reached the age of 18. The same applies to the conclusion of a contract which, according to the traditional or religious ideas of the partners, takes the place of marriage.'*

The ban introduced by the Act to Combat Child Marriage of 17 July 2017 is less stringent than the previous one in that only the marriage of minors is prohibited. On the other hand, the prohibition, going beyond the previous one, also covers non-religious, 'traditional' acts.

IV. Discrimination of Muslims (and by Muslims)

The legal system in Germany does not discriminate towards Muslims. There are some laws and decisions of the German high courts that are interpreted by interested

[26] Animal Welfare Act, Art 4a: (1) Warm-blooded animals may be slaughtered only if stunned before exsanguination. (2) By way of derogation from paragraph (1), no stunning shall be required if: 1. it is impossible under the circumstances in the case of an emergency slaughter; 2. the competent authority have granted an exemption for slaughter without stunning (ritual slaughter); this exemption may be granted only where necessary to meet the requirements of members of religious communities in the territory covered by this Act whose mandatory rules require ritual slaughter and prohibit consumption of meat of animals not slaughtered in this way; 3. this is meant as an exemption by ordinance under Article 4b (3); BGBl I, p. 1094.

[27] BVerfG Urteil vom 15, Jan 2002, 1 BvR 1783/99 <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2002/01/rs20020115_1bvr178399.html>.

[28] Gesetz zur Reform des Personenstandsrechts vom 19 Feb 2007 (BGBl. I p. 122), Art. 1, 5 Abs 2.

[29] 'Risiken für Zwangsverheiratung und „Ehren"-Mord steigen – Standesamtliche Trauung muss wieder Vorrang vor der religiösen haben!', *Terre des Femmes,* 25 Nov 2012 <https://www.frauenrechte.de/index.php/presse/pressearchiv/2012/1076-risiken-fuer-zwangsverheiratung-und-ehren-mord-steigen-standesamtliche-trauung-muss-wieder-vorrang-vor-der-religioesen-haben-25102012.html>.

Islamic groups as restrictions or discriminations against Muslims. In particular the prohibition to wear a headscarf as a public servant, for example as a teacher, has been a subject of high court decisions. The Supreme Court decided that wearing a headscarf does not make a teacher personally unsuitable in every case.[30] A blanket prohibition for teachers to wear a headscarf is not allowed.[31] In that sense the critique of Human Rights Watch of the year 2009 has lost its basis. HRW criticised the general headscarf ban for teachers as public servants as a discrimination against religious freedom.[32] In this context, the court emphasises in a decision from 2020 that all beliefs are equal according to the law.[33]

Another case was the so-called 'Burkini-decision' of the Bundesverfassungsgericht. In this case it had to be decided whether Muslim girls are obliged to participate in school swimming lessons, which is part of the compulsory coeducational sports programme in public schools.[34] In these cases, the German High Courts decided that although a restriction may violate the religious freedom of the individual or the Islamic community, it must be tolerated by them because of the constitutional barriers laid down in sect. 4 GG.

The Supreme Court also had to deal with the question of whether the public muezzin's call to prayer via sound system should be tolerated in public as a particular expression of religious freedom or whether denial could be an act of discrimination.[35] The court has opted for an extensive interpretation of positive religious freedom. Simply seeing a religious symbol does not force anyone to participate in the practice of religion. The citizen has '*in a society that gives space to different beliefs, no right to be spared from foreign statements of faith, cultic acts and religious symbols*'.[36] That is undoubtedly correct. However, a distinction must be made between showing cultic symbols and performing them. The muezzin's call to prayer contains the Islamic creed, which deliberately sets itself apart from other religions and rejects them. It is therefore not comparable to the ringing of church bells, which does not contain any

[30] BVerfG, 24 Sept 2003 - 2 BvR 1436/02.

[31] BVerfG, 27 Jan 2015 - 1 BvR 471/10.

[32] Human Rights Watch, 'Diskriminierung im Namen der Neutralität. Kopftuchverbote für Lehrkräfte und Beamte in Deutschland', Feb 2009 <https://www.hrw.org/reports/germany0209de_webwcover.pdf>.

[33] BVerfG, 14 Jan 2020 - 2 BvR 1333/17.

[34] BVerfG, 8 Nov 2016 - 1 BvR 3237/13, <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/11/rk20161108_1bvr323713.html>.

[35] BVerfGE 93, 1, 16.

[36] A. Hense, (*Staatskirchenrechtliche Abhandlungen; Band 32*) *Glockenläuten und Uhrenschlag: Der Gebrauch von Kirchenglocken in der kirchlichen und staatlichen Rechtsordnung* (Berlin, Duncker & Humblot GmbH, 1998), p. 279.

creed. For this reason, the jurisprudence was criticised in the literature.[37] I agree. The essential factual difference between the two actions is not properly appreciated here. So far, however, it has been a rather theoretical legal question in Germany as most mosques do not practise the call to prayer to the outside world.

The assessment of a religion or a religious act according to its actual behaviour, i.e. according to its social impact, inevitably also indirectly includes the assessment of religious content.[38] The criterion of differentiation cannot be a general 'cultural adequacy' of the religion to be assessed,[39] but only its constitutional compatibility.[40] In this case, the competing fundamental constitutional rights must be weighed against each other. This was done by the courts. From my point of view, there is no violation of the EU directive of religious non-discrimination[41] by the respective public authorities.

A large number of open questions determine the current state of knowledge about discrimination against Muslims in the labour market. One reason for this is the empirical research on discrimination, which is generally still underdeveloped in Germany and has so far only been able to provide convincing evidence in isolated cases that (Muslim) migrants in the labour market are confronted with discriminatory obstacles and behaviours beyond individual cases.[42] On an objective level, legally legitimised forms of unequal treatment, such as the 'headscarf prohibition' under state law and the 'church clause' in the General Equal Treatment Act (sect. 9), represent religion-related barriers for Muslims and, in special cases, also for Muslim women even if they are legally justified when they serve, for example, in the police, judiciary or the military. If Muslim women act as representatives of the state, they must abstain from using religious symbols while doing so, as this state is religiously neutral according to Article 140 GG and 137 I WRV. Since this rule applies equally to members of all religions, it does not constitute discrimination against Muslims.

It is difficult to determine whether Muslims in Germany discriminate against so-called non-believers. The assessment of this question has to be twofold: firstly for the Islamic communities and secondly for the individuals acting in society. If one looks at the self-descriptions of the Islamic organisations in Germany, one finds that they generally emphasise the compatibility of the teaching of Qur'an and Sunnah with German Basic Law; but in fact there are certain tensions, especially with regard to

[37] T. Schirrmacher, 'Der lautsprecherverstärkte islamische Gebetsruf vom Minarett verletzt die negative Religionsfreiheit !?' in: International Institute for Religious Freedom*, Bulletin 2014/4*, p. 8.

[38] C. Hillgruber, *Staat und Religion* (Ferdinand Schöningh, 2007), p. 54.

[39] According to a historical decision of the Bundesverfassungsgericht, see: BVerfGE 12, 1 (4); change in the viewpoint: M. Brenner, 'Staat und Religion' (2000) 59 *VVDStRL*, pp. 264, 280 ff.

[40] C. Waldhoff, 'Die Zukunft des Staatskirchenrechts' (2008) 42 *Essener Gespräche*, pp. 55, 78.

[41] EU Directive 2000/78.

[42] M. Peucker, *Diskriminierung aufgrund der islamischen Religionszugehörigkeit im Kontext Arbeitsleben – Erkenntnisse, Fragen und Handlungsempfehlungen* (Bamberg, 2010), p. 4.

the acceptance of non-believers or atheists and in particular the position of women in family and society.[43] The answers given by Islamic associations to these key questions of liberal societies were given in a very ambivalent manner. They are open to a wide range of interpretation. In this respect, an uncertainty remains.

V. Exercise of religious freedom and other cultural rights

As previously mentioned, sect. 4 GG secures the broad exercise of religious freedom, only restricted by very few other constitutional rights of others, that may concur in individual cases. The religious education of all members of a religious community is guaranteed in sect. 7 III GG and parallel legislation in most of the constitutions of the states in Germany. However, the practical implementation of this constitutional requirement for non-Christian religions is a long time coming. The causes are manifold. Firstly, it should be noted that the number of Muslim pupils varies greatly from region to region. Secondly, there are certain legal requirements for the establishment of religious education. There must be academically trained teachers who hold a publicly recognised academic degree. A minimum number of eight pupils at each age in the school concerned is required. There has to be teaching material approved by the state and the religion. Finally, a contact person for the respective religion has to be named who decides on religion-specific questions, in particular the content of teaching and the appointment of teachers.[44] In view of the number of pupils in particular, it only seems realistic to establish Islamic religious instruction in the metropolitan areas. In conclusion: the law does indeed open up the possibility; the. practical implementation often fails in the details. Due to this situation, religious education remains in most cases in the private sphere of the mosques and the Islamic school, beyond any control of the state's educational monopoly according to sect. 7 I GG and the concrete school laws of the German states.

It is not recognisable that a European Islam as defined by Bassam Tibi[45] and others has been able to establish itself in Germany so far. The main causes for this are the import of imams and the extensive self-isolation of the communities from the majority society, whose values are often viewed negatively. However, an increasing participation of Muslims and Islamic communities in social life in Germany can be observed, e.g. through the participation or implementation of social projects or the Open Mosque Day once a year.

[43] Deutscher Bundestag-Wissenschaftliche Dienste, *Islamische Organisationen in Deutschland*, p. 6.

[44] M. Pulte, *Grundfragen des Staatskirchen- und Religionsrechts* (Würzburg, echter, 2016), p. 129.

[45] B. Tibi, *Euro-Islam* (Darmstadt, Primus Verlag, 2009); B. Tibi, 'Keine Selbstaufgabe durch totale Anpassung an den Westen - Der Euro-Islam ist nur im Einklang mit der kulturellen Moderne möglich' (2005) 32/33 *Das Parlament*.

VI. Free speech and Islam

In Sections 166-168 StGB (= Criminal Code), German law protects every religious belief and ideology within the constitutional limits of the fundamental rights of German Basic Law. For a long time, jurisprudence has recognised an indirect third-party effect of the fundamental rights, which are therefore not to be understood only as defensive rights against the state.[46] Non-governmental organisations must respect fundamental rights in the same way as the state. Insulting religious communities is therefore a criminal offence. In fact there is very little case law in Germany that refers to the blasphemy law. As far as Islam is concerned, a decision by the Lüdinghausen (Northrhine-Westfalia) District Court from 2006 can serve as a precedent. In this case, someone had printed texts of the Koran on toilet paper and was sentenced to one year in prison on probation for this.[47] This judgment led to a discussion about the deletion of § 166 StGB again.[48] On the other hand, in 2012 we find two judgments in the same case stating that showing caricatures of Mohammed does not violate the ban on blasphemy. For the fulfilment of the criminal offence of § 166 StGB there is clearly no 'abuse' in the sense of contempt of the religious creed. Furthermore, caricatures belong to the protected field of artistic freedom of sect 5 III GG.[49] In 2016 a former NPD politician was sentenced to a fine for insulting Islam according to sect. 166 II StGB. As part of a public speech, there was a verbal derailment in response to the Wulff-speech of 2010.[50] The judgments show that Islam is just as legally protected as other religions in Germany. As far as the criminal offence of blasphemy is concerned, there are also a few decisions on the Christian confession (mostly the Roman Catholic Church) such as insults to the Pope[51] or saints.[52] The courts always assumed the fulfilment of an offence from sect. 166 StGB, if the act was actually capable of disturbing the public peace. Otherwise, the lawsuits have been dismissed.

[46] BVerfG, 15 Jan 1958 - 1 BvR 400/51 [Lüth-decision]; BVerfG, 11 April 2018 - 1 BvR 3080/09; OLG München, 24 Aug 2018 - 18 W 1294/18 [Facebook decision].

[47] AG Lüdinghausen, 23 Feb 2006 - 7 Ls 540 Js 1309/05 31/05.

[48] R. Steinke, ' "Gotteslästerung" im säkularen Staat - Ein Plädoyer für die Streichung des § 166 StGB' (2008) *KritJustiz*, pp. 451-7.

[49] VG Berlin, 16 Aug 2012 - 1 L 217.12, OVG Berlin-Brandenburg, 17 Aug 2012 - 1 S 117.12, <https://gerichtsentscheidungen.brandenburg.de/gerichtsentscheidung/8979>.

[50] AG Köln, 10 Aug 2016 - 523 Ds 154/16, <http://www.justiz.nrw.de/nrwe/ag_koeln/j2016/523_Ds_154_16_Urteil_20160810.html>; LG Köln, 17 Feb 2017 - 157 Ns 101/16.

[51] Amtsgericht Lüdinghausen, 9 Ds-81 Js 3303/15-174/15, <http://www.justiz.nrw.de/nrwe/lgs/muenster/ag_luedinghausen/j2016/9_Ds_81_Js_3303_15_174_15_Urteil_20160225.html>.

[52] OLG Köln, 11 Nov 1981 - 3 Ss 704/81 <https://research.wolterskluwer-online.de/document/f2517ee1-ab80-4393-a296-d6b3c161481a>.

VII. Challenges

As in other countries, there are attacks against Muslims in Germany, which at this time are motivated primarily by the current uncontrollable migration of people from the Middle East and Africa. In recent years, anti-Islamic attacks have mostly had a neo-nationalist and racist background. The ZMR has repeatedly complained about this situation since the attacks on Muslim homes. In March 2020, the federal administration appointed an 'Independent Expert Group on Muslim Hostility (UEM)' with twelve representatives from science and practice to research hostility towards Muslims in Germany on behalf of the federal administration and to develop proposals for preventing and combating it.[53]

Islam in Germany is not European Islam. It is characterised by many confessional and national components, which have not yet promoted a tendency towards standardisation in the direction of Euro-Islam. It also seems to be the case that the Muslim communities do not want this because they want to preserve their own identity.

German Universities have offered the subject Islamic Studies since the 2010/2011 winter semester. This decision goes back to recommendations of the Science Council from 2010, which called for the establishment of a denomination-oriented Islamic theology at German universities.[54] As a result of the introduction of professorships for Islamic theology at some state universities,[55] Islam is gaining more importance in academic discourse. The academic training of Islamic religion teachers supports this process at the level of youth education. Nevertheless, the mosque community remains the most important place of religious education for Muslims alongside the family. Self-chosen enclaves (Muslim cafes, clubs, shops) continue to slow down the process of overcoming the boundaries between public and private manifestation of Muslim life in Germany.

Islamophobia is an increasing phenomenon in German society. Muslims experience discrimination in everyday life, on the labour market, in the education system, in state authorities, as well as in the housing market and in the service sector. Women wearing headscarves are particularly vulnerable to discrimination and violence. Radical islamophobia and anti-Islamic offences have acquired statistical significance. According to a preliminary evaluation, 813 Islamophobic crimes have been reported so

[53] 'Press Information from 02.03.2020', Federal Ministry of the Interior, Building and Community, <https://www.bmi.bund.de/SharedDocs/pressemitteilungen/DE/2020/02/expertenkreis-muslimfeindlichkeit.html>.

[54] Wissenschaftsrat, *Empfehlungen des Wissenschaftsrats zur Weiterentwicklung von Theologien und religionsbezogenen Wissenschaften an deutschen Universitäten* (Berlin, 2010), pp. 73-85 (74) <https://www.wissenschaftsrat.de/download/archiv/9678-10.pdf?__blob=publicationFile&v=1>.

[55] The Universities with the subject Islamic studies are: Frankfurt Koblenz, Osnabrück, Münster, Paderborn, Tübingen.

far in 2018 and the number of reported physical injuries has increased. In 74 cases of violent crimes 52 persons were injured and two died.[56]

Indeed, Islamophobia is fertile soil for anti-immigration movements like PEGIDA,[57] especially in some parts of eastern Germany. This movement comes along with neo-nationalist and neo-fascistic tendencies.

Since the 1990s, it has been observed that Islamic communities and their associations have endeavoured to establish a closer connection with the secular state and society. It should be noted that there is no uniform representation of Muslims in Germany. Depending on the denomination and orientation, there are different associations that strive for social dialogue. See above (II.). The Islamic Charter of the *Zentralrat der Muslime in Deutschland* (ZMD) goes furthest in this respect.

Due to the destructive events of 11 September 2001, the ZMD decided to publish a Charter of Islam in Germany.[58] According to the ZMD, this serves the dual purpose of bringing the debate about the position of Islam and Muslims in German society to a more objective level, and to demonstrate the Muslims' positions on the foundations of state, society and the legal system vis-à-vis the majority of society. The Islamic charter created on this occasion contains 21 theses. The first eight theses formulate statements of faith and ethical and moral principles of Islam. The remaining 13 deal with topics arising from the minority situation of Muslims in a Western and Christian-Occidentally shaped, secular constitutional state.

From the point of view of religious policy and religious law, such a charter is generally to be welcomed. It enables a determination of the proportion of at least those Muslims who want to see themselves represented by the ZMD. Unfortunately, this is the minority of Muslims in Germany. The vast majority belong to Turkish-Sunni Islam, whose umbrella organisation, as we have already seen, is largely under the control of the Turkish national administration. For this reason, the question of political and religious legal capacity of the Islamic Charter arises. Nevertheless, it is the only document of a Muslim organisation giving information about the research question.

With regard to the relation to human rights and the relationship to the programme of the secular state, thesis 11 seems at first sight to state total agreement between the Islamic and the secular understanding of the role of the state:

> *'11. Muslims approve of the division of government into three parts, and the constitutional and democratic fundamental order granted by the constitutional law Whether German citizens or not, the Muslims represented by the Central Council therefore*

[56] Deutscher Bundestag, *Drucksache 19/17069*, 2010 <https://dip21.bundestag.de/dip21/btd/19/170/1917069.pdf>.

[57] PEGIDA means: Patriotic Europeans against the Islamization of the West, established in Dresden 20 Oct 2014.

[58] N. Elyas, 'Islamische Charta', *Zentralrat der Muslime in Deutschland e.V.*, 20 Feb 2002 <http://www. Zentralrat.de/3035php>.

> *approve of the division of government into three parts, and the constitutional and democratic fundamental order granted by the German constitutional law, including the pluralism of political parties, the right to vote and the eligibility of women, as well as freedom of religion. Therefore, they accept, too, the right to change religion, to have a different or no religion at all. The Qur'an forbids all execution of force and all coercion in matters of faith.'*

Looking deeper into the wording, we have to admit that there are some problems which need to be mentioned. The assurance of free change of religion or irreligion has to be weighed positively from the wording. But what about compatibility with Islamic law? Is this abrogated here? Apostasy from Islam is a capital offence followed by capital punishment in the Shari'a. The ZMD has to resolve this contradiction. '*If the ZMD indeed advocates unrestricted change of religion, it represents an outside position within Islam.*'[59] The wording also seems to be positive with regard to equality between men and women. Looking at the text, we see that equality between men and women is reduced here to the right to vote. It remains unclear whether the equal position of women in society is also recognised in all areas.[60]

In thesis 18, the ZMD states that the organisation feels responsible for the whole of society. In particular, it points out that the '*Central Council (ZMD) deplores the violation of human rights wherever and whenever this occurs. Thus, it is a partner in the fight against religious discrimination, xenophobia, racism, sexism, and violence.*'

The wording remains unclear. It is too general to discern a concrete obligation from it. What 'violations of human rights' does Islam condemn? Further questions arise. Does Islam stand against the unequal treatment of women and minorities too, as we have seen in Western societies? What is codified in Islam? Alternatively, does it only demand the fight against the discrimination of Muslims? In the literature, the view is taken that numerous Muslims not only advocate equal rights for women and men in Islam, but for the recognition of human rights in their entirety. They argue that human rights and Islam are not contradictory, but that the Shari'a - interpreted in a contemporary way - is entirely compatible with human rights. This modern interpretation of the Qur'an provokes resistance from conservative theologians who are of the opinion that the Qur'an is God's authentic word and therefore unchangeably valid for all times.[61] This issue remains open in the present. The answer to this, however, determines whether Islam succeeds in catching up with modernity.

[59] Institut für Islamfragen der Evangelischen Allianz in Deutschland, Österreich, Schweiz, *Islamic Charter of the Central Council of Muslims in Germany (ZMD) – A Comment*, pp. 1-14 (8) (Draft).

[60] C. Troll, 'Eine Islamische "Charta" für Deutschland' (2002) 220 *Stimmen der Zeit*, pp. 289-90.

[61] Institut für Islamfragen, (Fn. 58), 11; A. Duncker, 'Menschenrechte und Islam' *Bundeszentrale für politische Bildung,* 12 Oct 2009 <https://www.bpb.de/internationales/weltweit/menschenrechte/38719/menschenrechte-und-islam>.

VIII. Conclusion

The legal system in Germany provides constitutional and legal provisions to guarantee a certain standard of religious freedom without the legal system discriminating against any religion. As Hans Barion pointed out in previous decades: the German constitutional state is ecclesiologically colour-blind.[62] Updated to today's situation in the fields of law and religion, this means that the religiously neutral and parity-based state does not interfere in the internal affairs of any religion with regard to its teaching, its members or its authorities. If the state respects these legal requirements, it can nonetheless promote religions in a specific way which it expects to contribute to the common good. Based on this expectation, the state took the initiative for the Islam Conference in 2005 as a forum for dialogue between the state and the Islamic religion and its denominations. Not everyone participated. That is not the responsibility of the state, but of the denominations.

The attempt to integrate the second and third generations of Muslim immigrants into German society was made very late. In my opinion, the consequences of this political decision are isolation and lack of integration of Muslims in a religiously pluralistic state, although the legal system does not oppose it or even create institutional problems at this level. On the other hand, however, there is also insufficient willingness to integrate and a lack of willingness to adapt to the constitutional premises of the secular constitutional state by some denominations or mosque communities. So far there has been no convincing, viable concept for Germany to lead to the successful integration of Muslims. Of course, this is not a legal but a political problem.[63]

[62] H. Barion, E. Forsthoff and W. Weber, *Ordnung und Ortung im kanonischen Recht*, *Festschrift für Carl Schmidt zum 70. Geburtstag. Dargebracht von Freunden und Schülern* (Berlin, Duncker und Humblot, 1959), pp. 1-34 (1).

[63] All websites last accessed on 23 Aug 2021.

MUSLIMS IN GREECE

Konstantinos Tsitselikis[1]

I. Introduction[2]

A. Old and new Muslim communities

Greece is one of the European countries where Islam is present under two forms: A) A minority group, according to the traditional legal content of the term, placed within the framework of the post-Ottoman legacy, and B) An immigrant population of late settlement. Greek law regulates these phenomena from a rather different point of view. The basic idea of the law governing Muslims in Greece is founded on two criteria: citizenship and territory. The Muslims of Greek citizenship are granted special rights when they are residents of Thrace. Muslims who live outside Thrace and foreign Muslims are not subject to any special regime. At all events, the legal regulations pertaining to a certain religious affiliation serve a dual purpose: to grant as few rights as possible or to grant minority rights tantamount to segregation. Non-territorial autonomy and territorial autonomy are thus intermingled. In fact, this approach has brought about long-lasting social, legal and political implications.

B. Historical background

The presence of Islam has been closely linked to the Greek State since its initial foundation. The Protocols signed in London in 1829, 1830 and 1831 reflected the will of the Great Powers to protect the Muslims as a minority living in the newly emerging independent Greek state. Thus, the few Muslims of Halkida[3] who remained in

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[2] This report is an updated version of the one published in 2004 at R. Potz & W. Wieshaider (eds), *Islam and the European Union* (Peeters, Leuven).

[3] L. Baltsiotis, *The enemy intra muros. The Muslim community of Chalkida (1833-1881)*, (Athens, Vivliorama, 2007, in Greek).

Greece and obtained Greek citizenship became subject to a special protection clause: Through the Act of 10 February 1833, King Otto reaffirmed the religious freedom afforded to any Greek citizen; in particular the Muslims who would remain in Greece would enjoy full rights.

After the annexation of Thessaly and part of Epirus (Arta) under the Treaty of Constantinople (1881), 40,000 Muslims were given minority rights.[4] However, according to the population census of 1907, a few years before the Balkan Wars, there were 3,516 Muslims in Greece.[5]

As a result of the Balkan Wars of 1912-1913 the 'New Territories' (Macedonia, Epirus, Crete, islands of the Eastern Aegean) were annexed by Greece under the terms of the Treaty of Bucharest (1913). Thus, a significant number of Muslims became Greek citizens. The legal status regarding the overall Muslim population of Greece was re-defined by the Greek-Turkish Treaty of 1913 concluded in Athens and followed the patterns of the Treaty of Constantinople.

However, more comprehensive provisions on minority protection came after the end of the World War I and the Greek-Turkish war (1919-1922), bringing about two major results: First, the emergence of the Republic of Turkey and the new frontier between Greece and Turkey, and second, the population exchange between Muslims of Greece and the Greek-Orthodox of Turkey.[6] The Convention of Lausanne of January 1923, which mandated the exchange, officially set in motion an 'ethnic cleansing' of doubtful lawfulness.[7] For different political reasons envisaged by both sides, Article 2 of the Convention exempted from the exchange the Muslims of Western Thrace and the Greek-Orthodox population of Istanbul/Constantinople. Extra-conventionally, the 'Muslims of Albanian origin' in Greece have been also exempted from the population exchange. Indeed, the legal protection regarding the Muslims of Greece was established by the Treaty of Lausanne signed in July 1923.[8]

After the completion of the exchange of population, the Muslim presence in Greece has been affected by two major events: First, the total persecution of the Albanian-speaking Muslims of Epirus (*Chams*) by Greek guerrillas in 1944. Second, following the annexation of the Dodecanese islands after World War II (under the Treaty of Paris, 1947), about 9,000 Muslims of Rhodes and Kos islands became Greek

[4] A. Popovic, *L' Islam balkanique* (Berlin, Osteuropa-Institut an der Freien Universität Berlin, Balkanologische Veröffentlichungen, 1986), p. 128.

[5] Kingdom of Greece, Ministry of the interior, *Population census of 1907* (Athens, 1909), p. 101.

[6] K. Tsitselikis (ed), *The Greek-Turkish population exchange. Aspects of a national confrontation* (Athens, Kritiki/KEMO, 2006).

[7] S. Seferiades, 'L'échange des populations' (1928) 24 *RCADI,* Chapter IV, pp. 327-30.

[8] The general framework of legal protection regarding minorities in Greece was set by the Treaty of Sevres on minorities in Greece, which was signed in 1920, put finally into force by the Treaty of Lausanne in 1923. The Muslims of Albanian origin were subject only to the Treaty of Sevres.

citizens. According to the official data, there were altogether 134,722 Muslim Greek citizens in 1940[9] and 111,990 in 1951.[10]

In addition to the legally recognised Muslim minority, as mentioned before, Islam is present in Greece under a new form as a result of the significant immigration flow from the international geopolitical developments since 1991. Several Muslim communities have been established in the largest Greek cities, mainly in Athens. In theory, immigrants enjoy general human rights and the status of 'alien', under Greek law, provided that they hold a valid residence permit. In 2001, Muslims, mainly from Iraq, Afghanistan and Pakistan crossed Greece in order to reach Western Europe. Some thousands stayed in Greece. Finally, a new wave of refugees, coming mostly from Syria since 2013, crossed Greece and others after 2016 'stranded' in the country. At present there are around 200,000 alien Muslims in Greece, including 70,000 asylum seekers and refugees: Non-Greek nationals (estimates and 2011 census figures in parenthesis): Pakistani: 70,000 (34,178); Bangladeshi: 35,000 (11,076); Syrian: 60,000 (7,628); Iraqi: 10,000 (3,692); Palestinian: 5,000 (976); Afghan: 25,000 (6,911); Egyptian: 15,000 (10,455); Other: 50,000.[11]

II. Institutional Recognition by the State

A. International obligations

The Treaties of 1830, 1881 and 1913 were the first legally binding documents imposing international obligations on Greece vis-à-vis its *Muslim* inhabitants. The Treaty on the Protection of Minorities in Greece (Sevres, 1920) and the Treaty of Peace (Lausanne, 1923) were the legal foundation for the protection of minorities in Greece during the Inter War period. The Treaty of Lausanne continues to constitute the main legal document, which regulates the status of the Muslims of Greek citizenship (Articles 37-45).

The territorial implementation of the legal protection of minorities stemming from the Treaty of Lausanne, which does not define expressly its ratione loci application, has to be taken into account when regarding three cases: first, that of the Chams, Albanian speaking Muslims who had been informally exempted from the exchange of population of 1923, living in Epirus until their en masse forced exodus in 1944; second, the annexation of the Dodecanese in 1947 and the incorporation of a new Muslim minority population; third, the internal migration of Thrace's Muslims

[9] Greek Office of Information, *Greece: Basic statistics* (London, 1949), p. 10.

[10] National Service on Statistics, *Population census 1951*, p. 184. Since there is no official data on religious affiliation.

[11] 'Greece' in: Egdūnas Račius, Stephanie Müssig, Samim Akgönül, Ahmet Alibašić, Jørgen Nielsen and Oliver Scharbrodt (eds), *Yearbook of Muslims in Europe* (vol 12, Leiden, Brill, 2020).

to large cities (particularly Athens and less so Thessaloniki) for economic reasons . In the first case, the Treaty of Lausanne was initially applied in part, but is no longer so. In the last two cases the Treaty is not applied at all.

Another controversial point regarding the Treaty of Lausanne's applicability deals with the evoked reciprocity of the Treaty's minority provisions between Greece and Turkey. Very often, Greece invokes Turkey's violations of the Treaty to cover legally its own maltreatment of the minority. However, the reciprocity argument cannot be valid for two reasons:[12] First, the Treaty itself does not recognise any legal reciprocity between the legal obligations of the two countries. Article 45 of the Treaty expresses Turkey's obligations to Greece as merely 'similar'. Second, according to international law on treaties, human rights –and consequently minority rights- are not subject to any reciprocity.[13]

B. National, ethnic and linguistic diversity

Muslims of Greece do not form a homogenous population group , at either a social or an economic level, or indeed as far as language and national or ethnic identity are concerned. First of all, Muslims belonging to the minority of Thrace constitute a distinct group with an important degree of internal coherence. Other Muslim groups of traditional settlement, such as the Muslims of the Dodecanese islands, do not have real social bonds with Muslims of Thrace. The second category of Muslims, namely the immigrants, is settled mostly in urban areas, particularly in Athens. They create a societal network apart, segregated through nationality affiliations: immigrant Muslims belong to at least 15 different communities, coming from Asia and Africa. Opportunities for them to have any contact with the Muslims of Thrace are very precarious, rarely in cases of weddings or funerals.

The Muslim minority of Thrace (today around 100,000)[14] consists mainly of ethnic Turks living in the prefecture of Rodopi and Xanthi. Pomaks and Roma also belong to the broader Muslim minority. The minority population comprises less than 1/3 of the overall population of Western Thrace. The Turks constitute the larger and ideologically predominant group within the Muslim minority. They assume a national, cultural and linguistic identity, which tends to extend to all Muslims through the vehicle of Islam, enhancing a common national Turkish identity.

[12] S. Akgönül (ed), *Reciprocity. Greek and Turkish Minorities: Law, Religion and Politics* (Istanbul, Bilgi University Press, 2008).

[13] Treaty of Vienna 1969, Art 60 (5).

[14] My estimate: there were 93,273 Muslims in 1920, and 103,880 in 1991, according to V. Aarbakke, *The Muslim minority of Greek Thrace* (vol 1 and 2, University of Bergen, 2000), p. 31.

The Pomaks[15] are a Slav (Southern Bulgarian) speaking population, residing in the mountainous frontier area between Greece and Bulgaria which is gradually being assimilated into the Turkish national and linguistic profile. In essence, a Pomak could be defined as a Slav-speaking Muslim. Pomaks live in Xanthi (10,000) prefecture, in Rodopi (7,000) and Evros (3,000).

The 20,000-strong Romá population[16] are residents of the main cities and larger villages of Thrace. Roma settlements can also be found in Volos, Serres, Thessaloniki and Athens. Athens has the largest Muslim community of Roma outside Thrace. They speak mostly Turkish and to a limited extend Romani.

The Muslims of the Dodecanese islands, Rhodes and Kos, number not more than 2,000 respectively. They are mostly bilingual, speaking Greek and Turkish. Some are descendants of Greek-speaking Muslims who migrated from Crete between 1890 and1910.

As far as the immigrant Muslims are concerned there are no reliable statistical data on their presence. It is possible they exceed 250,000 in number. By far the largest community of immigrants in Greece, the Albanians (400,000), have little or no real link with Islam. Most Muslim immigrants, asylum seekers, and refugees come from Africa and Asia (Afghanistan, Bangladesh, Egypt, Ghana, Iraq, Iran, India, Palestine, Pakistan, Libya, Morocco, Nigeria, Syria, Sudan, and Turkey).

C. Economic and social status - Organisational structures

Both minority Muslims and immigrant Muslims have organised social, economic or religious structures based on their cultural, linguistic or religious affinities. These structures coexist but they are not connected to each other. To a certain extent they are in contact or integrated within the majority's professional networks.

In general the economic position of the Muslim communities in Greece lies at the lower social strata. This applies mainly for the newly settled immigrants irrespective of their religious affiliation. The case of the Muslims of Thrace should be examined in a totally different context: first, the minority have gone in tandem with the structures and development of the Greek State since 1920; second, the minority remains segregated in many fields of politics and social habits. Greek domestic and relevant international law, do not take into account Muslims' self-identification, which in many cases has been ambiguous due to shifts between religion and national consciousness, as a predominant factor of minority adherence.

[15] See S. Trumbeta, *Constructing identities for the Moslems of Thrace: The case of Pomaks and Gypsies*, (Athens, Kritiki, 2001, in Greek).

[16] Trumbeta, *Constructing identities for the Moslems of Thrace*, p. 159.

1. *The Muslim minority: The 'Old Islam'*

According to frequently expressed views, the Muslim religion in Thrace prevents minority populations from integrating into broader society, making them resistant to modern influences. Though religion per se is not a factor, the way it functions within the minority group could contribute to a self-isolation mechanism. In contrast, Muslims of the Dodecanese islands have integrated into the economic life of the area, especially after the tourism boom in the 1980's.

In Thrace, the isolation of the minority can be seen from two contradictory points of view: from the inside, in terms of imposed marginalisation by Greek society with the state aiming at its national-ideological emasculation, while from the outside, as a self-defensive segregation, avoiding any contact with Greek society.

Minority Muslims of Thrace work in agriculture, construction or manufacturing. They are mainly field workers, peasants and farmers, shopkeepers, merchants and employees in the private sector. Only recently are Muslims hired – albeit in very small numbers--in the public sector in Thrace or the Dodecanese islands. Muslims participate in trade union associations with their Christian colleagues. At the top of the minority's society there are university graduates: pharmacists, dentists, lawyers, physicians, engineers as well as Muslim teachers delivering the Turkish curriculum for the minority schools. Muslim women often work in agriculture, as field workers, when they are not householders.

The perspectives regarding the social and economic integration of the Muslims of Greek citizenship is an issue closely linked to Greek-Turkish relations, local political and economic circumstances and the national ideological perception of 'non-Greek Orthodox' and 'non-Greek speaking' people as Greek nationals. Greek authorities adopted measures of intimidation and discrimination against the Muslims, especially after the Turkish invasion in Cyprus as a kind of reprisals. Administrative measures of discrimination against the Muslims of Thrace have dropped drastically only since the mid-1990s.

Minority Muslims who migrated to the large Greek cities, mainly to Athens, Thessaloniki, Thiva or elsewhere, have had to live in a new environment, predominantly Greek-Orthodox. The lack of minority schools and places of worship affects considerably the traditional way of socialisation within a Muslim community and creates new networks of solidarity both inside and outside the group.

Since the period of the Greek dictatorship, but mainly since the time following the Turkish invasion of Cyprus, (1974) , the minority of Thrace has become the arena of an unconventional conflict: the war over names has taken on large dimensions : Greece and Turkey both insist on a religious or ethnic character of the minority in a totally static way. The obvious manifestation of Islamic sentiments by the greatest part of the minority members has been ignored on the Greek side, in the same way that the manifestation of the Moslem faith has been played down on the Turkish side.

Symptomatic of the situation is the transfer of the diplomatic controversy into the courtrooms, which politicise the use of the term 'Turk/Turkish'. The Greek courts denied granting permission to minority associations the use "Turkish" in their title. Even after the European Court of Human Rights has ruled that this violates the right to association, Greek courts persist in not allowing the registration of these minority associations.[17] The minority associations claiming their national character are: *The Union of the Turkish Youth of Komotini*, the *Union of Turkish Teachers of Western Thrace*, the *Turkish Union of Xanthi*, and the *Turkish Women's Association*.

In the context of the minority's self-organisation, the *Supreme Minority Committee* was established in 1980 as an informal body comprising all elected representatives of the Muslim minority and representatives of the professions. In 1982, the *Scientists' Association of the Minority of Western Thrace* (*Bati Trakya Azinligi Yuksek Tansilliler Dernegi*) was founded aiming at reaching all university graduates. The large majority of the 400 members are at present to all intents and purposes inactive. A series of associations have been founded by members of the minority in Thrace for cultural or other non-political purposes.

Minority Muslims who migrated to the large cities, mainly to Athens and Thessaloniki, are not subject to the Treaty of Lausanne. The lack of minority schools and places of worship considerably affects the traditional ways of socialisation within a Muslim community.

Political representation became an issue when the minority tried to elect independent deputies with a Turkish national profile. To be represented in the Greek parliament, a political party or an independent candidate has to gain more than 3% of the total number of votes at a national level. In general, two to four Muslims are elected in the Parliament as candidates of the main political parties. Furthermore, Muslims participate in the elected bodies of local authorities throughout Thrace. Three Muslim mayors are usually elected in Rodopi and Xanthi.The only minority political party which survived the past political turmoil (1989-1993) linked to the independent political representation of the minority, is *Dostluk-Eşitlik-Bariş Partisi* (Equality-Friendship-Peace Party), founded in 1994.[18] Since then, they have taken part in local elections and European Parliament elections or have entered local politics.

In the area of Thrace, several media address themselves to the Muslim minority: more than 10 newspapers are published in Turkish while one Greek newspaper from Komotini includes a section in Turkish. There are also several radio stations broadcasting in Turkish, and a series of web-sites. Moreover, a newspaper in the Pomak language, written in the Greek alphabet, appears from time to time.

[17] Tsitselikis, *Old and New Islam in Greece.*

[18] See Aarbakke, *The Muslim minority of Greek Thrace*, pp. 357-500.

2. *The immigrant communities: the 'New Islam'*

Muslim immigrants who settled in Greece from the 1980's,including a huge spike after 1991, face serious problems with regard to social integration, such as unemployment, health care, insurance, stay permit, accommodation etc. Muslim –often undocumented- immigrant work as a cheap labour force or as private employees. The European Court of Human Rights found a case of collective forced labour involving a large group of Bangladeshi workers in Manolada.[19] It seems that this is only the tip of the iceberg. On the other hand, there is a considerable number of shops and small enterprises owned by Muslims migrants especially in Athens.

Immigrant Muslims are gradually becoming more integrated into Greek society through their participation in the labour market and the economy, albeit irregularly and haphazardly. The majority of Muslim immigrants have organised themselves in Communities ('associations' according to Greek civil law). Of these communities, the largest are the Egyptian, Bangladeshi and Pakistani, the Nigerian, the Afghani and the Syrian. Muslim immigrants' integration into Greek legal institutions will take longer, especially as far as the Greek civil law is concerned: Family status is regulated informally by Islamic law according to the formalities of their respective countries. Legal disputes concerning family matters are usually resolved by the members of the community in Greece or in the home country and not before the Greek courts. The practical problems related to funerals highlight the legal shortcomings and the administrative reluctance on this matter, since there are no provisions for holding Islamic funerals outside Thrace. As far as the immigrant Muslims press is concerned, there are rather limited publications, concentrated in Athens: a few papers in Arabic and Urdu and mostly websites appearing in a number of languages of the Muslim immigrants.[20]

D. **The institutions of Old Islam: The Muslim Turkish minority in Thrace**

Muslims had been granted special rights on religious grounds since the establishment of the Greek State. There are no legal regulations dealing with any of the Islamic communities other than the Muslim Greek citizens residing in Thrace. The legal framework based on the Lausanne Treaty establishes three pillars of minority autonomy through special institutions: minority education, community properties and the Mouftis.

There is sufficient number of mosques in Thrace (and the Dodecanese islands) functioning for every day ritual needs, namely about 300 mosques and masjids. Nonetheless, Muslims outside Thrace or Rhodes and Kos islands have no opportunities to enjoy their freedom of worship, since no official mosque operates out of these areas.

[19] *Chowdury and Others v Greece*, App no 21884/15 (ECHR, 30 March 2017).
[20] National Service on Statistics, *Population census 1951*, p. 184.

In Athens, Thessaloniki and other cities, about 100 prayer halls (masjids)operate through private initiative. Official licenses have been only been granted to 5 of them.

1. *The Mufti as head of the religious communities of Thrace*

The *Mufti* has an important authority in interpreting Islamic Law in the Muslim community. The Muftis of Greece were given a special legal status deriving from international law. Under the Treaty of Constantinople (1881), the Mufti is recognised as the religious leader of the Muslim communities. Under the Treaty of Athens (1913), the legal protection of the personal status of Muslims has been extended, assigning a jurisdiction role to the Muftis. Today, legally recognised Muftis who exercise jurisdiction, are based in Komotini, Xanthi and Didimotiho.

The Mufti has spiritual duties and a certain jurisdiction is bestowed upon him by law. A Mufti's religious duties concern marriages, the appointment and dismissal of religious ministers at local mosques. Furthermore the Mufti is competent to certify a conversion to Islam. Furthermore, he is deemed to be the supervisor of the two *medrese* in Thrace which in fact are religious middle and high schools (*ierospoudastiria*).[21]

The selection of Muftis became an issue of major importance for the Muslims of Thrace and Greek-Turkish relations. Since 1991, there have been two Muftis in Xanthi and two in Komotini, one appointed by the State and one elected by a group of Muslims. The legal acts issued by the appointed Muftis[22] —who are recognised by the law— have legal effects. On the hand, Turkey refuses to recognise the institutional existence of the appointed Muftis. The political controversy between Greece and Turkey over the control of the Mufti is reflected in the Greek courts' judgments, which were found by ECtHR to violate the European Convention of Human Rights.[23] According to Act 4964/2022 (Art. 151-156) the Minister of Education and the Cults appoints the Mufti after a Consultative Committee submits its report on the candidates.

In Rhodes and Kos, the local Mufti gradually lost any official status, and today only imams operate at the local mosques.

Today, there are about 300 mosques and masjids operating in Thrace. Each mosque has one regular *imam* and one regular *muezzin* (man who calls people to prayer). A serious dispute emerged over the plans for controlling staff. On the other hand, imams loyal to the elected Muftis are part of a parallel system financed by Turkish sources.

[21] In 2018, the curriculum of the Muslim seminaries-high schools was revised, according to the Ministerial Decision No. 182944/Θ2/2018).

[22] According to Act 4559/2018, the age of retirement of the muftis was set at 67. As a result, the Muftis of Xanthi and Komotini had to retire and be replaced.

[23] On the cases of I. Serif and A. Agga before the ECtHR see Tsitselikis, *Old and New Islam in Greece*, pp. 422-5.

2. *Community properties*

The most important source of income for the Muslim community is real estate, called *vakif/vakoufi*, the revenue from which guarantees the welfare of the Muftis' service and, to a certain extent, the minority schools' viability. The assets coming from the exploitation of the vakfs are used for their maintenance, to cover all Mufti office expenses and in some cases to pay salaries for the minority schoolteachers. After chronic mismanagement and failure to implement Act 1091/1981, the Greek Parliament passed Act 3647/2008 on the administration and the management of the vakf of the Muslim minority, which in fact remained only partially implemented, whereas the members of the Management Committee continue to be appointed by the government and not elected.[24] The vakf controversy is a prime example of the priorities and power balances in minority matters, where political, economic and "national" interests are involved.[25]

Beyond Thrace, vakif property exists also in the Dodecanese islands. The vakfs in Rhodes and Kos are managed by a five-member 'Organisation for the management of the vakif' on each island, under an Italian decree of 1929, which remains in force within the Greek legal order by Article 7 of the Royal Decree of 9 May 1947.[26] There are also vakif properties in Thessaly and in Kavala and Thasos island belonging to the Egyptian government.

3. *Minority education*

Under the legislative framework on the execution of the Treaty of Lausanne's provisions, a special educational system has been established for Muslims 'in their own language'. The bilingual (Greek/Turkish) minority educational system is based first of all on Articles 40 and 41 of the Treaty of Lausanne concerning private and public minority schools. Thus, Turkish, the dominant language within the minority, and Greek, the state's official language, are the two languages taught in minority schools for an equal amount of time. The minority education covers mainly primary education and in some cases secondary education. A raft of legislation on education and special minority education laws and decrees[27] govern the structure, the organisation and the content of minority education. The relevant legal framework is articulated through a labyrinth of provisions of different legal value (international treaties, constitution, laws, bylaws, etc.), at times contradictory in nature. The legal status of minority education rests on a *sui generis* combination of legal regulations of private character and public schools.

[24] Tsitselikis, *Old and New Islam in Greece*, pp. 347-51.

[25] D. Kurban and K. Tsitselikis, *A Tale of Reciprocity. Minority Foundations in Greece and Turkey* (Istanbul, TESEV-KEMO, 2010).

[26] Amending Art 4 (1) of Law ΔΡΛΔ of 1913 and Art 4 (1) of the Legislative Decree 218/1947.

[27] See Acts 694/1977 and 695/1977 among many more.

Minority education concerns mainly *primary schools*. In 2020 there were 115 minority elementary schools. In total, about 5,000 pupils attended these schools in 2019.[28] As the curriculum comprises two parts, the Greek-language and the Turkish-language, the teachers have to follow this division: Muslim teachers teach the Turkish curriculum and Christian teachers deliver the Greek one (Decree 1109/1972). In addition to the subjects of religion and the Turkish language, physics, chemistry, mathematics, and drawing are taught by the Muslim teachers in Turkish. Their Christian colleagues teach the Greek language, geography, history, the natural environment and foreign languages. Gymnastics and music are also taught in Greek.

One rather astonishing regulation regards the exclusive appointment of Muslim teachers for the Turkish-language curriculum and Christian teachers for the Greek-language curriculum: the law (Act 4310/2014, Article 64 par.1) forbids Muslim Minority teachers to be appointed in order to teach the lessons in the Greek-language part of the curriculum in minority schools.

Most of the Muslim teachers were trained in the 2-years Special Pedagogical Academy of Thessaloniki (which was abolished in 2013), while their Christian colleagues are graduates of the University Schools of Primary Education (4 years academic training). A few elementary and middle school teachers (today 16) dispatched from Turkey (*metaklitoi or non-permanent*) work in minority schools as a part of the exchange of school staff taking place every year reciprocally between Greece and Turkey.

According to the Greek-Turkish agreement of 1968, Turkish language textbooks have to be prepared by Turkey and distributed to the schools upon approval by the Greek government.[29] Greek language textbooks have been adapted to the sociolinguistic particularities of the non-Greek speaking pupils thanks to a 20-year project of the Ministry of Education.[30]

Secondary minority education is guaranteed partly for children coming from minority primary schools. Only a limited number of students will have the opportunity to follow a minority high school because of the limited number of such schools: two minority high schools have been established, one in Komotini and one in Xanthi. More than 2,000 Muslim pupils chose to attend the Greek public high schools. In

[28] K. Tsitselikis and G. Mavrommatis, *Turkish. The Turkish Language in Education in Greece* (2nd edn, Leeuwarden, Mercator European Research Centre on Multilingualism and Language Learning and Fryske Academy, 2019).

[29] L. Baltsiotis and K. Tsitselikis, 'The minority Education of Thrace, Legal Status, Problems and Perspectives' in: Anna Fragkoudaki and Thalia Dragona (eds), *Addition vs. Subtraction, Multiplication vs. Division. The Reformative Intervention to Minority Education of Thrace* (Athens, Metaihmio, 2008, in Greek), p. 37.

[30] See *Education of Muslim Minority Children in Thrace* <https://museduc.gr/el/>.

Thrace, two more middle-high schools belong to minority education, those being the two *medrese* or religious schools (*ierospoudastiria*) of Ehinos and Komotini.[31]

A permanent very low rate of children entering higher education in Greece has reduced the chances for social and economic advancement of Thrace's Muslims. In order to rectify this situation, an institutionalised facilitation for minority schools graduates would make it easier for them to enter Greek universities. Since 1996, a special quota 0.5% on the available places in tertiary education has been set[32] in order to address the language difficulties which Muslim pupils face during Greek-language exams to enter tertiary education. In effect, the measure attempts to compensate for the lack of perfect knowledge of the Greek language of Muslim students who attended the bilingual minority school. All Muslim pupil who are of residents of Thrace and attend any kind of school, minority or mainstream may make use of this measure. Conversely, Muslim pupils who have settled in other area in Greece are not included in this special entry quota.

4. *Special religious education pertaining to Islam is provided only in Thrace*

The teaching of the Koran is guaranteed as a separate subject in the Turkish language in primary and secondary minority schools. Furthermore, in five public (non-minority) high schools located in the mountainous area of Rodopi, though attended by minority population the curriculum, the religious subject is taught in Greek. As previously mentioned, the appointment at public schools of Muslim teachers teaching the Koran in Greek triggered serious reactions among the minority.

In Thrace there are two Islamic Seminaries (*medrese*), the first being in Komotini (in Rodopi) and the second in Ehinos (in Xanthi). In fact they are middle and high schools providing some special courses.

In 2007, the Greek government adopted Act 3536/2007, which provided for the appointment of 240 teachers for Islamic religious courses at Greek public schools attended (also) by Muslim minority students. The minority contested the implementation of the law as regards the teacher selection procedure. The law was amended by Act 4115/201 and implementation began in the face of strong opposition, since the courses are taught in Greek.

III. The applicability of Islamic law in Greece

As referred to previously, norms of Islamic Law are applicable for Muslims of Greek citizenship residing in Thrace in cases of family and inheritance disputes.

[31] In 2018, the curriculum of the Muslim seminaries-high schools was revised, according to the Ministerial Decision No. 182944/Θ2/2018).

[32] The legal framework of this special quota is governed by Art 2 (1) Act 2341/1995, Art 2 (5) and 7 Act 2529/1997, which was amended and implemented through a series of new regulations.

Article 42 of the Treaty of Lausanne in conjunction with Article 4 of Act 145/1914 constitutes the legal basis for this *sui generis* incorporation of Islamic Law into the Greek civil law. The special courts applying the jurisdiction of the Mufti were set up under Act 2345/1920, which regulated the Mufti's competence in accordance with the Treaty of Athens. Finally, Act 4964/2022 (Art 146) governs the legal status of the Mufti and the framework of his jurisdiction.

Under this legal framework, the three Muftis of Thrace appointed by the government adjudicate cases dealing with family and inheritance issues. They apply limited norms of Islamic Law (following the Hanafi Islamic school) within the administrative area of their jurisdiction. It was unclear for decades whether Islamic jurisdiction is voluntary (according to an interpretation of human rights principles and norms) or mandatory (according to the Court of Cassation, *Areios Pagos*). In the case that the Mufti's jurisdiction was obligatory, it would be a legally imposed segregation among the Greek citizens on religious grounds, a situation which would contradict the Constitution and the European Convention of Human Rights.

In January 2018, the Government passed Act 4511/ 2018, according to which shari'a law implemented in Thrace for Muslim Greek citizens ceased to be obligatory. Moreover, the law made it clear that Muslims of Thrace can draft a public will. Although the implementation of the law was dependent on the adoption of procedural norms as regards the process before the mufti-judge, in October 2018 the law was again amended (Act 4569/2018, Article 48 par. 3). Thereby its implementation was disconnected from the adoption of procedural rules. These amendments anticipated the ruling of the European Court on Human Rights which in December 2018 found a violation of the right to property in combination with discrimination on the ground that the Court of Cassation had imposed sharia law without the explicit wish of the members of the Muslim minority of Thrace.[33] Finally, a new law (4964/2022, article 146) codified all new regulations.

As to the procedure before the Mufti, new concrete norms have been adopted (Presidential Decree 52/2019). However, still no remedies against the decision of the Mufti are provided as far as the merits are concerned. The Mufti's decision is subject to approval by the First Instance Civil Court of the same administrative district. The Civil Court is solely empowered to control the limits of the jurisdiction of the Mufti's decision and not the merits of the case. This decision is subject to appeal, concerning again only the application of the Mufti's jurisdiction. Furthermore, the Civil Court and the Court of Appeal should exert control over the constitutionality of the Mufti's decision.

[33] The case that triggered the change of the law is *Molla Sali v Greece*, App no 20452/14 (ECtHR, GC, 19 Dec 2018).

The coexistence of the two legal systems, the one applying Islamic Law and the other the Greek Civil Code, still gives grounds for legal discrepancies and shortcomings:[34]

- How compatible the procedure is before the Mufti regarding the right to a fair trial, as perceived by Article 6 of the ECHR, when specifically: 1. There is no remedy for the control of the merits of the Mufti's decision. 2. There are no effective means to control the constitutionality since the judge of the Civil Court is not familiar with Islamic law.

- There is no inherent and adequate legal guarantee for upholding fundamental human rights as regards gender equality when Islamic family and inheritance law provides disadvantageous regulations for women.

- The Mufti's appointment by the State could contradict the moral obligation to follow the community's will to have a religious leader of their choice. On the contrary, the election by the Muslim community of the Mufti, being a judge, would contradict the basic constitutional rules regarding the status of judges; they have to be appointed by the State, enjoying full independence.

IV. New Islam: Freedom of religion

The settlement of a significant number of Muslims mainly in Athens, stressed the problem of lack of a mosque since the early 1980's. Recently, a mosque was built from state proceeds in Elaionas, in Athens, but still remains out of operation. Also an Administrative Board was set up to administer the mosque, while the majority of its members are not Muslims (Presidential Decree 42/2019).

The absence of a cemetery for Muslims is also a thorny issue. The debate over the need for a special cemetery for Muslims wishing to bury their dead in accordance with their own religious traditions is still unresolved. According to the law (Act 582/1968, Article 6), a special section for non-Orthodox can be built within any cemetery. However, such a decision has to be approved by the local Orthodox bishop.

Weddings in accordance with the Muslim ceremony have legal effects only when they take place before of one of Thrace's Muftis. According to Greek civil law, two types of wedding ceremonies are guaranteed: the civil and the religious, having both equal legal effects.[35] According to Act 4301/2014, religious communities, and therefore migrant Muslims,[36] could set up their own legal bodies and assign religious

[34] K. Tsitselikis, 'Sharī'a in Greece. Between communal autonomy and individual human rights', part 4, islamiclawblog, Harvard University, Law School, Journal in Islamic Law <https://islamiclaw.blog/category/greece/>.

[35] The civil wedding ceremony was introduced by Art 1367 of Civil Code.

[36] The law is not applicable to Muslims of Thrace who are already legally recognised: the three Mufti Offices enjoy the status of legal body of public law, along with the Greek Orthodox Church and the Jewish Communities.

ministers whose acts would have legal effects. Muslim communities of Greece have yet to implement the law.

When non-Greek citizens' private law cases are brought before the Greek judge, private international law is applicable. In relevant cases, the applicable law according to the Greek Civil Code is the law of the state of the citizenship. In these terms, under the premise that this state applies Islamic Law, the Greek judge could apply it cases of family and inheritance disputes.[37] The applicability of the law is subject to the observance of public order, or the commonly perceived morals (Article 33). Polygamy could be one of the matters that would run counter to public order. In practice, Muslim immigrants are very reluctant to bring their cases before the Greek judge, very often because they are not aware that Islamic law could be applied or because feel that they lack familiarity with Greek authorities.

A. Education for Muslim immigrants

Thousands of Muslim pupils from Asia and Africa attend Greek public schools, as all other immigrant children.[38] They can be exempt from attending a Greek Orthodox religious course, but no Islamic religious education is provided. However, in theory, intercultural education could include religious courses for Muslims.

Act 2413/1996 introduced 'intercultural education' into the national educational system. According to Article 34 of this law, 'Intercultural education aims at the organising and functioning of primary and secondary schools for the education of young people with educational and social problems'. These schools should apply the curriculum of the public schools adapted to the special cultural, social or educational needs of their pupils.

As of 2021, 13 public primary and 13 secondary intercultural schools were operating throughout Greece. They address all children with special needs. 'Special subjects', which could adapt the curriculum to the immigrant children's needs, have been implemented to a very limited extent. The adjustments of the curriculum should have covered two main issues linked to the immigrants' otherness: religion and language. As already pointed out, no Islamic education is provided by these schools. Under Act 4415/2016, the legal framework of intercultural schools has been improved, and a foreign language could be introduced as a means of education (Article 21 par.9). Up to the present it has not been implemented.

[37] Relations between the married regarding personal and property matters (Art 14, 15), between parents and child (Art 24), marriage (Art 13), adoption (Art 23), custody of minor (Art 24), divorce (Art 16) and inheritance (Art 28).

[38] Albanians are nor taken into consideration. There are 50,000 pupils from Albania, who mostly do not express adherence to Islam.

A few private foreign schools provide Islamic education. Immigrant communities organise afternoon Koran lessons in their prayer houses, especially in Athens.

B. Acquiring Greek citizenship

Granting Greek citizenship to migrant Muslims was for decades a tacitly accepted practice. A new law on citizenship, Act 3838/2010, introduced elements of jus soli, so children of immigrants who were born in Greece or have attended school for a certain number of years can acquire Greek citizenship. Furthermore, the Act made administration accountable for the relevant procedures. In that context, gradually migrants with a Muslim background acquired Greek citizenship. Thus, in 2021 there were a few thousand Muslim Greek citizens who do not belong to the group of Thrace or Dodecanese Muslims, and therefore a new group of Muslims appeared, in between 'Old' and 'New' Islam. A small number of Greek Orthodox converts to Islam have also formed a very small group, among the New Islam.

V. Conclusions

Diversity should be perceived as an asset under modern notions of the role of religion within society, taking into account cultural and religious identities correspondingly. This would create a potential legal and political configuration that would better facilitate Muslims' social integration. Muslims in Greece continue to belong to two main different categories as far as legal status and special rights are concerned. On some occasions, legal discrepancies and ideological resistance to alignment with the principles of fundamental human rights have been mitigated, while in some other instances they persist. Greek governments, courts and the legal order show a reluctance to accept respect of language, religion or ethnic otherness. Minority rights pertaining to the Muslim minority of Thrace still constitute an ideological battleground between Greek and Turkish nationalism.

Muslim immigrants are still the target of racism and xenophobia. Unlike the Christians, Muslim immigrants and refugees are considered to bring negative elements such as criminality, social tension, and represent a threat to Greek-Orthodox profile of the country.

It would appear that Islam is perceived, legally and ideologically as being incompatible with the Christian/Greek prevailing identity. Thus, the Greek legal order, gradually adjusting to European standards, seems to be suffering by a kind of paralysis, according to which nationally biased structures and ideologies are consolidated, and thus it remains reluctant to accept any —old or new— minority affiliation.[39]

[39] All websites last accessed on 22 Sept 2021.

ISLAM AND HUMAN RIGHTS IN HUNGARY. RELIGIOUS FREEDOM ISSUES AND SOME CHALLENGES OF A COEXISTENCE

Balázs Schanda [1]

I. Introduction: the social framework

A. Historical notes on Muslims in Hungary

It is assumed that some Hungarian tribes encountered Islam over their route to Central Europe in the 8th century, but there is no historical evidence for that. Until the expansion of the Ottoman Empire in the Balkans there was hardly any contact between Hungary and the Islamic world. During the Ottoman occupation of central Hungary in the 16th and 17th centuries the presence of Muslims in the country was evident, but conversions to Islam remained exceptional (mainly kidnapped children or slaves). After the Ottomans were driven out of Hungary at the end of the 17th century, only limited architectural heritage remained of Muslims but no Muslim population remained in Hungary. Islam again became a topic of exotic interest. Some Hungarians became noted Orientalists, for example Ignaz Goldziher (1850-1921) a rabbi who became a professor at the Azhar University, Cairo and whose major work "Introduction to Islamic Theology and Law" is a point of reference to this day.[2]

B. Muslims in Hungary today

The number of Muslims in the country has risen from a few hundred thirty years ago to a few thousand, which is still a relatively low figure. A small, but visible part of the Muslim community arrived as students from Iran, Palestine, Egypt, Syria and other Soviet-oriented Arab countries in the 70s and 80s and did not return to their home countries. There are probably a larger number of Muslims among the less

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[2] For an English edition: I. Goldziher, *Introduction to Islamic Theology and Law* (Princeton University Press, 1981).

integrated new immigrants, who may be left outs of the census for various reasons. The census data of 2011 are as follows: the number of Muslims has risen to 5,579 (from 2,907 in 2001); 2,300 Muslims declared themselves to be Arab, while 2,200 stated other ethnicities; as multiple ethnic affiliations are possible, 4000 Muslims also claimed to be ethnic Hungarians; the proportion of those having a higher education is relatively high; and the average age of Muslims is below the average of the general population. Hungary is probably the last country in Europe where Jews outnumber Muslims, although Muslim communities often claim to have significantly more members than the figures stated by the census.[3]

Some of the Muslim students who remained in Hungary after their studies married Hungarians, some of whom converted to Islam. Since the collapse of the communist system there has been some immigration of Turks and Arabs (active in trade and services industries) but their number remains limited. Also the number of Muslim asylum seekers is low in Hungary. The Muslim communities in the country are generally not regarded as at risk of fundamentalist radicalisation (e.g. there were no reports of anyone from Hungary joining ISIS).

Based on the data provided by the Muslim community, the number of Muslims in Hungary could be significantly higher than the census data as it ranges from 6,000 to 30-50,000. There are two Muslim communities recognised by Parliament: one of them runs two mosques in Budapest and two in the rural cities of Pécs and Szeged;. the other runs one mosque in Budapest and three more in other cities. Most of these facilities are former shops converted into prayer houses. Neither these figures nor the websites of Muslim communities suggest an expanding dynamic of Islam in Hungary, although the website of the Organization of Muslims in Hungary seems to be more up to date and available in English as well as Arabic.[4] Both communities would be classified as Sunni. The Hungarian Islam Community places more emphasis on its Hungarian identity, the historical connection between Islam and Hungary, as well as visible charitable activities,[5] whereas the Organization of Muslims in Hungary is more international, but also favours the integration of Muslims in Europe while preserving their Muslim identity. In this way they try to facilitate the exercise of Islam for all Muslims in the country. A further Muslim community was set up in 2003 but it ceased to exist in 2012 and its leader – a dentist who studied in Hungary and later got in trouble for alleged links to terrorist organizations – has returned to Jordan.

Parliament and local governments might have Muslim members but no such person has publicly proclaimed their faith in Islam.

[3] Census data available at: <http://www.ksh.hu/nepszamlalas/vallas_sb>.

[4] *The Organisation of Muslims in Hungary* <https://iszlam.com/english/itemlist/category/456-about-us>.

[5] *Hungarian Islamic Community* <http://magyariszlam.hu/mikmagyar/news.php>.

II. Institutional recognition by the state

A. Legal form and status of Islamic communities

There are different levels of legal recognition for religious communities. Two Muslim communities are officially approved at the highest level (by Parliament). One of them is the (Hungarian Islamic Community,) which was recognised in 1988 as the legal successor to of the Islamic community acknowledged by a statute in 1916.[6] The other Muslim community was set up in 2000 and is also recognised by Parliament. More Islamic communities could register as religious associations but at present none is known to exist.

B. Financing Islamic communities

As all income tax payers have the right to assign 1 % of their income tax to a religious community of their choice, this also applies to Muslim communities. The two recognised Islamic communities are supported in this way: in 2019 one of them by 1,152 taxpayers, the other by 974.[7]

All religious communities enjoy full exemption from local taxes and fees (in the case of receiving gifts or inheritances).

Special public subsidies have not yet been provided to Islamic communities, except for of the renovation of the 16th century mosques of Siklós and Pécs. These monuments are under public ownership and serve as museums though occasionally (in Pécs every week) give way to religious services.

C. Institutionalised communication between Islam and the Government

Due to the limited social significance of Islamic communities there is not much institutional communication between these communities and the Government. The two recognised Islamic communities theoretically constitute an Islamic council but in practice this does not function.

III. Application of Shari'a?

Religious law is not applied in Hungary at state fora. Hungary has no system of personal laws. Marriage became secular with the Civil Marriage Act of 1895. State laws do not include religious rules, but certainly coincide with natural law or religious norms. For example, the fact that marriage is only possible between one man and one

[6] Act XVII/1916.

[7] Data provided by the National Tax and Customs Administration: <file:///C:/Users/user/Downloads/Szja_1_os_felajanlasban_reszesult_technikai_szamos_kedvezmenyezettek_a_2019._rendelkez__evben_10.16%20(1).pdf>.

woman – as is also stated by the Fundamental Law (Constitution) – could be seen as a "reproduction" of a religious norm whereas others would regard it as an element of natural law. The legislator, however, does not refer to religious norms. The Islamic communities have not claimed exemption from state law or claimed the recognition of Sharia law by the state.

IV. Discrimination of Muslims (and by Muslims)

No case relating to discrimination of Muslims (or by Muslims) has been raised so far to the Equal Treatment Authority.

A significant proportion of Muslims residing in Hungary run small, family-based businesses in trade and services. There is no visible presence of Muslims in the public sector. A limited number of visiting female students wear a headscarf at universities, but this practice does not raise public concern.

V. Exercise of religious freedom and other cultural rights

A. Mosques

Mosques and other institutions can be set up by religious communities without any restrictions though general limitations would apply. A Muslim community gave up the plan of constructing a mosque in Budapest as residents protested against a possible increase in traffic in the neighborhood.

In the largest public cemetery of in Budapest there has been a section for Muslim burials and graves since World War I. The establishment of a Muslim cemetery is one of the major concerns of Islamic communities.

B. Islamic rituals

There are no special rules regarding Islamic rituals or the rituals of any other specific religion.

With regard to halal food, animal welfare has become a concern since the collapse of the communist regime. This rising concern, however, is sometimes sponsored by industry rather than by the love of animals (a campaign against the custom of force-feeding of geese turned out to be sponsored by the French goose liver industry – the major competitor in this sector. The statute on animal protection provides for painless slaughter but exception can be made in the case of religiously motivated ritual needs.[8]

The exemption on slaughter is not a privilege of the Jewish or Muslim communities, rather it is formulated in neutral way, without mentioning any religion. Detailed

[8] Act XXVIII/1998, Art 19 (d).

regulations on slaughter following religious prescriptions are provided by a decree of the minister for agriculture. Slaughter has to be overseen by official veterinarians and may be observed and controlled by the religious institution that has commissioned it (140/2012. (XII. 22.) FVM § 2). The food security agency issues permission for slaughterhouses and also supervises them. The procedure follows EU law (Directive 93/113/EC).

For the import or export of kosher/halal food there are no special rules: the same provisions would apply for non-kosher food. The demand for kosher/halal food is very limited in Hungary: vast majority of Jews does not follow kosher rules and the number of observant Muslims is not high either. Data on imported kosher/halal food are not available. Kosher and halal food produced in Hungary is widely exported. In general kosher/halal meat production is dominated by poultry and to a lesser extent sheep, whereas beef is less common. A list of certified halal producers is available for the Muslim community.[9] Whereas most halal restaurants are Turkish- or Arab-owned, the only connection to Muslims that most certified food factories have is as customers. Government-sponsored marketing of agricultural products is laying great emphasis on exporting halal and kosher food from Hungary as there is seen as to be a gap in the markets.

C. **Education**

Islamic children at public schools could opt for Islamic religious education if one of the recognized Islamic communities provided for such education. Due to the limited size of Islamic communities the religious instruction of children in Muslim families is provided in congregations rather than in public schools. Muslim attendees in public schools would therefore learn ethics instead of religion. As regards claims for exemptions (swimming, participation in Christmas celebrations etc.), solutions are found at the local level.

Islamic communities have not yet set up schools. A bilingual (Turkish-Hungarian) primary and secondary school is to be established by a Turkish-government-sponsored foundation in Budapest (Maarif Primary and High School) beginning September 2020.

VI. **Free speech and Islam**

Anti-Muslim defamation or hate-speech cases have not occurred so far. Some anti-Christian provocations have led to court cases but none of them was connected to Muslims. There would be no difference in the treatment of symbols of different religions.

[9] <www.magyariszlam.hu>.

VII. Challenges posed by Islam in the traditional understanding and application of democracy and rights in Europe

A. Political demands stemming from Muslim communities

Muslim communities have not raised special political demands. Occasionally they voice concern about Islamophobia.

B. Security and liberty in the light of Islam(ophobia)

Religious radicalisation and religious extremism are not seen as a central issue but as a potential danger that can and must be prevented by preserving the country's religious and cultural homogeneity. Security in the long run is closely connected to the handling of migration, which has become a central political issue. The security of the Jewish community in Hungary is among the arguments presented against the immigration of Muslims.

C. The connection between islamophobia and anti-immigration political movements or adoption of anti-immigration policies

Immigration to Hungary is limited, only 2% of the population are resident aliens, mostly from European countries and from China. The anti-immigration policy of the government enjoys support r across political lines. When foreign workforce is needed, there is a clear preference for migrant workers from non-Islamic countries (primarily the Ukraine). It should be noted that Hungary has no colonial legacy.

Since the period of wars between the Kingdom of Hungary and the Ottoman Empire (15th -17th centuries) there is has existed a deeply rooted perception of Hungary as a bulwark of the Christian West against Islam. Although the anti-Turkish sentiments have widely disappeared, the feeling of being a small and endangered nation with a unique culture is widely held. Mass immigration is generally seen as a danger to the national culture, security and established way of life.

The Constitution clearly recognises the impact of Christianity in the history of Hungary as well as the duty of the state to defend the Christian culture of Hungary. This is not formulated in a hostile way towards other religions but clearly favours preservation of the historically established cultural landscape. Also the responsibility of the political nation towards the cultural community is clearly stated. On the international level the Government's foreign aid policy (Hungary Helps) clearly favours persecuted Christians. Field action is primarily carried out in Iraq, Syria and some African countries. University scholarship programmes provided by the Government openly target Christians (and only Christians) from the Middle East. The religious bias is a message against the political correctness that does not focus special attention to on the fate of Christian minorities in radical Muslim societies.

The migration policy of Hungary is clearly rejects the mass immigration of persons of a different cultural background. This is clearly regarded as a danger to the security and the Christian culture of Hungary that enjoys constitutional protection.[10] Hungarian politics abolished political correctness in this regard. Probably no other prime minister in Europe would put it in this way:

> 'The civilization that stems from Christianity and the civilization that stems from Islam are not compatible. They cannot mingle, but can only exist side by side. This is the situation in the Middle East, and also in Europe. Our perceptions of the world are so different that they lead to parallel worlds. This is not a political issue, but the reality of life.'[11]

Prime Minister Orbán has linked immigration and terrorism since the 2015 attack on Charlie Hebdo.[12] The integration of immigrants with a Muslim background is Western Europe is generally seen as unsuccessful.

Since the migration crisis of 2015 the fear of the Islamisation of Europe has also become a topic of simplified political communication. For example in the 2018 parliamentary election campaign the president of a far right party ("Jobbik") was criticized for pro-Islam statements – for a conservative political movement pro-Islam statements would be seen as incoherent. The government's' anti-immigration and anti-Muslim rhetoric has been criticized by Muslim communities in Hungary.[13] Muslim communities have also blamed this attitude for administrative barriers to opening mosques and expanding cemeteries.[14]

Politicians have voiced both deep respect towards Islam and the distance between Western/Hungarian culture and Islamic culture.[15] For Hungarians relations towards Islam have been associated with relations to Turks for centuries. Gestures of respect towards Islam may be connected to trade and foreign politics especially with regard to the strong political alliance with Turkey. An example would be the state-sponsored

[10] Art R.

[11] Z. Kovács, 'Protecting European Freedom: PM Orbán's interview with Passauer Neue Presse', *ABOUT HUNGARY,* 22 Oct 2016 <http://abouthungary.hu/blog/protecting-european-freedom-pm-orbans-interview-with-pnp/>.

[12] A. Rettman, 'Orban demonises immigrants at Paris march', *euobserver*, 12 Jan 2015 <https://euobserver.com/justice/127172>.

[13] '2016 Report on International Religious Freedom: Hungary', *United States Department of State/Bureau of Democracy, Human Rights, and Labor* <https://www.state.gov/reports/2016-report-on-international-religious-freedom/hungary/>.

[14] '2018 Report on International Religious Freedom: Hungary' *United States Department of State/Bureau of Democracy, Human Rights, and Labor* <https://www.state.gov/reports/2018-report-on-international-religious-freedom/hungary/>.

[15] For example the speeach of prime minister Viktor Orbán at the annual summit of the Union of Arab Banks <https://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-annual-summit-of-the-union-of-arab-banks>.

renovation of the tomb of Gül Baba, a bektashi dervish who died after the Turkish siege of Buda in 1541. The tomb was reopened on a state visit by president Recep Tayyip Erdogan in 2018.[16] The archeological research for the tomb and the commemoration of Sultan Suleiman the Magnificent (1494-1566) in Szigetvár belongs in a similar context. This political cooperation has strong historical roots: both in 1711 and 1849 Hungarian leaders fighting Austrian central powers found refuge in Turkey. The last Pasha of Buda who was killed in the Christian re-conquest of the city is commemorated in a bilingual epitaph as

> 'The last governor of the 145-year-long Turkish occupation of Buda, Abdurrahman Abdi Pasha the Albanian fell at this place on 2 September 1686, when he was 70 years old. He was a heroic enemy, may he rest in peace.'

Historical reconciliation has been achieved over the centuries.

In short, Islam is respected as long as it is far away in time or space, or when it is the religion of wealthy investors.

VIII. Conclusions

The presence of Islam today does not constitute a major challenge in Hungary. Migration into the country remains limited and politics is careful when it comes to the question of opening the borders towards non-Hungarian immigrants. Recognised Muslim communities have not challenged the secular nature of the state and have not claimed the application of sharia law, but rather try to fit into the established legal system.[17]

[16] <https://gulbabaalapitvany.hu/en/gul-babas-tomb/>.

[17] All websites last accessed on 12 June 2021.

ISLAM AND HUMAN RIGHTS IN ITALY IN AN AGE OF RELIGIOUS DIVERSITY

Francesco Alicino[1]

I. Introduction

In Italy Islam is a minority religion. Among the total population of 60 million, of which around 70 percent is Catholic, there are currently about 2.7 million Muslims living in the country. They are overwhelmingly Sunni, with Moroccans forming the majority, followed by Albanians. 1.7 million are non-Italian citizens, 0.9 million are Italian citizens, including converted Italians.[2] Muslims live mostly in the central and northern most prosperous regions: 60 percent reside in Lombardy, Piedmont, Veneto and Emilia Romagna; 10 percent live in the two largest Italian cities, Rome and Milan.[3]

In modern Italy the presence of Islam started in the 1960s when, the first Muslims, embassy employees and businessmen, began to arrive in the country. In the 1970s the Islamic presence was very limited compared to other European States like France, Germany and the UK: during the first three decades after the Second World War, while these states became destinations for immigrants coming from outside Europe, Italy remained a place of emigration. The first real wave of immigration from North Africa, from Morocco in particular, began in the 1970s and went on during the 1980s. But it was in the 1990s that the flow of Muslim immigrants grew considerably: so much so that in three decades now Islam has become Italy's second-largest religion. Since the 1990s the number of Muslims in the country has increased more

[1] LUM University, Casamassima, Bari, Italy.

[2] See 'Sondaggio Doxa su religiosità e ateismo', *Unione degli Atei e degli Agnostici Razionalisti*, April 2019 <https://www.uaar.it/doxa2019/>.

[3] Centro Studi Ricerche IDOS and Centro Studi Ricerche Confronti, 'Dossier statistico immigrazione 2020. Scheda di sintesi', June 2021 <http://www.cestim.it/sezioni/dati_statistici/italia/Idos/2020-ITALIA_SCHEDA%20SINTESI.pdf>; 'La presenza dei musulmani in Italia', *Openpolis*, 18 June 2021 <https://www.openpolis.it/la-presenza-dei-musulmani-in-italia/>.

than tenfold.[4] Moreover, the number is set to double again by 2030, boosted by immigration from North and sub-Saharan Africa, the Balkans, South Asia and the Middle East.[5]

It is important to point out that the changes within Italian society today are not only related to the presence of Muslims and Islamic groups. Nevertheless, given the climate of fear and insecurity interwoven with the emergencies of the recent wave of immigration and the threat of international terrorism (leading to an overestimate of the Muslim population),[6] Islam highlights the most striking aspects of Italy's cultural-religious landscape.[7] In other words, Islam indicates the country's current pluralism. That is even more evident when compared with Italy's past religious situation, largely dominated by the Catholic Church and a small number of other minority confessions with a Judaeo-Christian religious background.[8]

This helps to explain why Muslims and Islamic groups have become the discursive substitute for socio-economic diversity, implying other sensitive matters that are associated with Islam in one way or another: the issues of gender inequality, dress codes, family models, immigration policies, religion-inspired terrorism are the best indicators of that.[9] But this might also explain the fact that in the collective imagination of many Italians, Muslims are perceived as the paradigm of 'otherness', and Islam is often synonymous with 'other' religions, other than traditional ones.[10] It is no accident that such a situation is being further fuelled by the ringing endorsement

[4] M. Ambrosini, P. Naso and C. Paravati (eds), *Il Dio dei migranti. Pluralismo, conflitto, integrazione* (Bologna, il Mulino, 2018).

[5] 'Europe's Growing Muslim Population. Muslims are projected to increase as a share of Europe's population – even with no future migration', *Pew Research Center,* 29 Nov 2017 <https://www.pewforum.org/2017/11/29/europes-growing-muslim-population/>.

[6] Q. Ariès, 'Europeans overestimate Muslim population: poll Italians, Germans and Belgians believed Muslims make up a fifth of their countries' populations', *Politico*, 14 Dec 2016 <https://www.politico.eu/article/europeans-overestimate-muslim-population-poll/>; 'Perceptions are not reality: what the world gets wrong', *Ipsos-MORI*, 14 Dec 2016 <https://www.ipsos.com/ipsos-mori/en-uk/perceptions-are-not-reality-what-world-gets-wrong>. See also A. Frisina, 'Young Muslims' Everyday Tactics and Strategies: Resisting Islamophobia, Negotiating Italianness, Becoming Citizens' (2010) 31/5 *Journal of Intercultural Studies*, pp. 557-72; C. Bonini and G. D'Avanzo, *Il mercato della paura. La guerra al terrorismo islamico: inchiesta sull'inganno italiano* (Torino, Einaudi, 2006); G. Marranci, 'Multiculturalism, Islam and the Clash of Civilizations Theory: Rethinking Islamophobia' (2004) 5/1 *Culture and Religion*, pp. 105-17.

[7] C. Burdett, 'Representations of the Islamic community in Italy 2001-2011' (2013) 13/1 *Journal of Romance Studies*, pp. 1-18.

[8] S. Allievi, 'Immigration, Religious Diversity and Recognition of Differences: The Italian way to Multiculturalism' (2013) 21/6 *Identities*, pp. 724-37.

[9] C. Burdett, *Italy*, *Islam and the Islamic world: Representations and Reflections from 9/11 to the Arab Uprisings* (Oxford, Peter Lang, 2016).

[10] F. Alicino, 'The Italian Legal System and Imams: A difficult Relationship' in: Mohammed Hashas, Jan Jaap de Ruiter and Niels Valdemar Vinding (eds), *Imams in Western Europe. Develop-*

of the anti-immigration platform, which some political factions openly describe as fighting against an 'Islamic invasion'.[11] That is also evident when it comes to the 'question of the mosques'.

In Italy mosques are normally considered Islamic cultural centres, where Muslims can interact with other associations and public institutions. This is because, with the exception of the Islamic Cultural Centre of Italy (ICCI) based in Rome,[12] no Muslim organisation has ever been formally recognised as a religious denomination. It is not by chance that the ICCI is the only organisation with an official mosque, which happens to be the largest Islamic place of worship in Europe. On the other hand, there are approximately 700 unofficial Muslim places of worship in the country, where Islamic communities regularly experience difficulties in obtaining permission from local governments to build mosques or even to keep them open.[13]

Municipalities have to comply with national and regional laws related to places of worship. In determining the proportion of the city's places of worship, these laws provide a set amount of public funds for their construction. State support comes mainly from city councils and is integrated with regional funding. In fact, these kinds of support are manly reserved for the Catholic Church and some minority religions that have been able to sign an 'understanding' (called *intesa*) with the State under Article 8 par 3 of the Constitution.[14] The same cannot be said for Islamic organisations. When these groups apply to city departments to build mosques, they encounter

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ments, Transformations, and Institutional Challenges (Amsterdam, Amsterdam University Press, 2018), pp. 359-80.

[11] While visiting Hungary (2 May 2019), The Ministry of the Interior Matteo Salvini from the far-right League Party gave an interview to Hungarian national television, saying that some European capitals were in the hands of Islamic minorities: 'if we do not take back control of our roots, Europe will become Islamic caliphate,' Mr. Salvini said. Few mouths earlier, while vowing to halt a migrant "invasion", he had affirmed that 'Italian culture and society risk being eradicated by Islam". "We have to decide if our ethnicity, if our white race, if our society continues to exist or if our society will be rubbed out,' Attilio Fontana, the League candidate to become the next head of the Lombardy Region, also told Radio Padania. See L. Montalto Monella and S. Amiel, 'Salvini claims he is saving Europe from Islam, what are the facts?', *euronews*, 6 May 2019 <https://www.euronews.com/2019/05/03/europe-will-become-an-islamic-caliphate-if-we-don-t-take-back-control-salvini-tells-hunga>; C. Balmer, 'Northern League leader says Italian society threatened by Islam', *Reuters*, 15 Jan 2018 <https://www.reuters.com/article/us-italy-election-league/northern-league-leader-says-italian-society-threatened-by-islam-idUSKBN1F4249>.

[12] This association is the only one that has been recognised as a religious legal entity under the 1159/1929 law on admitted religion. See 'Decreto del Presidente della Repubblica 21 dicembre 1974, n. 712, Riconoscimento della personalità giuridica dell'ente Centro islamico culturale d'Italia', *Gazzetta Ufficiale della Repubblica Italiana* <https://www.gazzettaufficiale.it/eli/id/1975/01/11/074U0712/sg>.

[13] G. Galeazzo and I. Lombardo, 'La sfida fra le 700 moschee: così l'Islam italiano va a caccia di fondi', *La Stampa*, 1 July 2019 https://www.lastampa.it/cronaca/2016/05/01/news/la-sfida-fra-le-700-moschee-cosi-l-islam-italiano-va-a-caccia-di-fondi-1.34995971.

[14] See *infra*, para. II.

many administrative and political obstacles, even when the requests are in line with the land-use planning laws and with the constitutional right to freedom of religion; that also explains why in Italy Muslims may pray, but they are hardly ever allowed to build proper mosques. Thus, Islamic groups often improvise collective worship at warehouses, shops, supermarkets, apartments, stadiums, gyms and garages. And yet, once again, public authorities are not always disposed to tolerate these 'places of worship'; this is also because these places frequently provoke tensions between Islamic communities and local residents.[15]

This is also a result of not particularly forward-looking policies, such as those related to the leaderships of the northern regions of Lombardy, Veneto and Liguria, where what are known as anti-mosque laws have been promoted and approved: following Article 117 of the Italian Constitution and the national laws concerning land-use planning,[16] the legislative bodies (councils) of these regions have sought to subject anyone wishing to build a mosque to an exhaustive list of legal restrictions, thus preventing any construction of this kind.[17] On the other hand, some of these regional laws have been declared illegitimate by the Constitutional Court because they are in conflict with Articles 8 and 19 of the Constitution, which are indispensable parts of Italy's supreme principle of secularism (*principio supremo di lacità*).[18] In particular, those regional laws are in breach of the fundamental right of all religions to be treated fairly and equally – meaning free from all unreasonable discrimination – as well as the right of anyone to freely profess religious belief in any form, individually or with others, and to promote and celebrate religious rites in public or in private.[19]

II. Institutional Recognition by the State

Under the Italian Constitution all individuals and all communities with religious aims are equal and equally free before the law. They can operate without authorisation or prior registration. The only restriction is based on the protection of public order and common decency. Thus, in theory, Muslims have the right to profess their faith freely and propagate religion in any form.[20] In practice, apart from the Islamic

[15] N. Degiorgis, *Hidden Islam* (Bolzano, Rorhof, 2014).

[16] In this field, the Italian Parliament has the power to set general rules, the 20 Italian Regions legislate their own regional laws in the frameworks of national law.

[17] F. Oliosi, 'La questione dei luoghi di culto islamici nell'ordinamento italiano: alla ricerca di un porto sicuro' in: Di Carlo Cardia and Giuseppe dalla Torre (eds), *Comunità islamiche in Italia. Identità e forme giuridiche* (Torino, Giappichelli, 2015), pp. 175-210.

[18] See *infra*, para. II.

[19] Corte cost., 24 marzo 2016, n. 63; Corte cost., 7 aprile 2016, n. 67.

[20] L. Paladin, 'Voce Ordine pubblico' (1965) XII *Novissimo Digesto italiano*, p. 130.

Cultural Centre of Italy, the vast majority of Muslim groups constitute themselves as non-recognised associations with a very weak legal capacity.[21]

In order to better understand this situation, it is important to note that Article 7 of the Italian Constitution establishes mutual independence and sovereignty for both the State and the Roman Catholic Church. Albeit less strong, this principle is also affirmed in Article 8 par 2 that recognises the right to self-organisation for minority religions, defined as denominations other than Catholicism (*confessioni diverse dalla Cattolica*). At the same time, Articles 7 par 2 and 8 par 3 of the Constitution regulating State-Church relations. Based on what scholars typically refer to as the bilateralism method (*metodo della bilateralità pattizia*), these articles promote legislative rules that aim at combining respect for general constitutional rules and attention to specific religious claims.[22] More precisely, Article 7 par 2 declares that the 1929 Lateran Pacts[23] govern the relations between the State and the Catholic Church. However, this article also affirms that any change to those pacts, when accepted by the Holy See and the State, does not require the procedure of constitutional amendments.[24] Both the 1929 Lateran Pacts and Article 7 par 2 are seen as legal prototypes of the bilateralism

[21] In accordance with Art 36-38 of the Italian Civil Code, this kind of association implies independence in property matters and the possibility to receive donations. Non-recognized associations are the simplest model of association that does not provide particular control from the State's authorities.

[22] F. Finocchiaro, *Diritto ecclesiastico* (Bologna, Zanichelli, 2012), p. 128; G. Balladore Pallieri, *Diritto costituzionale* (Milano, Giuffrè, 1970), p. 124; F. Margiotta Broglio, 'Dalla questione romana al superamento dei Patti lateranensi' in: General Director of President of the Council of Ministers, *La revisione del Concordato. Un accordo di libertà* (Roma, Istituto Poligrafico e Zecca dello Stato, 1986), p. 19; S. Berlingò, 'Fonti del diritto ecclesiastico' (1991) *Digesto discipiline pubblicistiche*, p. 459; G. Casuscelli, *Concordati, intese e pluralismo confessionale* (Milano, Giuffrè, 1974), p. 144; G. Casuscelli, *Post-confessionismo e transizione* (Milano, Giuffrè, 1984), p. 55; R. Botta, *Tutela del sentimento religioso ed appartenenza confessionale nella società globale. Lezioni di diritto ecclesiastico per il triennio con appendice bibliografica e normativa* (Torino, Giappichelli, 2002), p. 54; C. Cardia, *La riforma del Concordato. Dal confessionismo alla laicità dello Stato* (Torino, Einaudi, 1980), pp. 108-9; G. Battista Varnier, 'La prospettiva pattizia' in: Vittorio Parlato and Varnier Giovanni Battista (eds), *Principio pattizio e realtà religiose minoritarie* (Torino, Giappichelli, 1995), pp. 8-13; J. Pasquali Cerioli, 'Interpretazione assiologica, principio di bilateralità pattizia e (in)eguale libertà di accedere alle intese ex art. 8, terzo comma, Cost' (2016) *Rivista telematica* <www.statoechiese.it>; G. Casuscelli, 'Il pluralismo in materia religiosa nell'attuazione della Costituzione ad opera del legislatore repubblicano' in: Sara Domianello (ed), *Diritto e religione in Italia. Rapporto nazionale sulla salvaguardia della libertà religiosa in regime di pluralismo confessionale e culturale* (Bologna, Mulino, 2012), p. 23; G. D'Angelo, *Repubblica e confessioni religiose tra bilateralità necessaria e ruolo pubblico: contributo alla interpretazione dell'art. 117, comma 2, lett. c) della Costituzione* (Torino, Giappichelli, 2012), p. 13.

[23] F. Margiotta Broglio, *Italia e Santa Sede dalla grande guerra alla conciliazione* (Roma-Bari, Laterza, 1966), p. 77; R. Pertici, *Chiesa e Stato in Italia. Dalla Grande Guerra al nuovo Concordato. Dibattiti storici in Parlamento* (Bologna, il Mulino, 2009), p. 185.

[24] Art 138 of the Italian Constitution regulates this procedure.

principle, which is also incorporated into Article 8 par 3 of the Constitution.[25] Accordingly, only legislative acts can regulate relations between minority religions and the State.[26] Nevertheless, these acts must be based on *intese*, which can be translated as 'understandings' between the State and denominations other than Catholicism.[27]

In other words, once the Italian Government and the representatives of a given religion have signed an agreement (in the case of the Catholic Church) or an understanding (for minority religions), these two documents need to be ratified (for the agreement) or approved (for the understanding) by specific legislative acts of Parliament. And, so far as organizations without *intese* are concerned, these groups are subject to the 1159/1929 law on 'admitted religions' (*culti ammessi*).[28] Having been approved during the Fascist regime, this law is not always congruent with constitutional provisions.[29] However, the 1929 law is still in force as Parliament has not been able to replace it with a more constitutionally inclined legislation.[30]

In 1984, the Italian Government signed the first *intesa* with the Waldensian Church. Since then, the Government has signed thirteen *intese*, twelve of which have been approved by Parliament to date.[31] In this manner, the method of bilateral legislation, while recognising significant legal benefits, underscores the importance of the

[25] N. Colaianni, *Confessioni religiose e intese. Contributo all'interpretazione sistematica dell'art. 8 della Costituzione* (Bari, Cacucci, 1990), p. 132.

[26] F. Modugno, 'Norme singolari, speciali, eccezionali' (1978) XXVIII *Enciclopedia del diritto*, p. 508; M. Ricca, *Legge e Intesa con le confessioni religiose: sul dualismo tipicità-atipicità nella dinamica delle fonti* (Torino, Giappichelli, 1996), p. 25.

[27] G. Casuscelli, 'La rappresentanza e l'intesa' in: A. Ferrari (ed), *Islam in Europa/Islam in Italia tra diritto e società* (Bologna, il Mulino, 2008), p. 304.

[28] G. Bouchard, 'Concordato e intese, ovvero un pluralismo imperfetto' (2004) 1 *Quaderni di diritto e politica ecclesiastica*, pp. 70-1.

[29] According to this slaw, the Ministry of the Interior takes into consideration the characteristics of the denomination or religious entity that claims recognition. For example, the Ministry of the Interior takes into account: 1) the number of the claimants' members and how widespread they are in the Country; 2) the compatibility between the claimants' statute and the main principles of the Italian legal system; 3) the aim of the denomination that claims to be recognised by the State, an aim that has to be 'prevalently' of religion and worship. In contrast, religious groups possessing an understanding with the State are no longer subject to the 1929 law whose rules are entirely replaced by those, more favourable, of legislative acts approving *intese*. See A. Bettetini, 'Alla ricerca del 'ministro di culto': Presente e futuro di una qualifica nella società multireligiosa' (2000) 1 *Quaderni di diritto e politica ecclesiastica*, p. 249; A. Licastro, *I ministri di culto nell'ordinamento giuridico italiano* (Milano, Giuffrè, 2005), p. 482; C. Mirabelli, *L'appartenenza confessionale* (Padova, CEDAM, 1975), p. 359; O. Francesco, 'Voce Ministri di culto' (1990) XX *Enciclopedia giuridica*, p. 6.

[30] R. Zaccaria, S. Domianello, A. Ferrari, P. Floris and R. Mazzola (eds), *La legge che non c'è. Proposta per una legge sulla libertà religiosa* (Bologna, il Mulino, 2019).

[31] See 'Le intese con le confessioni religiose', *Governo Italiano - Presidenza del Consiglio dei Ministri - Servizio per i rapporti con le confessioni religiose e per le relazioni istituzionali* <http://presidenza.governo.it/USRI/confessioni/intese_indice.html>.

Catholic Church and other minority religions in society.[32] As such, the bilateralism method seems suitable to govern religious diversity in the framework of a democratic, pluralistic legal system; that is even more relevant in the light of the principle of *laicità* (secularism), which is not expressly enshrined in the 1948 Constitution. Yet, this has not prevented the Constitutional Court from specifying that, on the basis of a series of constitutional provisions,[33] secularism-*laicità* is one of the supreme principles (*principi supremi*)[34] of the Italian legal order.[35] This supreme principle does not imply indifference towards religions but it acknowledges the special status of denominational religions while also affirming the religious equidistance and impartiality of the State.[36] In other words, the Italian supreme principle of secularism, while recognising the State-religion separation, has a positive attitude towards confessions.[37] This is precisely delineated through the *favor religionis* (Articles 7, 8 and 20 of the Constitution) that, together with *favor libertatis* (Articles 2, 3 and 19 of the Constitution), legally defines the supreme principle of secularism. And it

[32] F. Alicino, *La legislazione sulla base di intesa. I test delle religioni "altre" e degli ateismi* (Bari, Cacucci, 2013), pp. 23-64.

[33] Namely Art 2 (under which "[t]he Italian Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled"), 3 (regulating the principle of equality); 7 (concerning the relation between the State and the Catholic Church), 8 (1st par: "[a]ll religious denominations are equally free before the law"; 2nd par: "[d]enominations other than Catholicism have the right to self-organization according to their own statutes, provided these do not conflict with Italian law), 19 ("[a]nyone is entitled to freely profess their religious belief in any form, individually or with others, and to promote them and celebrate rites in public or in private, provided they are not offensive to public morality), and 20 ("[n] o special limitation or tax burden may be imposed on the establishment, legal capacity or activities of any organization on the ground of its religious nature or its religious or confessional aims") of the 1948 Constitution.

[34] F. Finocchiaro, ''Principi supremi', ordine pubblico italiano e (auspicata) parità tra divorzio e nullità canonica del matrimonio' in: Franco Cipriani (ed), *Matrimonio concordatario e tutela giurisdizionale* (Napoli, ESI, 1992), p. 67.

[35] See the following decisions of the Italian Constitutional Court: no. 203/1989; no. 259/1990; no. 13/1991; no. 467/1991; no. 195/1993; no. 421/1993; no. 149/1995; no. 440/1995, no. 334/1996; n. 235/1997; no. 329/1997; no. 507/2000; no. 508/2000; no. 327/2002; no. 389/2004; n. 168/2005; no.102/2008; no. 52/2016.

[36] S. Lariccia, 'Problemi in temi dello Stato e delle istituzioni civili' in: Ludovico Mazzarolli, *Scritti in memoria di Livio Paladin* (Napoli, Jovene, 2004), p. 1251; S. Sicardi, 'Il principio di laicità nella giurisprudenza della Corte costituzionale (e rispetto alle posizioni dei giudici comuni)', *Associazione Italiana dei Costituzionalisti*, 9 Jan 2007 <https://www.associazionedeicostituzionalisti.it/old_sites/sito_AIC_2003-2010/materiali/convegni/200611foggia/sicardi1.html>.

[37] N. Colaianni, *La lotta per la laicità. Stato e Chiesa nell'età dei diritti* (Cacucci, Bari, 2017), p. 19.

should not be forgotten that *favor religionis* remains strictly connected to the method of bilateral legislation.[38]

Now, it is worth remarking that from 1984 onwards the practical implementation of relations between the State and minority religions has been characterised by the 'copy & paste' method of law production. As a result, all *intese* now in force have a very similar content. It means that these *intese* have established a de facto common legislation of sorts, which is far from being considered general legislation.[39] This legislation refers exclusively to all religious denominations that have an *intesa*, and excepts all other minority religions, which remain subject to the 1159/2929 law. It should also be underscored that there is no law regulating the procedure for the use of Article 8 par 3 of the Constitution. So, the decision on whether to start negotiations to sign *intese* is a matter for the Italian Government. Moreover, under the 1159/1929 law, the Government also plays a significant and the sole role in determining whether an organisation can be recognised as a religious denomination. And it should not be ignored that the 1159/1929 law's legal recognition is the first, although not decisive, step toward obtaining an *intesa*.

All of this can turn the discretionary power of the Government into discriminatory distinctions between religions with *intese* and those without *intese*.[40] Furthermore, based on the Government's attention and support, the bilateralism method leads many minority religions to consider State-Church relations not only as opportunities to exercise constitutional prerogatives but also, and above all, as instruments of public legitimacy. That is even more evident when referring to conspicuous religious groups, like Muslim ones, whose legal status is still regulated under more generic laws on recognised and non-recognised associations.[41] Since Islamic communities are normally prevented from being legally recognised even under the 1159/1929 law on admitted religion,[42] these organisations can instead choose the form of recognised associations with legal personality, through registration at the local prefecture. However, these kinds of association are not comparable to either religious denominations

[38] G. Battista Varnier, 'Il modello pattizio Stato-confessioni alla prova delle nuove dinamiche della società italiana' in: Valerio Tozzi and Gianfranco Macrì (eds), *Europa e Islam. Ridefinire i fondamenti della disciplina delle libertà religiose* (Soveria Mannelli, Rubbettino, 2009), p. 34.

[39] On the difference between 'common legislation and 'general legislation see F. Carnelutti, *Teoria generale del diritto* (Roma, Edizioni del Foro italiano, 1951), p. 42; V. Crisafulli, 'Voce Fonti del diritto (dir. cost.)' (1968) XII *Enciclopedia del diritto*, p. 948.

[40] See Corte cost., n. 52/2016.

[41] E. Camassa, 'Caratteristiche e modelli organizzativi dell'Islam italiano a livello locale: tra frammentarietà e mimetismo giuridico' in: Carlo Cardia and Giuseppe dalla Torre (eds), *Comunità islamiche in Italia. Identità e forme giuridiche* (Torino, Giappichelli, 2015), pp. 123-49.

[42] P. Floris, 'Comunità islamiche e lacune normative. L'ente che non c'è: l'associazione con fine di religione e di culto' in: Carlo Cardia and Giuseppe dalla Torre (eds), *Comunità islamiche in Italia. Identità e forme giuridiche* (Torino, Giappichelli, 2015), pp. 75-97.

with *intese* under Article 8 par 3 of the Constitution or non-Catholic confessions under the 1159/1929 law.[43]

For these very reasons, the bilateral State-Church method seems to function in a way that is contrary to fundamental rights and freedoms, including those related to both *favor libertatis* (Articles 2, 3 and 19) and *favor religionis* (Articles 7, 8, and 20),[44] which not by chance but rather by necessity are integral parts of the supreme principle of secularism.[45] Indeed, the Constitution recognises all persons as equal before the law and entitled to freely profess, practise and propagate religions in any form, individually or with others (*favor libertatis*). In addition, the Constitution also guarantees to all religious denominations and associated organisations that they be equally free before the law without discrimination on the basis of their religious nature or aims (*favor religionis*).

This point of discussion becomes even more pertinent when we look into the jurisprudence of the European Court of Human Rights (ECtHR), holding that the European Convention on Human Rights (ECHR) does not require a Member State to create a particular legal framework in order to grant religious communities special status. Yet a State which has created such a status through specific bilateral State-Church legislation must comply with its duty of neutrality and impartiality. In particular, this State should ensure that any group has a fair opportunity to apply for the aforementioned status and that the criteria established at the domestic level are in accordance with the principles of proportionality and non-discrimination.[46]

In sum, the practice of bilateral legislation seems to be in contrast not only with Articles 2, 3, 8, 19, 20 but also with Article 117 par 1 of the Constitution, under which legislative powers shall be 'in compliance with the constraints deriving from EU legislation and international obligation', including those referring to ECHR.[47] This means that, in the light of both Italy's Constitution and the supranational principles, the benefits of the bilateralism method have increasingly come to be seen in terms of 'negative externalities': these benefits, while creating privileges for the Catholic Church and a few minority denominations, produce unreasonable discrimination against all other religions, including those related to the Islamic community, the largest religion in Italy after Catholicism.[48]

[43] Italian Civil Code, Art 14-35; the 2000 decree of the President of Italian Republic (no. 361).

[44] N. Colaianni, 'Trent'anni di laicità (Rileggendo la sentenza n. 203 del 1989 e la successiva giurisprudenza costituzionale)' (2020) 21 *Rivista telematica* <www.statoechiese.it>, pp. 52-66.

[45] A. Pin, *The Legal Treatment of Muslim Minorities in Italy* (London, Routledge, 2016).

[46] *Savez crkava "Riječ života" and others v. Croatia,* App no 7798/08 (ECHR, 9 Dec 2010); *İzzettin Doğan and others v. Turkey*, App no. 62649/10 (ECHR, GC, 26 April 2016).

[47] N. Colaianni, 'Laicità e prevalenza delle fonti di diritto unilaterale sugli accordi con la Chiesa cattolica' (2010) 2 *Politica del diritto*, pp. 181-225.

[48] S. Allievi, *Islam italiano. Viaggio nella seconda religione del Paese* (Torino, Einaudi, 2003).

A. Stance of the State towards the Islamic Communities

In Italy, Muslim groups are not only excluded from the benefits of *intese*, they are also impeded from being legally recognised under the 1159/1929 law on admitted religions.[49] Hence, the most representative Islamic organisations in the country have sought to bypass this law, encouraging new forms of cooperation with the state. These groups have done so in order to reinforce their legal capacity and with the hope of persuading both the Government to sign *intese* and the Italian Parliament to approve them, as requested by Article 8 par 3 of the Constitution.

In 1990, two years after its establishment, the Union of Islamic Communities and Organisations in Italy (UCOII) publicly issued a draft understanding, which was sent to the Government. Similar attempts were made by other Muslim groups, such as the Association of Italian Muslims (1994) and the Islamic Italian Community (1996),[50] yet public authorities did not consider these efforts. Moreover, instead of using Article 8 par 3 of the Constitution or the 1159/1929 law, the Government has most often chosen other – formal and informal – mechanisms. That is the case of mini-understandings (*mini intese*) between representatives of public sector branches and minority religions, including Muslim ones.[51] Thus, following the example of two mini-understandings between the State Department of Penitentiary Administration (DAP) with the Jehovah's Witnesses and with Protestant Churches, on 5 November 2015 DAP and UCOII signed a protocol allowing Muslim religious ministers to enter prisons. This protocol was ratified on 8 January 2020 and, in October of the same year, extended to the Italian Islamic Conference (IIC).[52]

[49] V. Tozzi, 'Le confessioni religiose senza intesa non esistono' in: Ilaria Zuanazzi (ed), *Aequitas sive Deus. Studi in onore di Rinaldo Bertolino* (Torino, Giappichelli, 2011), p. 1033.

[50] L. Mussell, 'A proposito di una recente proposta di bozza d'intesa con l'Islam' (1997) I *Il Diritto ecclesiastico*, p. 295; M. Tedeschi, 'Verso un'intesa tra la Repubblica italiana e la Comunità islamica in Italia?' (1996) *Il diritto di famiglia*, p. 1574; A. Cilardo, 'Diritto islamico, diritto occidentale: ambiguità semantica' in: Valerio Tozzi and Gianfranco Macrì (eds), *Europa e Islam. Ridiscutere i fondamenti della disciplina delle libertà religiose* (Soveria Mannelli, Rubbettino, 2009), p. 94.

[51] F. Alicino, 'La bilateralità pattizia Stato-confessioni dopo la sentenza n. 52/2016 della Corte costituzionale' (2016) 2 *Osservatorio sulle Fonti*, pp. 1-16.

[52] These protocols allow imams to offer spiritual assistance to Muslim inmates detained in Italian prisons. UCOII and IIC will provide prison administration with a list of people who "perform the functions of imam in Italy" and who are "interested in guiding prayers and worship within prisons nationwide." The list will also specify at which mosque or prayer room each imam normally performs his worship. Imams will have to indicate their preference for three provinces where they would be willing to lead prayers for inmates. See M. Belli, 'Religione in carcere: intesa tra Dap e Comunità Islamiche', *gNews*, 5 June 2020 <https://www.gnewsonline.it/religione-in-carcere-intesa-tra-dap-e-comunita-islamiche/>. See also F. Alicino, 'Italy Tested by New Religious Diversity: Religion in the Italian Prison System' in: Anne-Laure Zwilling and Julia Martínez-Ariño (eds), *Religion and Prison in Europe* (Cham, Springer, 2020), pp. 219-36; S. Angeletti, 'L'accesso dei ministri di culto islamici negli istituti

Other initiatives of this kind have been undertaken during the emergency of the COVID-19 pandemic outbreak. The attention focuses on the protocol concerning the resumption of public masses, which was first signed on 7 May 2020 by the President of the Council of Ministers Giuseppe Conte, the Minister of the Interior Luciana Lamorgese and the President of the Italian Episcopal Conference Cardinal Gualtiero Bassetti.[53] A few days later very similar – copy & paste – documents were signed by other religious leaders, including those representing groups without *intese* or not even legally recognised as religious denominations, as is the case of Muslim communities.[54]

The fact remains that these protocols have nothing to do with the bilateralism method, given that they fall into neither Article 7 par 1 nor Article 8 par 3 of the Constitution. On the contrary, the protocols are part of the unilateral law that regulates public administrative procedure, according to which associations or private committees (that have concrete interest for the defence of legally significant situations and that could be prejudiced by the measure taken by public authorities) have the right to intervene during rulemaking proceedings.[55] The administrative nature of the 2020 protocols is also confirmed by the Technical Scientific Committee (*Comitato Tecnico Scientifico*), which approved the said documents before going to the State's authorities and the religious representatives for their signature.[56]

All of this also helps to understand the issues of Islamic burial ground in public cemeteries, in which separate sectors must be reserved for the burial of people belonging to religions other than Catholicism.[57] In the light of the national rules, city mayors should grant areas of the cemetery to minority religions. It should be noted that Muslim migrants often prefer to repatriate the body of a loved person to their country of origin. However, this was impossible during the COVID-2019 pandemic

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di detenzione, tra antichi problemi e prospettive di riforma. L'esperienza del Protocollo tra Dipartimento dell'Amministrazione penitenziaria e UCOII' (2018) *Rivista telematica <www.stataoechiese.it>*, p. 24.

[53] See Governo italiano, *Protocollo circa la ripresa delle celebrazioni con il popolo*, 7 May 2020 <http://www.governo.it/sites/new.governo.it/files/Protocollo_CEI_GOVERNO_20200507.PDF>.

[54] Governo italiano, *Protocollo con le Comunità Islamiche,* 15 May 2020 <https://www.interno.gov.it/sites/default/files/2020.05.14_protocollo_comunita_islamiche.pdf>.

[55] Legge 7 ago 1990, n. 241, Nuove norme sul procedimento amministrativo. See N. Colaianni, 'Il sistema delle fonti costituzionali del diritto ecclesiastico al tempo al tempo dell'emergenza (e oltre?) (2020) 4 *AIC*, pp. 209-27; G. Cimbalo, 'Il papa e la sfida della pandemia' (2020) 15 *Rivista telematica* <www.statoechiese.it>, pp. 1-9.

[56] See the above-mentioned *Protocollo circa la ripresa delle celebrazioni con il popolo*, where it is stated that "during the meeting of 6 May 2020 the Technical-Scientific Committee has analysed and approved this 'Protocol concerning the resumption of public Masses'" (*il Comitato Tecnico-Scientifico, nella seduta del 6 maggio 2020, ha esaminato e approvato il presente 'Protocollo circa la ripresa delle celebrazioni con il popolo*) (translation mine).

[57] See D.P.R. 10 sett 1990, n. 285, Approvazione del regolamento di polizia mortuaria, Art 100.

emergency, which has brought the issue of Muslim burial spaces to the forefront of State-Islam relations.

During the first phase of the outbreak between February and May 2020, the Italian Government stopped allowing bodies to be sent out of the country. Consequently, many Muslims had to be buried on Italian soil. The fact is that the Islamic requirement of burial within 24 hours of death could not always be honoured. For example, in the province of Brescia in the Region of Lombardy, a Macedonian family had to keep the body of one of its members enclosed in a coffin at home for more than a week; this was because the City in which they lived lacked an Islamic burial ground.[58] Just one year earlier (February 2019), the members of the Lombardy Regional Council had approved an amendment that negated a provision of the regional 2009 funerary law[59] compelling private associations to allow burials in their allocated spaces in public cemeteries, regardless of sex or religion.[60] League Party members sponsored the bill saying that the law would stop 'predominantly Muslim ghettoisation' in public cemeteries. Muslim leaders repeated that the law would likely only limit space for Islamic burials, thus creating further segregation. On 4 July 2020, the Council of San Donato Milanese, a Milan suburb, reserved 25 spaces for Islamic burials in Monticello's public cemetery. Islamic leaders stated this was an insufficient number of spots for the local Muslim communities.[61]

B. **The Government and Institutionalised Bodies**

Given the legislative vacuum on religious freedom, since the beginning of the 2000s the Italian Government in general and the Ministry of the Interior in particular have been trying to create administrative channels of communication which support a more formal collaboration between the Italian State and Muslim groups.[62]

[58] A. Gianfreda, *Tra cielo e terra. Libertà religiosa, riti funebri e spazi cimiteriali* (Roma, Libellula, 2020), pp. 323-70.

[59] Legge Regionale 30 dice 2009, n. 33, Testo unico delle leggi regionali in materia di sanità, Art 75.

[60] See Legge Regionale 4 marzo 2019, n. 4 Modifiche e integrazioni alla legge Regionale 30 dice 2009, n. 33.

[61] Office of International Religious Freedom, '2020 Report on International Religious Freedom: Italy', *US Department of State,* 12 May 2021 <https://www.state.gov/reports/2020-report-on-international-religious-freedom/italy/>.

[62] Similar approaches have been followed by other branches of the public administration, as demonstrated at local levels by consultative forums with representatives of Muslim communities and experts in religion. For example, on Feb 2016 the City of Florence and a local Muslim community also signed a Pact for integration and citizenship. In the same period, the City of Turin and twenty local Islamic organizations signed the "Pact of shared values" (*il patto di condivisione*) approved in the context of Turin Islamic Forum. See J. Pacini, 'Le relazioni dei centri islamici con enti locali ed istituzionali' in:

For example, in 2005 the Ministry of the Interior established the Council for Islam in Italy (*Consulta per l'Islam italiano*),[63] which supplied documents[64] aimed at reaffirming the 'values' of the Italian Constitution as well as encouraging the creation of an Italian federation of Islamic groups.[65] Three years later, the *Consulta* issued the Charter of values for integration and citizenship (*Carta dei valori per l'integrazione e la cittadinanza*), conceived as the basis for a future understanding between the State and Islam;[66] a Scientific Committee with the same composition as the Council was responsible for disseminating and promoting the content of the charter among both public authorities and Muslims who live in Italy.[67]

In 2010, the Ministry of the Interior also established a Committee for Islam in Italy (*Comitato per l'Islam Italiano*), which was made up of 19 members, including not only Muslim representatives but also academic experts on Islam and even prominent anti-Muslim figures in journalism: the composition of the Committee was intended to soften the lacklustre attempt at representativeness of the previous council.

In 2015, it was the turn of another body called the Council for the relations with Italian Islam, consisting of university professors and experts. This council set up a common agenda with representatives of the major national Muslim associations, namely the Islamic Cultural Centre of Italy (CICI), the Union of Islamic Communities and Organisations of Italy (UCOII), the Italian Islamic Religious Community (COREIS), the Union of Muslim Albanians in Italy (UAMI), the Association of Muslim Women in Italy (ADMI), the Cheikh Ahmadou Bamba Association, the Association of Somali Mothers and Children, the Islamic Association of Imams and Religious Leaders, and the Pakistani Islamic Association 'Muhammadiah'.

Carlo Cardia and Giuseppe dalla Torre (eds), *Comunità islamiche in Italia. Identità e forme giuridiche* (Torino, Giappichelli, 2015), pp. 245-69.

63 S. Ferrari, 'La consulta islamica' in: Fondazione Ismu (ed), *Dodicesimo rapporto sulle migrazioni 2006* (Milano, FrancoAngeli, 2007), pp. 249-63.

64 See C. Cardia, F. Testa, M.P. Paba (eds), 'Documenti del Comitato per l'Islam italiano' in: Carlo Cardia and Giuseppe dalla Torre (eds), *Comunità islamiche in Italia. Identità e forme giuridiche* (Torino, Giappichelli, 2015), pp. 663-94.

65 See C. Cardia, F. Testa, M.P. Paba (eds), 'La Dichiarazione di intenti per la federazione dell'Islam italiano' in: Carlo Cardia and Giuseppe dalla Torre (eds), *Comunità islamiche in Italia. Identità e forme giuridiche* (Torino, Giappichelli, 2015), pp. 659-62.

66 See C. Cardia, 'Introduzione alla Carta dei valori della cittadinanza e dell'integrazione' in: Ministero dell'Interno, *Carta dei valori della cittadinanza e dell'integrazione* (Roma, Ministero dell'Interno, 2008), p. 8. It should be also noted that in 2012 the Minister for Cooperation and Integration created a Permanent Conference on Religions, Culture and Integration (CRCI), where representatives of Muslim organizations and experts on Islam and on other religions were properly represented; however, the CRCI was essentially conceived as a space for meetings and seminars rather than a consultative body.

67 C. Cardia, F. Testa and M. Patrizia Paba, 'Relazione sull'Islam in Italia' in: Carlo Cardia and Giuseppe dalla Torre (eds), *Comunità islamiche in Italia. Identità e forme giuridiche* (Torino, Giappichelli, 2015), pp. 617-58.

In 2017, the Council for the relations with Italian Islam issued a 'National Pact for an Italian Islam Expression of an Open Community'.[68] This pact is divided into three parts. The first refers to the constitutional rules concerning religious freedom. The second and third contain two 'decalogues' calling on representatives of Muslim communities and the Ministry of the Interior to support the establishment of an Italian federation of Islamic communities that, among other things, should contribute in order to prevent and oppose religion-inspired violent radicalisation. Most importantly, the pact should serve to start the process of legal recognition of Muslim communities, which is the preliminary condition to start negotiations related to Article 8 par 3 of the Constitution. The pact also underlines the necessity to 'train imams and religious leaders who can act as effective mediators to ensure full implementation of the civil principles of coexistence, state secularism, legality and equality of rights between men and women'. Finally, the pact supports Muslim organisations that ensure the utmost transparency in their funding received from Italy or abroad and that deliver the Friday sermon in Italian.[69]

C. **Financing Islamic Communities**

Under Article 47 of the 222/1985 law (related to the relations between the State and the Catholic Church) and the similar rules incorporated on the laws approving the *intese* under Article 8 par 3 of the Constitution, all taxpayers can choose how to allocate 0.008 of the entire Italian income taxes (called *IRPEF*) to one of the following institutions: the State, the Catholic Church, or one of the few minority religions that have signed an *intesa*.[70] The fund (i.e. the overall amount of 0.008 of the *IRPEF*) is divided proportionally based on the choices the taxpayers made when submitting their income tax return.[71] It should be noted that in 1993 the Constitutional Court ruled that

[68] Ministero dell'Interno, *Patto nazionale per un Islam italiano, espressione di una comunità aperta, integrata e aderente ai valori e principi dell'ordinamento statale*, 1 Feb 2017, <https://www.interno.gov.it/it/amministrazione-trasparente/disposizioni-generali/atti-generali/atti-amministrativi-generali/decreti-direttive-e-altri-documenti/patto-nazionale-islam-italiano>; the translation refers to the English version of the National Pact <https://www.interno.gov.it/sites/default/files/patto_nazionale_per_un_islam_italiano_en_1.2.2017.pdf>.

[69] P. Naso, 'For Italian Islam', *Intercultural dialogue*, Jan-Feb 2017, pp. 1-4; C. Morucci, 'I rapporti con l'Islam italiano: dalle proposte d'intesa al Patto nazionale' (2018) 38 *Rivista telematica* <www.statoechiese.it>, pp. 1-32.

[70] The only exception is the *intesa* with the Church of Jesus Christ of Latter-Day Saints. See legge 30 luglio 2021, *Norme per la regolazione dei rapporti tra lo Stato e la Chiesa di Gesù Cristo dei Santi degli Ultimi giorni*.

[71] This division does not consider those taxpayers who do not sign for any of the mentioned institution. Since the beginning, the system of 0,008 of the *IRPEF* has seen only a minority of taxpayers (about 40 % of the all the Italian taxpayers) who made a choice. Until now the majority (about 80 %) of this minority have signed in favour of the Catholic Church. Due to the formatting of the *IRPEF,* even the

an act passed by the Region of Abruzzo,[72] was in contrast with the Constitution as it confined the financial support to the Catholic Church and those minority religions with an understanding with the Italian State: the public funding cannot create unreasonable distinctions on the basis of religious belonging, the Court said.[73] It remains the case that the legislative loophole on religious freedom and the practice of the bilateralism method do make such a distinction. This is even more evident in relation to Islamic groups, which are prevented from participating in the 0.008 *IRPEF* system.

On the other hand, the Italian Tax Authority allows 0.005 of *IRPEF* to support non-profit organisations, including Muslim ones. For example, at Centocelle on the southern outskirts of Rome, a man who works at an Islamic centre regularly collects donations from congregation members who are on their way home. A sign on the door of the 'mosque' in question – set up inside the garage of a large building – instructs people to sign for 0.005 of *IRPEF* in favour of the Islamic association that is based there. These parallel scenes of an ordinary weekly ritual represent the two contrasting sides of Islam in Italy: in requesting 0.005 of *IRPEF* there is a need for charity (*zakat*) but also a need to make up the financial shortfall caused by the absence of an official understanding between any of the country's Islamic group and the Italian State.[74]

This is also reflected in the fact that the most visible Islamic groups in Italy actually represent a minority of 'mosques', with most Islamic cultural centres self-managed by public and private foreign institutions of Muslim-majority countries of the MENA (Middle East and North Africa) region, such as Morocco, Saudi Arabia, Qatar, and Turkey. That is the case with the above-mentioned Great Mosque in Rome, inaugurated in 1995 and built at the expense of Saudi Arabia with the support of the Muslim World League. Another example is given by the Qatari Charity, which is a constant, controversial presence in European Islamic communities. Israeli and U.S. security services suspect that some of these humanitarian contributions may mask

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taxpayers who do not choose the Catholic Church will end up funding a religious organization, according to the selection made by those who do sign in favour of religious groups or the State. Moreover, most of Italian taxpayers do not understand how the system of 0,008 of the *IRPEF* really works. Criticism against this system have been affirmed by the Italian Audit Office (*Corte dei Conti*). See Corte dei Conti, Sezione centrale di controllo sulla gestione delle Amministrazioni dello Stato, *Destinazione e gestione dell'8 per mille dell'IRPEF: le azioni intraprese a seguito delle deliberazioni della Corte dei Conti*, 23 Dec 2016 <https://www.corteconti.it/Download?id=2121576e-4d57-475a-bbd4-7ef8195c0d42>. See also F. Alicino, 'Un referendum sull'otto per mille? Riflessioni sulle fonti' (2013) 33 *Rivista telematica* <www.statoechiese.it>, pp. 1-35.

[72] Legge regionale dell'Abruzzo del 16 marzo 1988, n. 29.

[73] See Corte cost., 27 aprile 1993, n. 195. See also Corte cost., 16 luglio 2002, n. 342.

[74] F.S. Dalba, 'Forme e modalità di finanziamento delle associazioni confessionali islamiche in Italia' in: Carlo Cardia and Giuseppe dalla Torre (eds), *Comunità islamiche in Italia. Identità e forme giuridiche* (Torino, Giappichelli, 2015) pp. 299-334.

activities sympathetic to religion-inspired terrorism. Regardless, in Italy these kinds of financial support show no sign of diminishing.[75]

It should also be noted that in Italy bankers and academics are stepping up efforts to develop Islamic finance, a trend which could benefit from growing religious-economic links between Muslim-majority countries, especially those of the Gulf region, and Islamic groups in Italy. Italy is seeking trade and investment with wealthy Arab States of the Gulf as a way to emerge from its debt problems. A number of initiatives have been taken by Italian authorities to study the issues related to a greater presence of Islamic finance. Italy's Central Bank, for example, has hosted a number of conferences on the subject. The Italian Banking Association (ABI) is coordinating working groups related to the issuance of a corporate or sovereign *sukuk*. At the same time SIMEST, a financial institution supporting the development and promotion of Italian enterprises abroad, has worked on the possibility of launching a 'Mediterranean Partnership Fund', part of which would be shari'a compliant. These initiatives, dedicated to promoting small and medium-sized enterprises through equity or semi-equity instruments, may involve the Union of Arab Banks, several governments of Muslim-majority countries and Islamic multilateral development banks.[76]

III. Application of Shari'a

Under Article 8 par 1 of the 1984 Villa Madama agreement between the Catholic Church and the State, a marriage contract made in accordance with Canon Law has civil effects when recorded in the State's registry office. Article 8 par 2 of the Villa Madama agreement also states that the effects of a sentence of annulment of marriage pronounced by the Catholic Church's tribunals are, at the request of one or both parties, incorporated into the State's legal system via the judgments of the Italian Courts of Appeal. These judges should not take into account the merits of the dispute, but the Courts of Appeal can make provisional financial measures in favour of one of the spouses: these measures are valid until the final decision of the State Court takes place.[77]

[75] C. Chesnot and G. Malbrunot, *Qatar Papers: Comment l'émirat finance l'islam de France et d'Europe* (Paris, Michel Lafon, 2019).

[76] See F. di Mauro et alii, *Islamic Finance in Europe* (European Central Bank, Frankfurt am Main, 2013), p. 26; P. Masiukiewicz, 'Expansion of Islamic Finance in Europe' (2017) 9/2 *Journal of Intercultural Management*, pp. 31-51; S. Iannazzone, 'Developments and Prospects for Islamic Finance in Italy' in: Mohyedine Hajjar (ed), *Islamic Finance in Europe: A Cross Analysis of 10 European Countries* (Cham, Palgrave, 2019), pp. 185-234.

[77] F. Alicino, 'I 'nodi' della delibazione di sentenze ecclesiastiche e il 'pettine' delle Sezioni Unite della Cassazione' (2014) I-II *Il Diritto ecclesiastico*, pp. 195-222.

Now, with the exception of the provisions regulating relations between the State and the Union of Italian Buddhists,[78] all the laws based on *intese* (Article 8 par 3 of the Constitution) contain similar rules to those of the Villa Madama agreement, but only in relation to the civil registration of religious marriages. This means that decisions of religious-minority tribunals have no effect on State law. So far as minority confessions without *intese* are concerned, they are subject to the 1159/1929 law on admitted religions, under which a religious minister can apply to the Italian Ministry of Interior in order to have a religious marriage registered in the State's registry office. However, this is possible only when a religious organisation is legally recognised by the State, which is not the case of any Islamic group, except one.[79] That is also reflected in the conditions of Muslims in Italy relating to other sensitive issues, such as those referring to labour law or education.[80]

A. Family Law and Succession-Inheritance Law

With the exception of marriages involving foreign citizens celebrated in the Great Mosque of Rome, no Muslim marriage legally exists, nor can their civil effects be recognised under Italian law. For this reason, Muslim marriages are normally followed by civil marriages. However, there are cases where a wife belonging to an Islamic community wishes to bring an end to the marital relationship.[81] So, the influential members of the community often try to convince the husband to pronounce repudiation under shari'a family law. Due to the absence of religious jurisdiction, the repudiation is valid within the Islamic community. But, because of the exclusive jurisdiction of the State, the effects of this repudiation cannot be incorporated into State law.

It should be remarked that the majority of Muslims living in Italy are non-citizens. In these cases, personal status is linked to the rules of the state of origin, which in turn is often subject to shari'a family rules. In Italy, these rules can be incorporated into the State legal order only through international private law.[82] The fact is that several provisions of shari'a rules do not always meet with the requirements of this system, especially when related to the principle of *ordre public* (public order). While

[78] Legge 31 dice 2012, n. 245 Norme per la regolazione dei rapporti tra lo Stato e l'Unione Buddhista Italiana, in attuazione dell'articolo 8, terzo comma, della Costituzione. See F. Alicino, 'Lo strano caso dei ministri di culto buddhisti. Ovvero la legge sui culti ammessi vs la legge di approvazione delle intese' (2013) 2 *Quaderni di diritto e politica ecclesiastica*, pp. 409-29.

[79] 'Decreto del Presidente della Repubblica 21 dicembre 1974, n. 712, Riconoscimento della personalità giuridica dell'ente Centro islamico culturale d'Italia', *Gazzetta Ufficiale della Repubblica Italiana*.

[80] See infra, paras. III.B and III.C.

[81] F. Sona, ''Mosque Marriages' and Nuptial Forms among Muslims in Italy' (2018) 7/3 *Oxford Journal of Law and Religion*, pp. 519-42.

[82] See legge 31 maggio 1995, n. 218, riforma del sistema italiano di diritto internazionale privato.

implying separation between religious laws and State law, this principle guarantees individuals' human rights from interference by other persons, groups or public authorities, including those of countries of origin. Hence, on 7 August 2020 the Italian Supreme Court (*Corte di Cassazione*) ruled on the non-recognition of the effects of a Palestinian shari'a court's decision: this decision conflicts with the *ordre public* regulating marriage and family in Italy, the court stated.[83]

It is important to note that the proceeding was brought by a woman of Italian and Jordanian dual nationality. She applied against her husband, who had requested that a judgment issued by the Western Nablus shari'a Court was recorded in the Italian registry office. In this case, the man had repudiated his wife in accordance with the Islamic divorce known as *talaq*. The shari'a court held that, in the light of the repudiation, the marriage was dissolved. Against the registration the woman argued that the shari'a court's judgment contravened the international public order: the Islamic law failed to provide equal rights, she said; this law also prevented her from access to the Palestinian court and, therefore, her right to a fair trial had been violated. For his part the man claimed that *talaq* is a legal form of divorce and that the shari'a court's judgment was passed after attempts to reconcile the couple.[84]

The Italian Supreme Court affirmed that, during the religious proceeding the woman did not have the right to a public hearing by an independent and impartial tribunal. In particular, this proceeding had infringed the adversarial principle, which is an essential element of the international public order relating to fair trials (*ordine pubblico processuale*). The Italian Supreme Court also ruled that the Palestinian shari'a court's judgment contravened the substantive characteristics of the international public order (*ordine pubblico matrimoniale*), since *talaq* is based on the unilateral right of the man to divorce his wife. More specifically, *talaq* violated the legal equality of the spouses as enshrined in the Italian Constitution and the international rules now in force in Italy, including those referring to both the European Convention on Human Rights and European Union law.[85]

It is interesting to note that the subject remains under debate, as the same Italian Supreme Court demonstrated through a judicial order issued just a week after the above-mentioned 7 August 2020 judgment. The order concerned the decision of the Supreme Court of Tehran, which had recognized a unilateral divorce. One of the spouses applied to the Court of Appeal of Bari in order to have this decision recorded in the Italian registry office. The Court of Appeal ruled that the request must be rejected since the decision was in contravention of the international public order: the Iranian unilateral divorce can be assimilated with the Islamic repudiation, which

[83] Cass., 7 agosto 2020, n. 16804/20.
[84] Cass., 7 agosto 2020, n. 16804/20.
[85] Cass., 7 agosto 2020, n. 16804/20.

is incompatible with the fundamental rights of the Italian legal system, Bari's Court affirmed. In contrast, the Italian Supreme Court stated that the Courts of Appeal must not enter into the merits of the case. Rather, in the light of the international private law, they only have to analyse the effects of the foreign judgments. In particular, considering that it is almost impossible to eliminate the differences between the two States in matters of marriage and family, the Courts of Appeal must assess the impact of those effects on the Italian legal system.[86]

For many aspects, this jurisprudence reflects that of other European states, like Greece and France. In 2018, for instance, the Thessaloniki Court reiterated that the Islamic repudiation contravened the European Convention on Human Rights. However, in the particular case, the applicant had fully accepted the dissolution of her marriage. Furthermore, she was the one seeking the recognition of the *talaq* in Greece. For this reason, the Thessaloniki Court affirmed that a dismissal of the application would lead to an absurd situation, where neither of the spouses wished to maintain the marriage. The Court also held that forcing the applicant to initiate divorce proceedings in Greece would be costly and time-consuming.[87]

Similarly, in 2001, through the mitigated doctrine of public order (*ordre public atténué*), the French Supreme Court recognised the civil effects of a foreign judgment based on *talaq*: in this case the repudiation was subject to an open trial during which the woman asserted her claims; moreover, the Algerian judgment guaranteed financial advantages to the wife, ordering the husband to pay damages for the divorce due to spousal abuse and abandonment of the marital home.[88] Nevertheless, three years later the same *Cour de Cassation* did not confirm this jurisprudence. Here the Court stressed the radical contradiction between the Islamic *talaq* and the fundamental rights of the French legal system, including the principle of gender equality.[89] The same can be said about the decision issued in 2014, when the *Cour de Cassation* did

[86] D. Scolart, 'La Cassazione e il ripudio (*ṭalāq*) palestinese. Considerazioni a partire dal diritto islamico', *Questione giustizia,* 4 Dec 2020 <https://www.questionegiustizia.it/articolo/la-cassazione-e-il-ripudio-al-q-palestinese-considerazioni-a-partire-dal-diritto-islamico>.

[87] CFI Thessaloniki, 17 July 2019, Nr. 8458/2019.

[88] Cour de Cassation, Chambre civile 1, du 3 juillet 2001, 00-11.968: "[a]ttendu que, par motifs propres et adoptés, la cour d'appel a énoncé que la conception française de l'ordre public international ne s'opposait pas à la reconnaissance en France d'un divorce étranger par répudiation unilatérale par le mari dès lors que le choix du tribunal par celui-ci n'avait pas été frauduleux, que la répudiation avait ouvert une procédure à la faveur de laquelle chaque partie avait fait valoir ses prétentions et ses défenses et que le jugement algérien, passé en force de chose jugée et susceptible d'exécution, avait garanti des avantages financiers à l'épouse en condamnant le mari à lui payer des dommages-intérêts pour divorce abusif, une pension de retraite légale et une pension alimentaire d'abandon".

[89] Cour de Cassation, Chambre civile 1, du 17 février 2004, 02-11.618. See Y. Heyraud, 'Ordre public international et mariage: entre tradition et instrumentalisation' (2016) *Revue Juridique de l'Ouest*, pp. 83-108.

not incorporate the effects of an Algerian judgment into France's legal system, precisely because the judgment was based on the unilateral Islamic *talaq*.[90]

Although the Italian courts have never explicitly endorsed the concept of *ordre public atténué*, sometimes they have taken the same view and achieved the same results. An example is given by the 1999 case concerning an Italian citizen who died in a car crash. The heirs were two daughters of his first marriage and his wife, a Somali citizen, married under Somali law. The two daughters contested the right of the woman to inherit their father's property: the marriage is based on Islamic law allowing polygamy and repudiation, the two daughters affirmed; therefore, in Italy this marriage is contrary to the international *ordre public*. On the contrary, the Italian Supreme Court held that the factual circumstances under which the women had contracted marriage according to the Somali *lex loci* do not prevent her from claiming the inheritance rights: even though the marriage was celebrated under shari'a family law, which legalise polygamy and repudiation, the woman retained the rights of the individual as enshrined in the Italian legal system.[91]

B. **Labour Law**

Given the legislative loophole, Italian law does not take into account the specific needs of Muslim workers, such as the weekly day of rest for those who take part in the congregational prayer. However, since Italian general law does not recognise any Islamic holiday, at local and national level administrative mini-understandings between the state authorities and Islamic organisations can include reasonable accommodations in order to meet the needs of Muslim workers during the observation of Islamic rituals;[92] like those related to daily and/or weekly prayers as well as the

[90] Cour de Cassation, Chambre civile 1, du 17 février 2004, 02-11.618: "[a]ttendu que l'arrêt retient que le jugement du Tribunal de Biskra avait été prononcé sur demande de M. X... au motif que 'la puissance maritale est entre les mains de l'époux selon la Charia et le Code' et que 'le Tribunal ne peut qu'accéder à sa requête' ; qu'il en résulte que cette décision constatant une répudiation unilatérale du mari sans donner d'effet juridique à l'opposition éventuelle de la femme et en privant l'autorité compétente de tout pouvoir autre que celui d'aménager les conséquences financières de cette rupture du lien matrimonial, est contraire au principe d'égalité des époux lors de la dissolution du mariage, reconnu par l'article 5 du protocole du 22 novembre 1984, n° 7, additionnel à la Convention européenne des droits de l'homme, que la France s'est engagée à garantir à toute personne relevant de sa juridiction, et à l'ordre public international".

[91] Cass., 2 marzo 1999, n. 1739. It should be noted that, according to the 218/1995 law concerning the international private law, the national law rules the inheritance of the deceased at the time of his/her death (Art 46). Nevertheless, under Art 46 (2) (a) of the 218/1995 law, a person can opt for the law of the country he/she resides in: this can be done with a statement made in the form of a will.

[92] F. Riccardi Celsi, 'Fattore religioso ew lavoratori di religione islamica. Aspetti riguardanti la contrattazione collettiva e gli accordi sindacali' in: Carlo Cardia and Giuseppe dalla Torre (eds), *Comunità islamiche in Italia. Identità e forme giuridiche* (Torino, Giappichelli, 2015) pp. 479-506.

holy month of Ramadan.[93] In addition, Article 4 of the 604/1966 law prohibits dismissal for discriminatory reasons such as religious belonging, including Islamic.[94] The 108/1990 law also invalidates dismissal for discriminatory reasons such as race, sex, language, and religion.[95]

C. **Education**

Concerning public schools, it is important to recall Article 9 of the 1984 Villa Madama agreement, under which every student at any level can choose to attend the teaching of the Catholic religion for 1 hour per week. With the exception of the understanding between the State and the Jewish Community of Italy, almost all *intese* that have been signed to date contain rules that allow confessions other than Catholicism to give religious lessons in public schools. The fact is that these rules have hardly ever been applied.[96] In any case, Islamic communities cannot have access to this kind of religious education because, as said before, these groups have neither the *intese* nor the possibility (at the moment) to be legally recognised as religious denominations.[97]

On the other hand, Article 33 par 3 of the Italian Constitution entitles private organisations to set up schools and educational institutes at no cost to the State. The 62/2000 law on the private education system also provides more specific rules regulating non-state schools.[98] In the light of these provisions two kinds of private school can be identified. First, private schools that can apply to the Italian Ministry of Education in order to be recognised on an equal basis as state schools: known as *scuole paritarie*, these institutes have to comply with specific requirements related to programmes, teachers, buildings, etc. Defined as *scuole non paritarie,* the other kind of private school cannot receive public funding and their certificates (diplomas, degrees, etc.) have not the same legal status as those of *scuole paritarie*.[99] In theory,

[93] In fact, this kind of recognition depends on the understanding under Art 8 (3) of the Constitution, as is the case of the Jews Community of Italy. See legge 8 marzo 1989, n. 101, Norme per la regolazione dei rapporti tra lo Stato e l'Unione delle Comunità ebraiche italiane, Art 4.

[94] Legge 15 luglio 1966, n. 604, Norme sui licenziamenti individuali.

[95] Legge 11 maggio 1990, n. 108, Disciplina dei licenziamenti individuali.

[96] In the last few years about 88% of the Italian students have chosen to attend this teaching. See C. Giorda, 'Religious Diversity in Italy and the Impact on Education: The History of a Failure' (2015) 17/1 *New diversities*, pp. 77-93; R. Mazzola, 'La religion á l'école en Italie: état des lieux et évolutions' in: Jean-Paul Willaime (ed), *Le défi de l'enseignement des faits religieux à l'ecole* (Paris, Riveneuve, 2014), pp. 103-20.

[97] S. Pasta and A. Cuciniello (eds), *Studenti musulmani a scuola. Pluralismo, religioni e intercultura* (Roma, Carocci, 2020).

[98] Legge 10 Marzo 2000, n. 62, Norme per la parità scolastica e disposizioni sul diritto allo studio e all'istruzione.

[99] A. Acquaviva, 'Scuola pubblica e privata e Islam' in: Carlo Cardia and Giuseppe dalla Torre (eds), *Comunità islamiche in Italia. Identità e forme giuridiche* (Torino, Giappichelli, 2015) pp. 451-78.

Muslim communities can establish both types of private school. In practice, they often face many difficulties in this area.[100] For example, in establishing a private school of the first kind, Islamic groups must demonstrate that the institute's primary purpose is to pursue broad public interests as opposed to narrow specific ones; that is quite impossible for a school based on religious grounds and for organisations like the Islamic ones.[101]

Muslim families can provide private education, which may include religious classes. They can do so by following the system of 'homeschooling'. But, apart from the fact that the homeschooling system is relatively unknown in Italy, Muslims typically prefer their children to attend public schools in order to foster the process of integration.[102] Moreover, many Muslim families want their children to attend the Catholic religious classes, through which pupils can at least learn basic notions of religion, spirituality and faith.[103]

IV. Islam, Human Rights and Democracy

In constitutional democracies, religion establishes itself as a complex subject involving belief, behaviour and belonging.[104] This reflects the concept of religious freedom that, in conjunction with the principle of equality, is not rooted in a quest for uniformity but rather in the recognition of diversity and plurality. Here the conceptual boundary of democracy expands to such an extent that it includes not only the self-determination of the individual with regard to religion, but also the protection of religious identity through which people share lifestyles and collective worship. For these reasons, constitutional democracies, while underscoring the universality of

[100] M. Parisi, 'Parità scolastica, educazione religiosa e scuole islamiche: problemi e prospettive' in: Valerio Tozzi and Marco Parisi (eds), *Immigrazione e soluzioni legislative in Italia e Spagna. Istanze autonomistiche, società multiculturali, diritti civili e di cittadinanza* (Ripalimosani Arti Grafiche la Regione, 2008), pp. 41-85.

[101] S. Coglievina, 'Religious education in Italian public schools: what room for Islam?' (2017) 29 *Rivista telematica* <www.statoechiese.it>, pp. 1-15.

[102] A. Cuciniello, 'L'educazione interculturale come antidoto all'analfabetismo religioso a scuola' in: Antonio Cuciniello and Stefano Pasta (eds), *Studenti musulmani a scuola. Pluralismo, religioni e intercultura* (Roma, Carocci, 2020), pp. 85-100. See also A. Angelucci et alii, *Chiesa e Islam in Italia. Incontro e dialogo* (Bologna, EDB, 2019).

[103] R. Guolo, 'Islam e scuola pubblica. Orientamenti di genitori di religione islamica in Piemonte' (2009) 4/2 *Ricerche di Pedagogia e Didattica*, pp. 1-16.

[104] D. A. Marshall, 'Behavior, Belonging, and Belief: A Theory of Ritual Practice' (2002) 20 *Sociological Theory*, pp. 360-80; B. Barry, *Culture and equality* (Cambridge, Polity Press, 2001); S. Bedi, 'What is so special about religion? The dilemma of the religious exemption' (2007) 15 *The Journal of Political Philosophy*, pp. 235-49; M. Festenstein, *Negotiating diversity: Culture, Deliberation, Trust* (Cambridge, Polity Press, 2005); M. Minow, 'Should religious groups be exempt from civil rights laws?' (2007) 48 *Boston College Law Review*, pp. 781-849.

human rights discourse, have to deal with religious organisations. They have to do so in such a way that the presence of major religions does not infringe on either the principle of non-discrimination of those who do not adhere to them, or the right of all (theistic, non-theistic, and atheistic) minority groups to be equally free before the law.

In other words, freedom of religion is not limited in its application to large religions, nor is the principle of equality limited to religions with institutional characteristics or practices analogous to traditional views. However, the real or perceived concerns related to the current emergencies, from immigration to terrorism, suggest that some aspects of this freedom should be sacrificed to achieve a higher level of security. That complicates the implementation of constitutional rules surrounding religious issues, which includes State-Church legal relations; what in some context is still framed with regard to traditional denominations.

An illustrative example of this exists in Italy. In particular, it exists in the very historical forms of bilateral state-confessions legislative method, which does not fit in easily with today's religious landscape. This method seems to be trapped in the 20th century, meaning in old ways of governing religious pluralism, strictly connected with the traditions of the Catholic Church and a small number of minority confessions. It explains why this method, while granting Catholicism and a few other religions access to important state benefits, prevents wider implementation of constitutional rights that recognise all individuals and all denominations as equal and equally free before the law. As we have seen, this is even more evident when referring to Muslims and Islamic groups.

For many years a sort of 'cold peace' has marked the relationship between the Italian State and Islam. Under the *glocal* (domestic and external) hot political factors, this peace is now little more than a 'ceasefire'. Far from supporting the pillars of constitutional democracy, this 'ceasefire' seems to be dictated by unreasonable distinctions, reciprocal suspicion, rampant insecurity, and emotional and irrational perceptions.

A. **Security and Liberty in the Light of Islam(ophobia)**

This is even more evident when related to the fact that in the last two decades the debate on Islam and Islamic issues has been violently raised, politically exploited and covered widely by the media;[105] even though the presence of Muslims and Islamic groups in Italy is not as significant as it is in other European countries. For example, the discussion about places of Islamic worship, namely mosques and minarets, is viv-

[105] C. Saint-Blancat, 'Italy' in: Jocelyne Cesari (ed), *The Oxford Handbook of European Islam* (Oxford, Oxford University Press, 2014), pp. 265-310; S. Coglievina, 'Italy' in: Jørgen Nielsen, Samim Akgönül, Ahmet Alibašić and Egdūnas Racius (eds), *The Yearbook of Muslims in Europe* (Leiden, Brill, 2013), pp. 351-67.

idly present in the Italian media, urban laws[106] and judicial disputes;[107] even though few visible mosques and no minarets have been built in Italy. In some local contexts female genital mutilation has been described as a health emergency, long before concrete and significant cases have been recorded and investigated by the competent authorities. The use of *hijabs* is fiercely debated, even though few women wearing them appear in Italian cities. The debate about full-face veils (*niqab* and *burqa*) has led to the proposition of laws banning them in schools, even though no pupil has yet worn such a veil. Not to mention the fact that a significant proportion of the population believes incoming refugees increase the likelihood of terrorism in the country,[108] even though Italy has remained largely unscathed by deadly Islamist attacks.[109] All of these issues are in effect imported from other western democracies where the presence of Islam has been more long-standing and influential than in Italy.[110]

Together with the climate of fear and insecurity, these issues have in any case produced some sorts of epistemological obstacle upon which media, politicians and public actors tend to consider Islam as something other than a 'religion'.[111] This is because Muslim communities do not align as thoroughly as required with the traditional category of religious belief, as defined during the history of relations between the Italian State and Church. And even if Muslim groups pass the 'denomination test' demonstrating them to be a religion, it must be proven that they satisfy the require-

[106] R. Mazzola, 'Libertà di culto e 'sicurezza urbana' nella Direttiva del Ministro dell'Interno per le manifestazioni nei centri urbani e nelle aree sensibili' (2009) 2 *Quaderni di diritto e politica ecclesiastica*, p. 403; M. Rizzi, 'Chiesa e Islam: una prospettiva locale' in: Chiara Brambilla and Massimo Rizzi, *Migrazioni e religioni. Un'esperienza locale di dialogo tra cristiani e musulmani* (Milano, FrancoAngeli, 2011), p. 21.

[107] Corte cost.: no. 63/2016, no. 67/2017.

[108] R. Wike, B. Stokes and K. Simmons, 'Europeans Fear Wave of Refugees Will Mean More Terrorism, Fewer Jobs. Sharp ideological divides across EU on views about minorities, diversity and national identity', *Pew Research Center*, 11 July 2016 <https://www.pewresearch.org/global/2016/07/11/europeans-fear-wave-of-refugees-will-mean-more-terrorism-fewer-jobs/>.

[109] C. Serioli, 'Jihadist Terrorism: Italy the Next Target?', *Global Risk Insights*, 20 Jan 2021, <https://globalriskinsights.com/2021/01/jihadist-terrorism-italy-the-next-target/>. See also A. Beccaro and S. Bonino, 'Terrorism and Counterterrorism: Italian Exceptionalism and Its Limits' (2019) *Studies in Conflict & Terrorism* (9 December).

[110] S. Allievi, 'Costruzione del nemico, bisogno di sicurezza e conflitto' in: Stefano Allievi (ed), *I musulmani e la società italiana, Percezioni reciproche e conflitti culturali, trasformazioni sociali* (Milano, FrancoAngeli, 2009), p. 20.

[111] In this case I refer to the Gaston Bachelard's notion of *obstacles épistémologiques*: G. Bachelard, *La formation de l'esprit scientifique* (Paris, Libraire Philosophique J. Vrin, 1938), p. 337: '[l]es obstacles épistémologiques affirment toujours quelque part des ombres ... sur la connaissance du réel, qui n'est jamais immédiate et pleine. Les révélations du réel sont toujours récurrentes. Le réel n'est jamais "ce qu'on pourrait croire" mais il est toujours ce qu'on aurait dû penser'.

ments of national law and tradition; that makes the collaboration-interaction between the state legal system and Islam very difficult.[112]

In other words, Islam and related groups are often suspected of being potentially undemocratic-like religions that, for instance, do not accept State-religion separation and that, furthermore, drive believers to illicit practices and conducts. As such, these communities are constantly subject to at least two kinds of test: the test of being a 'religion' under Article 8 of the Constitution; and the test of being a religious organisation that is compatible with Italy's constitutional democracy. And neither should it be forgotten that this happens when an increasing amount of Italian political rhetoric suggests the combining of security policies, economic strategies and immigration concerns with religion-orientated values of democracy and popular sovereignty, which ends up reinforcing the idea that Muslims are 'the others'.

Evidence of this can be seen when considering some problematic issues, like those related to religion-inspired extremism, upon which Islam and related groups are often judged as a potential war-like religion that pushes believers into a spiral of violent radicalisation, if not terrorism.

B. **The Impact of Religion-Inspired Terrorism**

The vast majority of western democracies usually refer to various forms of religion-inspired extremism as jihadist terrorism.[113] This kind of terrorism involves groups of persons who allegedly recruit, indoctrinate, finance or facilitate individuals to travel to the MENA region and the Greater Middle East to join ISIS, al-Qaeda and/or other radical movements fighting there. Cells preparing attacks in the West have also been taken into account by legislators, judicial proceedings and police forces. However, despite the huge amount of data and decades of relevant experience in this field, there is no clear comprehension of the phenomenon. In particular, there is no common consensus on the relation between jihadist acts of terrorism and Islam: in this matter it is very difficult to distinguish what is real from what is only a perception of reality.[114] In any case, states tend to emphasise that the prevention of jihad-

[112] J-F. Gaudreault-Desbiens, 'The Legal Treatment of Religious Claims in Western Multicultural Societies: Limits and Challenges' in: Carmela Decaro Bonella (ed), *Religious Claims in Multicultural Societies: The Legal Treatment* (Roma, Luiss University Press, 2014), pp. 17-40.

[113] See, for example, EUROPOL, *European Union Terrorism Situation and Trend Report (Te-Sat) 2020*, pp. 32-51, <https://www.europol.europa.eu/activities-services/main-reports/european-union-terrorism-situation-and-trend-report-te-sat-2020>.

[114] XII. See, among the others: Regulation of the European Parliament and the Council of the European Union on addressing the dissemination of terrorist content online, Brussels, 18 March 2021, 14308/1/20 REV 1; 'EU's response to the terrorist threat, New EU rules for removing terrorist content from the internet', *Council of the European Union,* 18 March 2021 <https://www.consilium.europa.eu/en/policies/fight-against-terrorism>; European Commission, Migration and Home Affaire, High-Level

ist terrorism implies additional and extraordinary legal measures under which, for example, even the dissemination of messages or images, whether online or offline, may be considered a form of terrorist activity: as such, this kind of behaviour should be legally punishable.[115]

This approach reflects many provisions of state criminal codes, including the Italian one. The attention focuses on Articles (270-bis, 270-bis.1, 270-ter, 270-quater, 270-quarter.1, 270-quinquies, 270-quinquies.1, 270-quinquies.2, 270-sexies, 270-septies) of Italy's penal code,[116] each entered into force after the attacks or planned attacks that, since 9/11, terrorist groups have carried out in the West and on European soil.[117] In order to prevent terrorist attacks, these rules give judicial courts and security forces considerable powers, on the basis that the prevention of religion-inspired terrorism often justifies unreasonable restrictions on fundamental freedoms, especially when referring to Muslims and Islamic communities. This, on the other hand, reinforces and reinvigorates public prejudices towards Islam.[118]

Commission Expert Group on Radicalization. Final Report (18 July 2018), <https://ec.europa.eu/home-affairs /sites/ homeaffairs/files/ what-we-do/ policies/european-agenda-security/20180613_final-report-radicalisation.pdf> (last accessed 6 July 2021). H.S. Gregg, 'Defining and Distinguishing Secular and Religious Terrorism' (2014) 8 *Perspectives on Terrorism,* pp. 1-16; 'Revised EU Strategy for Combating Radicalisation and Recruitment to Terrorism', *Council of the European Union,* 19 May 2014 <http://data.consilium.europa.eu/doc/document/ST-9956-2014-INIT/en/pdf>.

115 M. Ignatieff, *The Lesser Evil. Political Ethics in an Age of Terror* (Princeton, Princeton University Press, 2004), p. 2; B. Ackerman, 'The Emergency Constitution' (2004) 5 *The Yale Law Journal*, pp. 1029-91; W. Smit, 'Security versus Liberty?: Ethical Lesson from post-9/11 American Counter-Terrorist Security Politics' in: ThA. van Baarda and D.E.M. Verweij (eds), *The Moral Dimension of Asymmetrical Warfare: Counter-terrorism, Democratic Values and Military Ethics* (Leiden, Brill, 2009), pp. 401-18; L. Ferrajoli, 'Due ordini di politiche e di garanzie in tema di lotta al terrorismo' (2016) 8 *Questione giustizia*, p. 15.

116 See the special issue published by the Italian Association of Professors in Penal Law, 'La società punitiva. Populismo, diritto penale simbolico e ruolo del penalista' (2016) *Diritto penale contemporaneo* <http://www.penalecontemporaneo.it/d/5087-la-societa-punitiva-populismo-diritto-penale-simbolico-e-ruolo-del-penalista> (last accessed 6 June 2021).

117 A. Manna, 'Alcuni recenti esempi di legislazione penale compulsiva e di ricorrenti tentazioni circa l'utilizzazione di un diritto penale simbolico' (2016) *Diritto penale contemporaneo*, pp. 7-13; V. Militello, 'Terrorismo e sistema penale: realtà, prospettive, limiti' (2017) 1 *Diritto penale contemporaneo*, pp. 168-9; R. Bartoli, 'Legislazione e prassi in tema di contrasto al terrorismo internazionale: un nuovo paradigma emergenziale?' (2017) 2 *Diritto penale contemporaneo*, pp. 223-59; E. Mazzanti, 'L'adesione ideologica al terrorismo islamista tra giustizia penale e diritto dell'immigrazione' (2017) 1 *Diritto penale contemporaneo*, pp. 193-7.

118 See N. Colaianni, 'Sicurezza e prevenzione del terrorismo cosiddetto islamista: il disagio della libertà' in: F. Alicino (ed), *Terrorismo di ispirazione religiosa. Prevenzione e deradicalizzazione nello Stato laico* (Roma, Apes, 2020), pp. 13-56; R. Mazzola, ''Stato d'urgenza', 'ragion di stato' e fattore religioso' in: Roberto Martino, Francesco Alicino and Antonio Barone (eds), *L'impatto delle situazioni di urgenza delle attività umane regolate dal diritto* (Milano, Giuffrè, 2017), pp. 15-40.

It is also worth noting that, given its long and intense history of struggle against both domestic terrorism (see, for example, the 'years of lead' or *anni di piombo* in the 1970s) and criminal organisations (*mafia*, *'ndrangheta* and *camorra*),[119] Italy has also developed a highly efficient system of 'preventive measures': a system that, after Parliament approved the 2015 anti-terrorism decree,[120] can also be applied to prevent the current forms of international terrorism, including religion-inspired ones.[121] In particular, the preventive measures include the mechanisms and procedures of the anti-mafia code,[122] whose application is based on 'symptoms of social dangerousness' (*indizi di pericolosità sociale*). In cases like these, judicial authorities can authorise preventive measures not just when a person has committed a crime but also when there is reasonable evidence to consider that person 'socially dangerous' (*socialmente persicoloso*).

Specifically, judicial authority can order dangerous people: to maintain a lawful conduct, not to give cause for suspicion, not to associate with persons convicted of criminal offences or subject to preventive measures, not to own or carry firearms, not to enter bars or night-clubs, not to take part in religious meetings, and not to use telephones or the internet without specific authorisation. If necessary, these measures may be combined either with the prohibition of residence in some cities (*divieto di soggiorno*) or, in the case of particularly dangerous persons (*persona di particolare pericolosità*), with an order for compulsory residence in a specified municipality (*obbligo di soggiorno in un determinato comune*). The violation of these conditions is punishable by criminal laws.[123] As some relatively recent experiences have demonstrated, on the basis of Article 8 of the anti-mafia code regulating 'atypical preventive measures' (*misure atipiche di prevenzione*), judicial authority can order a person to

[119] A. Prosperi, 'L'esperienza della storia italiana, antica e recente' (2016) *Questione giustizia special issue*, pp. 16-25.

[120] Decreto-legge 18 febbraio 2015, n. 7 Misure urgenti per il contrasto del terrorismo, anche di matrice internazionale.

[121] More specifically, the preventive measures can be applied for "those who, working in groups or individually, are engaging in preparatory acts, objectively relevant, directed to take part in a conflict in foreign territory in support of a terrorist organization which pursues the aims laid down in article 270-sexies of the Italian penal code" (translation mine). See L. Staffler, 'Politica criminale e contrasto al terrorismo internazionale alla luce del d.l. antiterrorismo del 2015' (2016) 3 *Archivio penale*, pp. 7-11.

[122] Decreto legislativo 6 settembre 2011, n. 159, Codice delle leggi antimafia e delle misure di prevenzione, nonché nuove disposizioni in materia di documentazione antimafia, a norma degli articoli 1 e 2 della legge 13 agosto 2010, n. 136.

[123] V. Maiello, 'La prevenzione *ante delictum*, lineamenti generali' in: Francesco Palazzo and Carlo Enrico Paliero (eds), *Trattato teorico pratico di diritto penale* (Torino, Giappichelli, 2015), p. 325; V. Maiello, 'Profili sostanziali: le misure di prevenzione personali' (2015) 6 *Giurisprudenza italiana*, p. 1528; A. Balsamo, 'La prevenzione *ante delictum*' in: Roberto Kostoris and Renzo Orlandi (eds), *Contrasto al terrorismo interno e internazionale* (Torino, Giappichelli, 2006).

attend a 'de-radicalisation programme'. This programme can be elaborated in collaboration with public and private institutions and implemented under the control of a judicial court, which also guarantees that individuals' freedom of religion and the State's principle of secularism will be respected.[124]

It remains the case that both penal laws and preventive measures, while diminishing the probability of terrorist attacks, restrict fundamental rights. In particular, due to the nature of the current form of terrorism, these provisions tend to limit the right of Muslims and Islamic groups to practise their faith openly.[125] That also explains the debate on the boundaries of freedom of expression especially when related to hate speech, which may involve Muslim groups in both senses, as perpetrators and as victims.[126] In this manner, the State's efforts to prevent religion-inspired terrorism intermingle not only with human rights and public order,[127] but also with the securitisation of religious freedom and Muslim communities.[128] That in turn helps to analyse how the emergency of immigration and the prevention of international terrorism could impact on the interpretation of constitutional rules, including those concerning the relations between the State and Islam.[129] The 2016 decision (no. 52) of the Italian Constitutional Court is a clear example of that.

[124] Tribunale di Bari (Bari's Tribunal), Decreto del 25 gennaio 2017, n. 71, and Corte di Appello di Bari (Bari's Court of Appeal), Decreto del 4 dicembre 2017, which refer to the Decree issued by Bari's Tribunal on 25 Jan 2017. See V. Valente, 'Misure di prevenzione e de-radicalizzazione religiosa alla prova della laicità (a margine di taluni provvedimenti del Tribunale di Bari' (2017) 37 *Rivista telematica* <www.statoechiese.it>.

[125] F. Alicino, 'Lo Stato laico costituzionale di diritto di fronte all'emergenza del terrorismo islamista' in: Roberto Martino, Francesco Alicino and Antonio Barone (eds), *L'impatto delle situazioni di urgenza delle attività umane regolate dal diritto* (Milano, Giuffrè, 2017), pp. 41-84.

[126] C. Cianitto, *Quando la parola ferisce. Blasfemia e incitamento all'odio religioso nella società contemporanea* (Torino, Giappichelli, 2016). See also: R. Wike, J. Poushter, L. Silver, K. Devlin, J. Fetterlof, A. Castillo and C. Huang, 'Minority groups', *Pew Research Center,* 14 Oct 2019, according to which 55 per cent of the Italian population does not have positive views of Muslims, <https://www.pewresearch.org/global/2019/10/14/minority-groups/>; A. Roberta Siino, 'Islamophobia in Italy. National Report 2019' in: Enes Bayrakli and Farid Hafez (eds), *European Islamophobia Report 2019* (İstanbul, SETA, 2020), pp. 433-53.

[127] L. Lazarus, 'The Right of Security. Security Rights or Securitising Rights' in: Rob Dickinson, Elena Katselli, Colin Murray and Ole W. Pedersen (eds), *Examining Critical Perspectives on Human Rights* (Cambridge, Cambridge University Press, 2012), pp. 87-106.

[128] J. Cesary, 'Securitization of Islam in Europe' in: Jocelyne Cesary (ed), *Muslims in the West after 9/11: Religion, Politics and Law* (London-New York, Routledge, 2010), pp. 9-27; J. Fox and Y. Akbaba, 'Secularization of Islam and Religious Discrimination: Religious Minorities in Western Democracies' (2015) 13/2 *Comparative European Politics*, pp. 175-97; S. Bonino, 'The British state 'security syndrome' and Muslim diversity: challenges for liberal democracy in the age of terror' (2016) 10 *Contemporary Islam*, pp. 223-47.

[129] L. Orgad, *The Cultural Defence of Nations. A liberal Theory of Majority Rights* (Oxford, Oxford University Press, 2015).

C. **An Unpredictable Reality**

The case law in question regarded the request of the Italian Union of Atheists and Rationalist Agnostics, also known as UAAR, to start negotiations with the Government in order to sign an *intesa* under Article 8 par 3 of the Constitution. The Constitutional Court held that this Article is no longer bound to the right of all religions to be equally free before the law.[130] The real function and meaning of Article 8 par 3 is the extension of the bilateralism method from the Catholic Church to non-Catholic religions. This is possible where that method reflects the common intention of both the minority religion and the Government not only to sign an *intesa* but also to initiate negotiations under Article 8 par 3 of the Constitution.[131]

The Court also affirmed that the legal instrument of *intese* does not include the right to profess religious belief. This right, they clarified, is protected overall by other provisions,[132] including those related to Article 19, in conjunction with Article 8 par 1, of the Constitution: these provisions recognise all persons as free and equal before the law as well as entitled to freely practise and propagate religion in any form, individually or with others.[133] Concerning the bilateralism method, the Court stated that the Government holds a broad margin of political discretion in the matter. This implies the power to legally recognise a group as a religious denomination, as well as the power to assess whether it is appropriate to launch negotiations with a particular association and, upon conclusion thereof, sign an *intesa*. In this case, the Government may be held responsible before Parliament but not before judicial courts. In other words, the Government's decision has only political (not legal) implications and as such is not justiciable; meaning the decision is not subject to the right to a fair trial.[134]

It is important to note that the Constitutional Court supported the 52/2026 judgment with a significant *obiter dictum*, underlying

'the changing and unpredictable reality of national and international political relations, which may lead the Government to conclude that it is not appropriate to allow an association that requests it to launch negotiations. When confronted with this considerable variety of situations, which by definition does not lend itself well to classification, the Government is vested with a broad discretion, the only limit to which may be found in principles of constitutional law, which could induce it to refrain from

130 Corte costituzionale, no. 52/2016.

131 *Ibid.,* [129].

132 In particular, those of Art 3, 8 (1), 8 (2), 19 and 20 of the Constitution.

133 *Ibid.,* [129].

134 On the so-called *atti politici* (political acts) see: V. Cerulli Irelli, 'Politica e amministrazione tra atti 'politici' e atti 'di alta amministrazione'' (2009) 1 *Diritto pubblico*, pp. 101-34; A. Maria Sandulli, 'Atto politico ed eccesso di potere' (1946) XXII *Giurisprudenza completa della Corte suprema di cassazione – Sezioni civili*, p. 521.

granting even the implicit de facto 'legitimising' effect which the association could obtain from the mere launch of negotiations. Due to the reasons that justify them, choices of this type cannot be subject to review by the courts'.[135]

Strangely enough, this *dictum* has nothing to do with UAAR. In fact, it has to do with specific and conspicuous groups that in the future will request to launch negotiations under Article 8 par 3 of the Constitution. In other words, the *obiter dictum* supports the idea that the legal implication of the relations between State and minority religions should be described in the light of the reality that is 'changing and unpredictable'. That is because – as the Court seems to affirm – this reality is affected by some living emergencies, from immigration to international terrorism. In turn, these emergencies are related to both religion and national contexts where there is no State-religion separation. That explains the Constitutional Court's reference to the 'national and international political relations, which may lead the Government to conclude that it is not appropriate to allow an association that requests it to launch negotiations'.

In sum, the Court, while deciding about the request of the UAAR to start negotiations under Article 8 par 3 of the Constitution, intended to deal with similar requests put forward by Muslim groups. And the fact that the Court did not explicitly mention Islam is very significant. This case (the 52/2016 constitutional decision) is notable for its deafening silence.

V. Conclusion

Conflicting tendencies have always characterised the relation between religion and democracy. It would suffice to say that across generations, the major religious traditions have produced their own forms of extremism that contradicted essential elements of constitutional democracies. Additionally, the connections between religious identity and authoritarian ideas have been so frequently replicated in the history of democracy[136] that the rule of law and the rule of God often appear to be an odd

[135] Corte cost., n. 52/2016, para. 5.2 consideration on points of law (*Considerato in diritto*) (translation mine). The following is the original version of the *obiter dictum*: '[l]a serie di motivi e vicende che la realtà mutevole e imprevedibile dei rapporti politici interni e internazionali offre copiosa … possono indurre il Governo a ritenere non opportuno concedere all'associazione, che lo richiede, l'avvio delle trattative. A fronte di tale estrema varietà di situazioni, che per definizione non si presta a tipizzazioni, al Governo spetta una discrezionalità ampia, il cui unico limite è rintracciabile nei principi costituzionali, e che potrebbe indurlo a non concedere nemmeno quell'implicito effetto di 'legittimazione' in fatto che l'associazione potrebbe ottenere dal solo avvio delle trattative. Scelte del genere, per le ragioni che le motivano, non possono costituire oggetto di sindacato da parte del giudice'.

[136] See *ex plurimis* 'Special Issue 'Religion and Nationalism' (2019) *Religions*, <https://www.mdpi.com/journal/religions/special_issues/nationalism>; L. Addi, *Radical Arab Nationalism and Political Islam* (Washington, Georgetown University Press, 2017); B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London, Verso, 1983); P. W. Barker, *Religious*

couple of sorts, opposed in many respects. [137] At the same time, religion remains an integral part of the democratic landscapes. [138] Moreover, religious organisations can act as agents of civic mobilisation and networks of peaceable coexistence, thereby supporting democracy's skills such as cooperation, solidarity, accountability, consensus building, and public participation. [139]

These diverging influences, far from being reduced, are even more accentuated in the current age of religious diversity and plurality, especially when combining with the economic and political crises like those we have been experiencing for at least twenty years: the 9/11 attacks, the subsequent war on terror, the 2007-2008 financial disaster, the 2009-2010 Arab Spring, the perennial turmoil in the MENA region, and the ongoing COVID-19 global pandemic disease are the best examples of that. These crises tend to go hand in hand with other long-term issues, from immigration to religion-inspired terrorism, thus reinvigorating a sense of fear and insecurity in many democratic states. One of the implications is that, whether real or perceived, the rising level of uncertainty fuels anti-immigrant sentiments and suspicion towards some religious minorities: these groups are regarded not only as threats to the preservation of political and social stability but also as undemocratic, if not unmodern, religions. For the same reasons, the emergency scenario complicates the application of the

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Nationalism in Modern Europe (London, Routledge, 2008); M. Juergensmeyer, 'Religious Nationalism in a Global World' (2019) 10 *Religions*, p. 97; G. Goalwin, ''Religion and Nation Are One': Social Identity Complexity and the Roots of Religious Intolerance in Turkish Nationalism' (2018) 42/2 *Social Science History*, pp. 161-82; A. Grzymala-Busse, 'Religious Nationalism and Religious Influence' (2019) *Oxford Research Encyclopedias* <https://doi.org/10.1093/acrefore/9780190228637.013.813>.

[137] R. Hirschl and A. Shachar, 'Competing Orders? The Challenge of Religion to Modern Constitutionalism' (2018) 85 *The University of Chicago Law Review*, pp. 425-45.

[138] See, for example, R. Audi (ed), 'Religion & Democracy' (2020) 149/3 *Dædalus Journal of the American Academy of Arts & Sciences*, pp. 5-218; R. Finke and L.R. Iannaccone, 'Supply-side explanations for religious change' (1993) 527 *Annals of the American Academy of Political and Social Science*, pp. 27-39; R. Finke and R. Stark, *The Churching of Americ*a, *1776-1990* (New Brunswick, Rutgers University Press, 1992); P. Froese, 'After atheism: An analysis of religious monopolies in the post-communist world' (2004) 65/1 *Sociology of Religion*, pp. 57-75; B. Gaskins, M. Golder and D.A. Siegel, 'Religious participation and economic conservatism' (2013) 57 *American Journal of Political Science*, pp. 823-40; A. Gill, 'Religion and comparative politics' (2001) 4 *Annual Review of Political Science*, pp. 117-38; A. Gill and E. Lundsgaarde, 'State welfare spending and religiosity' (2004) 16 *Rationality and Society*, pp. 399-436.

[139] B. Grim and M. Grim, 'Belief, Behavior, and Belonging: How Faith is Indispensable in Preventing and Recovering from Substance Abuse' (2019) 58/5 *J Relig Health*, pp. 1713-50; P. Ben-Nun Bloom and G. Arikan, 'Priming Religious Belief and Religious Social Behaviour Affect Support for Democracy' (2013) 25 *International Journal of Public Opinion Research*, pp. 368-82; P. Ben-Nun Bloom and G. Arikan, 'Religion and Support for Democracy: A Cross-National Test of the Mediating Mechanisms' (2013) 43 *British Journal of Political Science*, pp. 375-397; P. Ben-Nun Bloomand and G. Arikan, 'A Two-Edged Sword: The Differential Effect of Religious Belief and Religious Social Context on Attitudes towards Democracy' (2012) 342 *Political Behavior*, pp. 49-76.

principle of secularism, which is fundamental to a functioning and pluralistic constitutional democracy. This implies both the right of all persons to hold any religion or beliefs and the prohibition of discrimination based on religious or non-religious affiliation.[140] Consequently, democracy protects minority rights, regardless of who may be in power or the major religion or belief in the country.[141]

From these points of view, Italy represents an interesting case study being currently exposed to a 'different' form of religious pluralism.

Pluralism is not actually new in the Italian context.[142] Various minority religions have long been part of the national scene and often enjoyed a level of public consideration far superior to their numerical significance. However, today in Italy there are religious organisations that, in the light of the traditional *ex parte Ecclesiæ* method of State-Church relations, stress some difficulties of constitutional relevance. In particular, this method has increasingly come to be seen in terms of 'negative externalities': while creating privileges for the Catholic Church and a small number of minority denominations, it produces unreasonable discriminations against all other religions. That is the case with the legal status of Muslim communities, which are often considered incapable of embracing democratic prerogatives,[143] including human rights and the principle of religion-State separation.[144] This opinion is also supported by well-known references to the relations between some Islamic organisations in Italy and the governments of Muslim-majority countries of the MENA region.[145] Furthermore, with the relatively recent problems of immigration and international terrorism, these

[140] European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, *Religious Practice and Observance in the EU Member States* (Brussels, European Union, 2013).

[141] OSCE Office for Democratic Institutions and Human Rights (ODIHR), *Freedom of Religion or Belief and Security. Policy Guidance* (Warsaw, OSCE/ODIHR, 2019). On this document see S. Ferrari, 'La sinergia tra libertà religiosa e sicurezza nelle *Linee Guida OSCE 2019*' in: Gabriele Fattori (ed), *Libertà religiosa e sicurezza* (Pisa, Pacini, 2021), pp. XI-XV. See also P. Annicchino, 'La traduzione delle Linee Guida OSCE in materia di libertà di religione o convinzione e sicurezza' in: idem, pp. 199-212.

[142] S. Allievi, 'Multiculturalism in Italy: The Missing Model' in: Alessandro Silj (ed), *European multiculturalism revisited* (London, Zed Books, 2010), pp. 147-80.

[143] C. Decaro Bonella, 'Le questioni aperte: contesti e metodo' in: Carmela Decaro Bonella (ed), *Tradizioni religiose e tradizioni costituzionali. L'islam e l'Occidente* (Roma, Carocci, 2013), p. 34.

[144] A.T. Kuru, *Islam, Authoritarianism, and Underdevelopment: A Global and Historical Comparison* (Cambridge, Cambridge University Press, 2019); M. Driessen, 'Religious Democracy and Civilizational Politics: Comparing Political Islam and Political Catholicism' (2013) *Center for International and Regional Studies Georgetown University School of Foreign Service in Qatar, Occasional Paper No. 12*, pp. 1-43; S. Cevik, 'Myths and Realities on Islam and Democracy in the Middle East' (2011) 38 *Estudios Políticos* pp.121-44.

[145] J. Laurence, 'Managing transnational Islam: Muslims and the state in Western Europe' in: Craig Parsons and Timothy Smeeding (eds), *Immigration and the Transformation of Europe* (Cambridge, Cambridge University Press, 2006), pp. 252-73.

organisations are viewed with even greater suspicion by some prominent political actors and a section of the Italian population alike.[146] That also describes how endogenous and exogenous factors may muddle the interpretation of Italy's constitutional rights, including the right of any religious group to be equally free before the law.[147]

[146] 'Views of Muslims more negative in Eastern and Southern Europe' in: Conrad Hackett, '5 facts about the Muslim population in Europe', *Pew Research Center*, 29 Nov 2017 <https://www.pewresearch.org/fact-tank/2017/11/29/5-facts-about-the-muslim-population-in-europe/>; F. Ciocca, *L'Islam italiano. Un'indagine tra religione, identità e islamofobia* (Milano, Melteni, 2019).

[147] All websites last accessed on 1 Sept 2021.

ISLAM AND HUMAN RIGHTS IN LITHUANIA: A CASE OF SUCCESSFUL POLITICS OF INCLUSION AND BELONGING

Egdūnas Račius[1]

I. Introduction: the social framework

Though the existence of a Muslim community in Lithuania has quite a long history – a continuous Muslim presence in the land spans half a millennium[2] - its Muslim population has never been numerically significant. Today, there are just several thousand individuals residing in Lithuania who self-identify as Muslims. The latest population census results showed that 2,727 individuals identified with Sunni Islam in 2011.[3] Just over half of those (1,400) were ethnic Tatars (chiefly autochthonous Lithuanian Tatars but also Tatars who, or whose ancestors, had come to Lithuania during the Soviet period (1944-1990) from inner Russia, namely Tatarstan and Bashkortostan), with ethnic Lithuanians and Russians making the second and third largest components – numbering almost 400 and just over 100 individuals respectively. The remaining 700 were comprised of individuals of a number of ethnicities, hailing mainly from Central and Western Asia. No other Islamic denominations are shown in the census results as they are statistically negligible. The Shi'i segment of the country's population of Muslim background may number several hundred individuals, mainly Azerbaijanis but also Lebanese and Iranians.

Additionally, a significant proportion of the Lithuanian Muslims (purportedly, mainly converts) reside outside Lithuania – the 2011 British census alone revealed[4] that some 535 Muslims who had immigrated to England and Wales between 2001 and 2011 were living there at the time. Most retained their Lithuanian citizenship,

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[2] E. Račius, *Muslims in Eastern Europe* (Edinburgh, Edinburgh University Press, 2018), pp. 26-7.

[3] Department of Statistics, *Gyventojai pagal tautybę, gimtąją kalbą ir tikybą [Inhabitants by ethnicity, mother tongue and faith]* (Vilnius. Statistics Lithuania, 2013), p. 5.

[4] 'Table CT0265 - Country of birth by year of arrival by religion', *UK Office for National Statistics,* 2014.

though with the Brexit transformations may have lately opted to switch citizenships (Lithuania does not ordinarily allow multiple citizenship, so the Lithuanian citizen who becomes a citizen of another country automatically loses his/her Lithuanian citizenship).

In the decade since 2011, when the last population census was conducted, the numbers of people who identify with Islam or are of Muslim background may have risen slightly due to both increased conversion of Lithuanian citizens to Islam and the arrival of expatriates, immigrants and refugees, but purportedly has remained within the range of 5,000 individuals. Comparison of the three most recent population census results reveals that the Lithuanian Tatar population in general and its Muslim component are shrinking fast, thus their share of the overall Muslim population is diminishing. The proportion of ethnic Lithuanians (converts and their progeny) professing Islam, in contrast, is steadily increasing. With immigration from Muslim-majority lands still low, the share of expatriates, immigrants and refugees remains small.

The Lithuanian Tatars started building their mosques soon after their arrival. Archives suggest that in the 17th and 18th centuries, there may have been up to several dozen mosques on the territory of today's Lithuania. However, only four of the historic mosques (three wooden in once Tatar-dominated villages, and one brick in the second largest city Kaunas) have survived to this day. There used to be a wooden mosque in Vilnius, the country's capital city, but it was pulled down in the late 1960s by the then Soviet authorities. Today Muslim congregations in the city make use of makeshift facilities (*musallas*, some owned, others rented) for their prayers and other religious activities. There may be up to half a dozen such *musallas* in Vilnius and several others in other bigger towns (Kaunas, Klaipėda). The Sunni Muslim Religious Community in Vilnius has recently secured a plot of land on the outskirts of the city for mosque construction.[5]

As the population of Muslim background in Lithuania is very small, their active participation in municipal or national politics is also very limited. There have, so far, been no MPs of Muslim background, though at least one Lithuanian Tatar has unsuccessfully run for the post on several electoral lists. Neither are there any Muslims on city or county councils.

As revealed by the population census of 2011, Lithuania's Muslim population is comprised of four main components, namely autochthonous Lithuanian Tatars, making up around half of the total self-professed Muslim population; ethnic Lithuanians and Russians, comprising a fifth of the Muslims of the country; Soviet-era colonists and their progeny make some fifteen per cent; and recent expatriates, immigrants and refugees, accounting for the remaining fifteen per cent or so.

[5] 'Vilnius Muslim community to build a mosque', *BNS*, 28 Aug 2019 <https://www.lrt.lt/en/news-in-english/19/1092192/vilnius-muslim-community-to-build-a-mosque>.

While the Tatar and colonist segments represent a very secularised part of the Muslim population whose forms of Islamic religiosity generally are referred to as 'traditional', converts together with some expatriates and immigrants tend to adhere to 'revivalist' types of Islamic religiosity. It is the converts and expatriates who are religiously most active – they make up the majority of those attending Friday prayers, and organise religious feasts, education and outreach (*da'wa*) activities. However, since most of the expatriate Muslims are not citizens of Lithuania, their role in society is minimal, while converts also shy away from publicity. Therefore, the autochthonous Lithuanian Tatars, and particularly their administrative-spiritual leadership – muftis – remain the public face of Islam in the country.

It is hard to talk about any coherent immigrant, let alone immigrant Muslim, communities in Lithuania, as there are so few immigrants in the country. There have been attempts at forming communities and organisations along ethnic/national lines (Lebanese, Afghan) but all were short-lived. So far, most religious immigrant Muslims attend *musallas* owned by Lithuanian Tatars and some are members of Muslim religious organisations founded by local Muslims. There are, however, several Muslim organisations (NGOs, not holding the status of a religious organisation) founded and run by expatriates. One of them is Association Baltic Turkish Culture Academy / Balturka, founded by followers of Fethullah Gülen, members of his Hizmet movement; the other is Association Ahmadiyya Lithuania, founded by members of the world-wide Ahmadiyya Muslim Community. Both organisations are very small, with membership numbers below one hundred. Nonetheless, Hizmet runs a private school (Vilnius International Meridian School)[6] in the capital Vilnius, and Ahmadiyya has been active in establishing its credibility and legitimacy through high-profile meetings with top politicians, organizing PR stunts and public events that draw in public intellectuals and politicians.[7]

II. Institutional recognition by the state

The Constitution of the Republic of Lithuania (adopted in 1992) makes an explicit distinction in Article 43 between what it refers to as 'traditional' and merely 'registered' 'churches'[8] and religious organisations. The Constitution, however, does not indicate which ones fall under which category.[9] Article 5 of the *Law on Religious Communities and Associations*, adopted in 1995, plainly states that

[6] *Vilnius International Meridian School* <vims.lt>.

[7] *Asociacija Ahmadija Lietuva* <https://www.facebook.com/AhmadijaLT/>.

[8] The term "church" used in the Constitution is to be understood as a generic term synonymous to 'religious organizations with formalized ecclesiastical hierarchy'.

[9] Seimas of the Republic of Lithuania, Constitution of the Republic of Lithuania 1992, Art 43 <http://www3.lrs.lt/home/Konstitucija/Constitution.htm>.

> 'the State shall recognise nine traditional religious communities and associations existing in Lithuania, which comprise a part of Lithuania's historical, spiritual and social heritage: Roman Catholic, Greek Catholic, Evangelical Lutheran, Evangelical Reformed, Russian Orthodox, Old Believer, Judaist, Sunni Muslim and Karaite.'[10]

In this way, Muslim religious collectivities whose members identify with the Sunni branch of Islam automatically fall into the category of 'traditional', while all other Muslims (Shi'is, Ibadis, Ahmadis and others), though perfectly entitled to register their religious organisations, may not expect the state to recognise them as 'traditional'.

As the aforementioned Law foresees a number of privileges (such as rights to tax exemptions, state-recognised religious marriage, confessional teaching in public schools, founding of confessional schools, days off during religious holidays, wearing of religious clothing on identity documents, and dietary needs in state institutions) accorded to 'traditional' faith communities, Sunni Muslims may also make use of them. In this way, arguably, features of Islamic law (and ethics) have been unwittingly included into the Lithuanian legal system.[11]

From the point of view of legal personality, Muslim religious collectivities in Lithuania fall into several different categories. Some are registered as religious organisations while others as various forms of NGOs. Those registered as religious organisations further differentiate into those that are representative of traditional denominations, namely, Sunni Islam, and those representing other branches of Islam. As of the end of 2020, there were twelve Muslim religious organisations registered as representing traditional (Sunni) denomination. Most of them were Lithuanian Tatar-run local Muslim religious communities.

After the *Law on Religious Communities and Associations* was adopted in 1995, local Muslim religious communities decided to found an umbrella organisation to represent them vis-à-vis the state. Thus, in 1998 the *Spiritual Centre of Sunni Muslims of Lithuania-Muftiate* (SCSML-M) was registered with the state as the sole representative organisation of the country's Sunni community. In 2018, a splinter umbrella organisation, the *Council of Muslim Religious Communities of Lithuania-Muftiate* (CMRCL-M, registered in 2019), was formed by some rebellious local Muslim religious organisations (among them, the most populous in the capital city Vilnius and the second largest city Kaunas). As of the end of 2020, both Muftiates

[10] Seimas of the Republic of Lithuania, Law on Religious Communities and Associations of the Republic of Lithuania 1995, Art 5 <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.385299?jfwid=16j6tpgu6w>.

[11] E. Račius, 'Islamic law in Lithuania? Its institutionalization, limits and prospects for application' in: Niels Valdemar Vinding, Egdūnas Račius and Jorn Thielmann (eds), *Exploring the Multitude of Muslims in Europe: Essays in Honour of Jørgen S. Nielsen* (Brill, 2018).

counted the support of more or less equal numbers of local organisations with several remaining undecided.

Muslim collectivities that chose to register as NGOs are allowed by law to engage in religious activities, including organising worship, religious education, publishing and dissemination of religious literature and engaging in proselytism.

Table 1. Main Muslim organisations in Lithuania

Organiszation	Status	Year founded/ registered	Remarks
Spiritual Centre of Sunni Muslims of Lithuania-Muftiate (Lietuvos musulmonų sunitų dvasinis centras - Muftiatas)	Traditional religious organisation	1998	
Council of Muslim Religious Communities of Lithuania-Muftiate (Lietuvos musulmonų religinių bendruomenių taryba - Muftiatas)	Traditional religious organisation	2018/19	
Hazrat Inayat Khan Sufism Study Circle (Hazrato Inajato Chano sufizmo studijų ratas)	Not traditional religious organisation	2002	As of 2020, in the process of being disbanded
Association Baltic Turkish Culture Academy / Balturka	Association	2008	
Association Ahmadiyya Lithuania	Association	2015	
Center of Islamic Culture and Education	Public enterprise	2012	
Education and Heritage	Public enterprise	2014	

Compiled by the author

Those Islamic organisations in Lithuania recognised as representing traditional denominations in the country receive a modest annual contribution from the state – every year the Government allocates a sum of money that is proportionally divided among religious organisations of all nine officially recognised traditional denominations. Until the institutional split in the Sunni community in 2018, it had been the *Spiritual Centre of Sunni Muslims of Lithuania-Muftiate* that would receive the entire state endowment designated to Muslims, which it would then distribute among its member-organisations (local Muslim religious communities). Since 2020, the state allocates funds separately to the *Spiritual Centre of Sunni Muslims of Lithuania-Muftiate* and the *Council of Muslim Religious Communities of Lithuania-Muftiate*.

Internally, Muslim religious organisations collect *zaka* and *sadaqa*, which make up the largest share of their funding. There is also occasional support from foreign state and non-state actors (particularly the Turkish Diyanet and TIKA) but this tends to be on an *ad hoc* basis and related to particular projects, like mosque repairs, publishing of Islamic literature or in the form of salaries for Turkish imams.

Since Lithuania formally recognises Sunni Muslims, understood to be represented by Lithuanian Tatars, as one of the traditional faith communities in the country, the Lithuanian Tatars are generally viewed in a favourable light across the political spectrum. Top state officials routinely show their goodwill toward Lithuanian Tatars by either inviting their leadership to state celebrations or sending congratulatory messages on the occasions of Islamic feasts. The two umbrella Muslim religious organisations, the Muftiates, receive the majority of the state's attention.

Non-traditional Muslim organisations are also viewed by the state favourably, with members of Hizmet having been granted refugee status, and the leadership of the Ahmadi community being received by such top state officials as the Speaker of Parliament. As there are no registered or informal Muslim religious collectivities (communities) in the country that would raise concern for the state (the State Security Department annual reports attest to this), there have been so far no attempts at the securitisation of Islam or Muslims in Lithuania.

The *Spiritual Centre of Sunni Muslims of Lithuania-Muftiate* and the *Council of Muslim Religious Communities of Lithuania-Muftiate* are the two umbrella Muslim religious organisations which act on behalf of their member communities vis-à-vis the state. The leaders of both organisations maintain permanent communication with the state through the Ministry of Justice, which is formally charged with the supervision of religious affairs in the country. There is no demand from the state's side that Muslim religious organisations form a unified umbrella Islamic Council that would serve as the interlocutor between the state and the Muslim communities.

No Lithuanian Muslim religious organisations have any representation on the EU level and, in general, their international ties are very limited, mainly confined to Turkey and Russia.

III. Application of Shari'a and its relationship to fundamental rights and human dignity

As indicated above, Sunni Muslims are recognised by the state as a traditional faith community and as such have a range of religious rights that are regarded by the state as legitimate and legal. Some stem directly from Shari'a or have its features.

Though family law, as part of the Civil Code, in Lithuania in general is of a secular nature, it nonetheless establishes a right-to-marriage procedure according to precepts of one's own religion.[12] Thus, Sunni Muslims may marry according to Islamic requirements before an Islamic cleric (mufti, imam) in a place of their choice (mosque, imam's office or other). Only clerics appointed (employed) by a state-

[12] Lietuvos Respublikos civilinis kodeksas. Trečioji knyga. Šeimos teisė, *Infolex,* 10 Nov 2020 <http://www.infolex.lt/portal/start_ta.asp?act=doc&fr=pop&doc=60696>.

registered Muslim religious organisation representing Sunnis may be authorised to preside over the wedding ceremony. After the ceremony, the cleric has to fill in and submit relevant documents to the local civil registry office, where the marriage is certified and officially registered. Over the past several decades, dozens of marriages have been conducted under the muftis' and imams' supervision. In some cases, the brides were not Muslim.

The Civil Code of Lithuania allows marriage contracts.[13] Though their content is described in law as mainly related to property rights and management, spouses may include other stipulations of their rights and duties. Thus, technically, the *niqah* contract is also covered by the law, provided its clauses do not contradict state laws, particularly fundamental rights and human dignity.

The Lithuanian Civil Code does not foresee a possibility of *talaq*-type divorce – Muslims, like followers of other faiths, have to follow secular divorce procedures established in law. There have been no instances of divorce hearings in court involving Islamic arguments.

Burials are regulated by the *Law on the Burial of Human Remains*, which stipulates that the religious convictions of the deceased and his/ her kith and kin/relatives are to be respected in the burial procedure and rituals.[14] This, *inter alia*, includes the exception to be buried earlier than the general rule, i.e. within 24 hours of death, something that is of importance to Muslims. Though Muslims or Islam are not mentioned in the Law, this particular clause on burial time was specifically designed to accommodate Muslims' needs and expectations.

In succession and inheritance matters Muslims in the country are to abide by relevant state laws, particularly the Civil Code,[15] which are secular and include no reference to religion. On the other hand, as long as the people concerned are content with the inheritance procedure and its results, the laws in Lithuania do not prohibit the practice of Islamic procedures of inheritance.

There are no features of Shari'a in the Lithuanian Labour Code.[16] Employees of faiths other than Western Christian, however, may request days off (unpaid leave of absence) during their religious holidays and feasts but this is at the discretion of the

[13] Račius, 'Islamic law in Lithuania?'.

[14] Lietuvos Respublikos žmonių palaikų laidojimo įstatymas <https://www.e-tar.lt/portal/en/legalAct/TAR.C51D9C259EFE/YhOreiUSMq>; also Lietuvos Respublikos civilinis kodeksas. Antroji knyga. Asmenys, Art 2.25, *Infolex* <https://www.infolex.lt/ta/20799:str2.25>.

[15] Lietuvos Respublikos civilinis kodeksas. Penktoji knyga. Paveldėjimo teisė, *Infolex* <https://www.infolex.lt/portal/start_ta.asp?act=doc&fr=pop&doc=57542&title=LR%20civilinis%20kodeksas.%20Penktoji%20knyga.%20Paveld%EBjimo%20teis%EB>.

[16] Seimas of the Republic of Lithuania, Lietuvos Respublikos Darbo kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo įstatymas, Nr. XII-2603, 14 Sept 2016 <https://www.e-tar.lt/portal/lt/legalAct/f6d686707e7011e6b969d7ae07280e89/asr>.

employer. Likewise, employees may seek time off for the communal prayers required by their religion but this also is left up to employer. Some Muslims are known to take several hours off on Fridays to attend *sala al-jumaa'*.

So far, there is no publicly available information in Lithuania on issues related to the rights of children and women that would involve any aspects of Shari'a. This may be in part due to low religiosity and concern for Islamic practices among the autochthonous population of Muslim background, and the fact that there are very few Muslim families of immigrant background.

IV. Discrimination of Muslims

Lithuania is a secular liberal democracy whose national laws are in line with the EU legal framework and regulations. It has all relevant legislation pertaining to prevention of and punishment for discrimination on any grounds, including religion. There have been no instances of complaints to the Office of the Equal Opportunities Ombudsperson[17] by individuals alleging that they have been discriminated against because of their Muslim background.

So far, there has been no need to apply laws and legal regulations like Directive 2000/78 as there have been no cases of alleged discrimination of Muslims on a religious basis.

There are very few Muslim women who wear hijab (chiefly Turkish members of Hizmet) and none has been seen publicly wearing *niqab*. Generally, the issues of gender and sexuality among Muslims are the realm of media interest, but news reports on the topic cover events and processes outside of Lithuania. There have been no cases with a gender or sexuality dimension that would relate to Muslim persons resident in Lithuania.

V. Exercise of religious freedom and other cultural rights

There are currently four historical (19th-20th century) mosques in Lithuania. However, only one of them, that in the second largest city Kaunas, is open to worshippers every Friday. When it was served by a Diyanet-supplied Turkish imam (until 2019), it was open on a daily basis but since his departure, due to lack of demand and for security reasons it has been closed during week days. The remaining three mosques, in villages once dominated by Tatars, open their doors only on Islamic holidays due to lack of demand. There are a number of *musallas* in the other biggest cities (Vilnius and Klaipėda).

Sunni Muslims, like other traditional faith communities, have the unequivocal right to build mosques or purchase buildings to be converted into mosques, provided

[17] *Office of the Equal Opportunities Ombudsperson* <https://www.lygybe.lt/lt/religija-pazymos>.

they obtain all required permissions. Over the course of twenty years *Vilnius Sunni Muslim Religious Community* has been offered by the Vilnius City Council a number of land plots as compensation for the Muslim property nationalised during the Soviet rule. In 2019, it finally accepted a plot offered free of charge on which to build a mosque.[18] The Vilnius City Council appears to be supportive of the Muslims' wish to build a mosque in the city and no obstacles are expected from its side. There has also been talk of constructing a mosque in the western sea port city Klaipėda but the matter remains unresolved.[19]

Non-traditional Muslim communities may establish and run *musallas* in their owned or rented premises and also construct purpose-built mosques on their owned land. So far, however, neither Hizmet nor Ahmadiyya own any land and have not publicly expressed any intention of constructing a purpose-built mosque.

No Islamic rituals are explicitly prohibited by Lithuanian laws. However, theoretically, some of them (like self-flagellation on Ashura or needle piercing during the *dhikr* ceremony) would be prohibited if they led to self-inflicted injuries and bodily harm. Likewise, rituals that would discriminate on any grounds (like gender, age and the like), would also be prohibited.

Islamic slaughtering in Lithuania is conditionally allowed as the *Law on Welfare and Protection of Animals* recognises the right to religious ritual slaughter.[20] World Halal Trust[21] (until 2021, LLC Halal Control Lithuania) is engaged in halal certification in Lithuania and neighbouring countries. It has issued a number of halal certificates to meat processing and other companies.[22] The certified companies in Lithuania produce halal products mainly for export to Muslim-majority countries.

Muslims may request halal meals at such state institutions as the Foreigner Registration Centre and the Refugee Reception Centre. Indeed, there have been cases when individuals of Muslim background complained to the Office of the Equal Opportunities Ombudsperson[23] of not having been provided a halal option at the centre's canteen. In such cases, the Office of the Equal Opportunities Ombudsperson ruled in favour of the complainants.

[18] 'Vilnius Muslim community to build a mosque', *LRT*, 28 Aug 2019 <https://www.lrt.lt/en/news-in-english/19/1092192/vilnius-muslim-community-to-build-a-mosque>.

[19] 'Klaipėdos musulmonai nori statyti mečetę', *Klaipėda*, 2 July 2009 <https://m.klaipeda.diena.lt/naujienos/klaipeda/miesto-pulsas/klaipedos-musulmonai-nori-statyti-mecete-578777>.

[20] Law on Welfare and Protection of Animals (Lietuvos Respublikos gyvūnų gerovės ir apsaugos įstatymas), No VIII-500, 6 Nov 1997 <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.455525?jfwid=-9dzqnu0jh>.

[21] *World Halal Trust* <https://worldhalaltrust.group/lt/>.

[22] 'Certification', *World Halal Trust* <https://worldhalaltrust.group/certified-companies/>.

[23] *Office of the Equal Opportunities Ombudsperson* <https://www.lygybe.lt/lt/religija-pazymos>.

Halal meals are available at some (Muslim-owned) restaurants and cafes and also the canteen of Vilnius International Meridian School (VIMS), run by Hizmet.

Though the Lithuanian *Law on Education* allows the establishment of confessional schools, Muslims in the country have not yet expressed any intention of founding one. Pupils of Muslim background attend either public schools or private schools (like Vilnius International Meridian School, run by Hizmet), including confessional Catholic schools. The Law does not foresee any exemptions on the grounds of religion, so pupils of different genders of all faiths are to attend mixed classes. Exemptions from Physical Education are possible only on health grounds.

The Lithuanian *Law on Education*, Article 31, grants the right to religious education in public schools to traditional faith communities.[24] Religious education in the form of confessional teaching is an optional subject. Pupils over 14 years of age may themselves choose whether to attend classes of confessional teaching or ethics. Parents of pupils younger than 14 make the decision on their behalf. Teachers of confessional teaching are to be appointed by the leadership of religious organisations representing traditional religious communities. The state pays their salary at public schools.

Sunni Muslims, like other traditional faith communities, may provide confessional teaching to pupils of Islamic faith in public schools if there is a sufficient number of pupils (i.e. 7) willing to attend such classes. There have been attempts to organise Islamic confessional teaching at public schools[25] but it has been discontinued due to lack of demand.

If the school is not able to offer confessional teaching, pupils of traditional faith communities may pursue confessional education at 'weekend schools' organised by communities in their own premises. Such learning is recognised by the state as part of the formal educational process.

Muslim communities in Vilnius and Kaunas run improvised (non-registered) 'weekend schools' organised in Kaunas mosque and the main *musalla* in Vilnius, where in separate groups school age children and adults are provided with basic knowledge about their faith. Up to several dozen pupils attend classes in each location every year. Islamic religious education at these 'weekend schools' is jointly provided by Turkish imams commissioned by Diyanet and local female Tatars, sometimes assisted by Arab expatriates and students. There have been attempts to formalise the curricula of these 'weekend schools' but the outcome is as yet undecided. A Turkish

[24] Seimas of the Repubic of Lithuania, Law on Education, No I-1489, 25 June 1991 <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/df672e20b93311e5be9bf78e07ed6470?jfwid=4t02bsoca>.

[25] E. Račius, '(Re)discovering One's Religion – Private Islamic Education in Lithuanian Muslim Communities' in: Jenny Berglund (ed), *European Perspectives on Islamic Education and Public Schooling* (Sheffield, Equinox Publishing, 2018).

Islamic NGO provided funding for the translation into Lithuanian and the publishing of the Turkish textbook to be used at the 'weekend schools.' Mosque and *musalla* libraries also contain a Russian translation of the same textbook.

Hizmet and Ahmadiyya also offer informal Islamic religious education (bordering on proselytism, *da'wa*) at their premises, mainly to adults.

So far, there have been no instances in Lithuania of tensions, let alone a clash, between individuality of human rights and communitarianism of religions involving Islamic aspects or Muslims. As the population of Muslim background in the country is small and the better half of it is not particularly religious, this issue does not appear to be relevant to the Lithuanian case.

VI. Free speech and Islam

A number of public intellectuals, journalists and politicians in Lithuania have publicly expressed their negative stance toward Islam and Muslims, some of which border on or contain features of Islamophobia and Muslimophobia. So far, however, there have been very few legal cases of defamation, blasphemy, hate speech or intolerance related to Islam or Muslims. Several individuals have been found guilty of incitement to racial hatred and exercising intolerance towards Muslim refugees.[26] A group of young hooligans was apprehended in Kaunas for vandalizing the Kaunas mosque.[27] There was also an instance where a public complaint by Muslim representatives was voiced that window screens of a casino in the capital city Vilnius had silhouettes of what looked like mosques.[28] The company that owns the casino agreed to change the window screens before the matter went to court.

There have been several legal cases of defamation, blasphemy, hate speech and intolerance involving Christian symbols. In one of them, a designer was found guilty and fined for the allegedly offensive advertisement of his clothing products.[29]

[26] B. Sabatauskaitė, 'Eglė Urbonaitė Tilindienė, Karolis Žibas, Lithuania' in: Enes Bayrakli and Farid Hafez (eds), *European islamophobia Report 2016* <http://www.islamophobiaeurope.com/wp-content/uploads/2017/03/LITHUANIA.pdf>, pp. 352-3; 'Lithuanian police to meet with refugees, locals after incident in Rukla', *The Baltic Times,* 20 Oct 2016 <https://www.baltictimes.com/lithuanian_police_to_meet_with_refugees__locals_after_incident_in_rukla/>.

[27] A. Masiokaitė-Liubinienė, 'Teenagers suspected of vandalising mosque and synagogue in Lithuania's Kaunas', LRT, 28 Nov 2019 <https://www.lrt.lt/en/news-in-english/19/1120497/teenagers-suspected-of-vandalising-mosque-and-synagogue-in-lithuania-s-kaunas>.

[28] A. Paknys, 'Vaizdas ant Vilniaus lošimo namų lango žeidžia musulmonus', *Lrytas.lt*, 27 June 2013 <https://lietuvosdiena.lrytas.lt/aktualijos/vaizdas-ant-vilniaus-losimo-namu-lango-zeidzia-musulmonus.htm>.

[29] 'Can Jesus Wear Jeans In Lithuania? The Strasbourg Court Will Decide', *Human Rights Monitoring Institute*, 20 Sept 2016 <https://hrmi.lt/en/eztt-imasi-nagrineti-jezaus-dzinsu-byla/>.

VII. Challenges posed by Islam in the traditional understanding and application of democracy and rights

The presence of Islam and Muslims in the country have not been seen by any state or non-state actors as posing any challenges in the traditional understanding and application of democracy and rights in Lithuania. The overwhelming majority of the country's Muslim population are secular and well integrated into society, thus their personal understanding of democracy and civil duties and rights reflects the notions found in the society as a whole.

No political demands have ever come from the Muslim religious collectivities. This may be due to the fact that the autochthonous Lithuanian Tatars are profoundly secular and well integrated into mainstream society while the expatriates, though playing an increasingly prominent role in the leadership of Muslim religious organisations, have not yet made themselves heard publicly. Lithuanian Tatars are content with the regime of governance of religion in the country, which treats Sunni Islam as one of the traditional denominations in the country with all its associated consequences – the enhanced religious and social rights of Sunni Muslims. Other Muslim denominations are too small and comprised mainly of non-citizen expatriates, many of whom reside in the country on a temporary basis.

None of the Muslim religious collectivities in Lithuania have so far challenged the boundaries between private and public. This may be due to the fact that most of the inhabitants of the country of Muslim background are profoundly secular and subscribe to the notion that religion is a private matter.

As announced by the State Security Department in its annual reports, every year the Lithuanian Border Police prevent from entering or request to leave the territory of Lithuania a number of foreigners (some of them of Muslim background) who are on the list of *personae non grata*, including those who are on the terrorism watch list. Some of these individuals of Muslim background are Islamic preachers and missionaries, others are travelling to or through Lithuania on business.

Though the State Security Department in its annual reports has indicated attempts by outside actors to radicalise local Muslims, it has also noted that there are no radical Muslim groupings or individuals among autochthonous Lithuanian Muslims, aka Tatars. On the other hand, in one of its annual reports (covering 2016),[30] the Department conveyed that it had been monitoring a group of around 70 people (both citizens of and foreigners residing in the country) for their 'radical Islamist views'. The report further stated that among them there was at least one person who was "supporting the terrorist organisation ISIS and would himself want to take part in 'jihad' in Syria' who

[30] Lietuvos Respublikos Valstybės Saugumo Departamentas, 2016 m. Veiklos ataskaita <https://www.vsd.lt/wp-content/uploads/2016/10/2016_veiklos-ataskaitaVIESA_0330.pdf>.

had already been apprehended on charges of possessing narcotics. Indeed, a number of Lithuanian female converts to Islam, particularly those residing outside Lithuania, were found to espouse Salafi ideology,[31] albeit of the quietist/purist type, that is to say not advocating any violent actions. No subsequent Department reports, however, ever referred to this group of monitored individuals and no threats stemming from them have been reported. In fact, the Department has remained silent on any potential threats to the security of Lithuania stemming from 'radical Islamists' resident in the country. No individuals of Muslim background are known to have left Lithuania to join any radical Muslim grouping like al-Qaida and its affiliates or the Islamic State.

Nonetheless, there have been several cases of alleged radicalisation of individual Muslims in the country. The best-known case is of an ethnic Lithuanian girl who had converted to Islam at an early age (still a teenager) and was charged with conspiring to perform a terrorist act in Russia.[32] She was apprehended just before leaving Lithuania, tried in court, first found guilty and later acquitted.

Though there are no far-right groupings in Lithuania of the likes found throughout Europe, a steady rise in far-right populist sentiment is observable in the country. There are a number of newly registered political parties which express radical (ultra-conservative Catholic and far-right) positions, including Islamophobic and Muslimophobic rhetoric. None of these parties so far have made it into Parliament or city or county councils.

Generally, the main security concerns in Lithuania revolve around threats stemming from Russia's hostile activities on military, espionage, social and economic fronts. There is a universal understanding across the political spectrum that Russia is the number one threat to Lithuanian security and indeed survival. Therefore, the greater part of attention and resources in the country are devoted to preventing and countering the harmful effects of Russia's activities against Lithuania.

As a number of national reports on Lithuania for the European Islamophobia project[33] reveal, there is little Islamophobia or Muslimophobia in Lithuania. Consequently, there has been little to no effect of Islamophobia on Lithuania's commitment to fundamental rights.

[31] E. Račius and V. Norvilaitė, 'Features of Salafism among Lithuanian Converts to Islam' (2014) 27/1 *Nordic Journal of Religion and Society*, pp 39–57.

[32] 'Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2716/2016*,**,***', United Nations Human Rights Committee, 24 Sept 2019 <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjvfIjqiI84ZFd1D-NP1S9EIxn40HjWZEWCAnohSEGaPhw6GaG0LO%2FOz7jmnUMIYAaVWPFJeM5SwxOTCWo0Ebo-9Q74ujN4akVd5K8UfA7pmEelJw7VNANDegiEvR%2F3Ryqww%3D%3D>; Human Rights Monitoring Institute, 'Lithuania Violated Teen Terror Suspect's Freedom of Expression', Liberties, 26 Sept 2019 <https://www.liberties.eu/en/news/lithuania-violates-freedom-expression-teen-terrorist/18106>.

[33] European Islamophobia Report <https://www.islamophobiaeurope.com/>.

There has been little immigration to independent Lithuania – as of 1 January 2019, there were just 58,000 foreigners residing in Lithuania, making just a little over two per cent of all inhabitants. The biggest national group of immigrants then were Ukrainian nationals – around 17,000. Nationals of other neighbouring countries made up the other largest groups of immigrants: some 12,500 Russian citizens and over 12,000 Belarusian citizens. Citizens of these three Slavic Orthodox countries comprise some 85 per cent of all foreigners living in Lithuania. However, almost 60 per cent of foreigners reside in the country on a temporary basis, mainly through employment contracts.

Immigrants from outside Europe make up a negligible share of the population of Lithuania. Those hailing from Muslim majority regions in Asia and Africa may amount to a thousand but they come from a multitude of countries with none dominating. Lithuania has been a transit country for both economic migrants and political refugees, with few requesting asylum. For instance, in 2018 only 279 asylum requests were filed: 74 by Tajik, 39 by Russian, 34 by Iraqi and 30 by Syrian nationals. The rate of those granted asylum has traditionally been low, with only a handful receiving conventional refugee status. But even those granted asylum tend to leave Lithuania for another (Western) European country. As there is no urgency, there have not been any calls to tighten immigration laws by any political or social actors.

As there is little immigration to Lithuania and only a negligible proportion of foreigners residing in the country are of Muslim background, there is little ground for manifest Islamophobia or Muslimophobia. Nonetheless, in the wake of the so-called 'European immigrant crisis' of 2015/16, there were some political actors (individuals and parties, among them at least one parliamentary) who expressed positions that may be read as containing anti-immigrant and anti-Muslim sentiments. At that time, it was expected that migrants, widely perceived to be of Muslim background, who relocated to Lithuania under the pan-European relocation scheme would pose challenges, if not threats, to the social order in the country. 2016 was also the year of parliamentary elections and some parties tried to play the immigration card. However, as it later turned out that very few of the relocated migrants chose to remain in Lithuania, Islamophobic and Muslimophobic sentiments among political actors died out.

In the 2020 general election campaign, no mention of immigration, let alone Muslim immigration, was made. No challenges or threats stemming from Islam or the presence of Muslims in the country were ever raised in campaign ads or debates.

There have been calls to ban female dress covering the face,[34] locally referred to as *burka*, but they were never taken seriously by mainstream political actors and no discussions, let alone decisions, took place on the parliamentary floor.

[34] 'Arturas Paulauskas calls for ban on the burqa in Lithuania', *The Baltic Times*, 13 Aug 2015 <https://www.baltictimes.com/arturas_palauskas__regulating_wearing_the_burqa_in_public_will_prevent__any_potential_misunderstandings_/>.

Though there are occasional *ad hoc* events promoting inter-religious dialogue, organised chiefly by NGOs, there are no state- or NGO-run programmes for mutual understanding or inter-religious dialogue in Lithuania.

School curricula and textbooks are not designed to promote mutual understanding and inter-religious dialogue either and rather focus on Lithuanian history and current developments from an ethno-confessional (Lithuanian-Catholic) point of view.

VIII. Conclusion

The regime of governance of religion in Lithuania, and particularly the practice of dividing faith communities into 'traditional' and 'others', is very problematic and arguably unsustainable.[35] As indicated above, Sunni Muslims are recognised by the state as a 'traditional' faith community. However, no legal act defines who among the world's Muslims of Sunni background fall into this category. Though not stated in any legal acts, it appears that the state, out of inertia, identifies the Lithuanian Tatars as the (sole) representatives of Sunni Islam in the country. There are, however, already two rival umbrella Sunni Muslim religious organisations which denounce each other as impostors and vie for recognition by the state as the (sole) true representative of Sunni Islam in Lithuania. Thus, arguably, Sunni Muslims (incidentally, like some other 'traditional' faith communities) do not appear to fit into the present system of the governance of religion in the country, which fails to recognise the wider social reality—the multiplicity of parallel (and even rival) forms of Islamic religiosity that claim to be truly 'Sunni'.

As long as the Muslim community remains both numerically insignificant and, more importantly, reluctant to push for the implementation of more religious rights implied (or presumed to be included) in the recognition of Sunni Islam by the state as a 'traditional' faith in the country, the comfortable *status quo* (in the form of the state model of co-existence between the secular state and Islam) will not be upset. However, if more observant (and thus demanding) Muslims (prospectively of convert or immigrant background of Salafi or other revivalist leanings) either ascend to positions of power within the existing Muslim community structures or create their own alternative power bases and proceed to claim the presumed rights, the status of Islam in the country would inevitably have to be reassessed, both on official and public levels. This would cause friction and tension not only between the officially secular state as well as the generally post-religious majority, on the one side, and the increasingly visible observant part of the Muslim community, on the other side, but within the Muslim community itself.

[35] E. Račius, 'The Legal Notion of "Traditional" Religions in Lithuania and its Socio-Political Consequences' (2020) 35/1 *Journal of Law and Religion*.

The Lithuanian Ministry of Justice, realising the outdatedness of the *Law on Religious Communities and Associations* and the unsustainability of the current system of governance of religion in the country, had at one point started considering amendments to the Law. It was suggested there be a profound reassessment of the constitutionally enshrined division between the 'traditional' and 'non-traditional' faith communities. However, the draft amendments have never reached the parliamentary floor to be voted on, as any thorough reconsideration of the system of governance of religion in Lithuania (and, *inter alia*, the state model of co-existence between the secular state and Islam) is possible only with the amendment of Article 43 of the Constitution, something that the Roman Catholic Church has been vehemently opposing, and there is no political power or will to overcome such an opposition. Therefore, for the foreseeable future, it seems that Lithuania is stuck with nine 'traditional' faith communities, among them Sunni Muslims, and the state model of co-existence between the secular state and Islam, no matter how flawed, will remain intact.[36]

[36] All websites last accessed on 24 Aug 2021.

ISLAM AND LAW IN THE NETHERLANDS

Sophie van Bijsterveld[1]

I. Introduction: the social framework

Islamic presence in the Netherlands dates from well before the first great waves of Muslim immigration to the country from the late 1960s and early 1970s onwards.[2] Nevertheless, these more recent waves of immigration of Muslims have had and continue to have an impact on society, politics and law. Three stages can be discerned in the debates and social, political, and legal attitudes in these domains. The first stage was marked by the belief that immigrant workers, as far as Muslims are concerned mainly from Turkey and Morocco, would remain in the Netherlands for a number of years as guest workers and then return home.

The second stage was marked by the awareness that instead of returning home, the guest workers were here to stay, and so were their families. This stage was characterised by changes in the law that aimed at accommodating for Islamic religious practices and rituals and securing the possibility for Muslims to practise their religion. Due to the fact that the Netherlands has always been religiously diverse, in combination with the open attitude towards religion in the law, the foundation of the law was favourable to such accommodation. As before, the dominant view was that cultural practices, including the cultivation of the language of these minorities, deserved support.

The third stage is characterised by a problematisation of Islam. By the end of the 1990s, the awareness grew that within Muslim communities ideas existed that were contrary to strongly held mainstream ideas in the Netherlands about for exam-

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[2] See for a fascinating chapter in the early history of the presence of Islam in the Netherlands and the construction of a Mosque in The Hague, U. Ryad, 'Te gast in Den Haag – discussies moskeebouw in Nederland vóór de Tweede Wereldoorlog' (2013) 4/2 *Tijdschrift voor Religie, Recht en Belei,* pp. 59-78.

ple male-female relationships, homosexuality, freedom of expression and religious liberty, and that Islamic religious leaders in the Netherlands had an impact on their followers in this respect. The dramatic events of the religiously motivated terrorist attacks in Washington D.C. and New York on 11 September 2001 only intensified these concerns. Doubts also arose as to the commitment of all Dutch Muslim communities to the values of democracy and the rule of law. These developments, as well as subsequent terrorist attacks, the civil war in Syria, the rise of IS, and the phenomenon of Dutch recruits joining the Jihad, impact debates to this day.

The developments outlined so far must, of course, be seen in a broader context. By the 1990s the proverbial culture of toleration in the Netherlands had made way for an emphasis on compliance and enforcement in all sorts of societal domains. Immigration from all parts of the world combined with open border policies of the EU caused a change in outlook of the population and increased population growth. A repositioning of the state vis-à-vis society resulted in financial withdrawal of the state in the social domain, thereby leaving behind the classic social welfare state. It is against this broader background that recurrent social surveys over the last two decades show that at the top of citizens' concerns are issues of values and norms, integration, and respectful behaviour.[3]

As of 1 January 2021, the total number of inhabitants of the Netherlands was 17,475,415, of which 4,305,908 have a migration background in the first or second generation, and of which 2,447,178 have a non-Western background; of this latter number 1,361,849 are first generation immigrants.[4] Equally recent figures on the presence of Islam in the Netherlands are not available.[5] In the more or less half century since the first waves of Muslim immigrants came, the practice of Islam as a lived religion has changed, as empirical studies show.[6]

[3] See J. den Ridder, E. Miltenburg and W. Huijnk en Sosha van Rijnberk, 'Burgerperspectieven 2019|4', *Social en Cultureel Planbureau*, 30 Dec 2019 <https://www.scp.nl/binaries/scp/documenten/monitors/2019/12/30/burgerperspectieven-2019-4/Burgerperspectieven_2019_4_WEB_Nagekomen+correctie.pdf> for a pre-Covid 19 report.

[4] Figures according to the CBS, 'Bevolking; geslacht, leeftijd, generatie en migratieachtergrond, 1 januari', *CBS,* 13 Oct 2021 <https://opendata.cbs.nl/statline/#/CBS/nl/dataset/37296ned/table?ts=1634559795428>; see also 'Hoeveel mensen met een migratieachtergrond wonen in Nederland?', *CBS* <https://www.cbs.nl/nl-nl/dossier/dossier-asiel-migratie-en-integratie/hoeveel-mensen-met-een-migratieachtergrond-wonen-in-nederland->.

[5] The CBS mentions a percentage of 5%, 'Religie in Nederland', *CBS*, 18 Dec 2020 <https://www.cbs.nl/nl-nl/longread/statistische-trends/2020/religie-in-nederland?onepage=true#c-4-Diversiteit-religieuze-stromingen>.

[6] See for instance W. Huijnk, 'De religieuze beleving van moslims in Nederland. Diversiteit en verandering in beeld', *Sociaal en Cultureel Planbureau*, June 2018 <https://www.scp.nl/binaries/scp/documenten/publicaties/2018/06/07/de-religieuze-beleving-van-moslims-in-nederland/Moslims_in_Nederland.pdf>.

In the Lower House of Parliament, the anti-Islam party PVV rose to become the second largest party in the 2017 general elections and has secured a solid third position in the 2021 elections. For the first time, in 2017 a political party with a Muslim/minority focus has entered the Lower House of Parliament to be joined by another party with a minority focus after the 2021 elections. At the local level, an Islamic party (NIDA) has managed to gain a few seats in one municipality in 2013 and in two municipalities in 2018. A number of parliamentarians, belonging to various political parties, have family backgrounds from countries in which Islam is the dominant religion.

II. Institutional recognition by the state

A. Legal entity status

For the legal organisation of Islamic communities various options are available under Dutch law. The first option is the legal structure available to Christian communities and which Jewish communities also make use of. It is the legal entity 'church', which in the closed system of categories of legal entities in Dutch law is a category *sui generis*.

The Dutch Civil Code does not define the concept of 'church'. It simply states that churches, their independent units and the structures in which they are united have legal personality (Article 2: 2 (Book 2) Civil Code, Section 1). It further states that they are governed by their own statutes in so far as they do not conflict with the law (Article 2: 2 (Book 2) Civil Code, Section 2). The notion 'law' is regarded as a reference to law of a more fundamental nature, not just any law. This interpretation is confirmed by the Supreme Court in a case concerning the dismissal of a protestant clergyman.[7]

The option of a 'church', however, is not used by Islamic communities. In practice, Islamic communities usually organise themselves as a foundation under Dutch law for the employment of an imam and the governance of a mosque. The option of an association under Dutch law is also a possibility, but the foundation is the legal entity commonly used. The legal entity used for Islamic religious communities in the Netherlands thus does not coincide with the religious community structure. Whatever the choice of their legal structures under Dutch law, no prior recognition or approval by the state is needed.

B. Financing of Islamic communities

Religious communities as such are not financed by the state.[8] They are responsible for their own finances. Nevertheless, a variety of forms of – modest – state support exist.

[7] Hoge Raad, 4 Oct 2019, ECLI:NL:HR:2019:1531.

[8] For an overview, see P. van Sasse van Ysselt, 'Financiële verhoudingen tussen overheid, kerk en religieuze organisaties' (2013) 1 *Tijdschrift voor Religie, Recht en Beleid*, pp. 65-86. See also S. van

Specific activities in the social sphere may receive state support,[9] such as local subsidies that municipalities may grant for the organisation of Iftar meals in the neighbourhood to which the neighbourhood or members of other religious communities are invited. The same is true for activities such as homework assistance organised by Islamic communities, even if such assistance takes place in a mosque. Such subsidies can be politically controversial, for instance if activities such as language lessons are provided for men and women separately or when youth activities promote religious views regarding marriage or pre-marital sexual behaviour.

An indirect method of support to religious communities at the national level is through tax facilities. Donations to 'general interest organisations' (*Algemeen nut beogende maatschappelijke instellingen – ANBI's*) are tax deductible. Traditionally, churches and other religious communities were explicitly mentioned next to general interest organisations; later they were simply regarded as such. In the course of the last few decades, the requirements for entitlement to a qualification as *ANBI* have been tightened. Not only must there be proof that the organisation's concrete activities are in the 'general interest' to a degree that is currently set at 90 %, but also prior assessment has been introduced as to whether the organisation fulfils all the criteria.[10] The development towards a more restrictive arrangement with regard to religious communities can be seen in part as a diminishing awareness of and diminishing support for the idea that religious communities hold a special place in society and that their activities as such are in the general interest. In part, the increasing unfamiliarity with Christian churches plays a role, and specifically the unfamiliarity with Islamic communities and the fear of money laundering and the financing of terrorist activities in an Islamic context.

Tax benefits are not the only form of indirect support for religious communities. In the execution of public policy goals such as the maintenance of cultural heritage, religious cultural heritage is also included. Thus, churches classified as monuments can apply for support in maintenance and restoration costs – which cover only part of the enormous overall expenses of their owners. Mosques do not (yet) qualify for such benefits, simply because of their more recent history.

Only a few forms of direct financial support from the state for religious purposes exist. These are legitimised by 'special circumstances'. In the second half of the previous century incidental support was provided by the state for church construction on newly reclaimed land, for reconstruction of the built environment after floods, or

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Bijsterveld, *State and Religion: Re-assessing a Mutual Relationship,* chapter 5 (The Hague, Eleven International Publishing, 2018).

[9] For education, see below, Section V.

[10] Christian and Jewish communities, united in an umbrella organization have made arrangements with the tax authorities to alleviate the requirements somewhat under the condition of self-regulation.

construction in areas of unprecedented population growth. With a view to the latter, as well as to bring some uniformity to the then extant incidental municipal support for church construction, a law was enacted at the national level that facilitated the building of churches. All in all, this Act of Parliament was in force from 1962 until its final expiration in 1975. In the 1980s, two subsequent temporary ministerial subsidy regulations specifically aimed at financially facilitating the construction of mosques were in force.[11] Under these regulations a total of about 100 mosques were built. The rationale behind these regulations was that Muslims were in a more disadvantageous situation than other religious groups were with respect to the construction of houses of worship, both in view of cultural history and of the newly expired Church Construction Support Act [*Wet premie kerkenbouw*]. The expiration of the second subsidy regulation marked a change in the position of the Lower House of Parliament. A parliamentary majority regarded direct financial support, moreover support that benefited one specific religion, as contrary to the principle of separation of Church and State.

An interesting new form of specific public financial support for a specific religious community was the municipality of Amsterdam's (financial) involvement in the construction of the Wester Mosque [*Westermoskee*]. This involvement must be viewed in the context of the wish to integrate the religious community into the larger municipal society and to bind the religious authorities involved to a 'liberal Islam', that is, an Islam that is at least in step with the constitutional principles of liberal democracy. Over the years, the municipality had also entered into favourable arrangements with other religions as regard the construction of houses of worship. This type of action can be seen in the perspective of a trend towards more differentiation in the relationships between the state and various religious communities, not as a matter of principle, but as a result of the fact that the state increasingly interacts with the various religious communities in diverse ways.[12]

The state finances spiritual chaplaincy services in the armed forces and penitentiary institutions. The chaplains are 'sent' by their respective sending bodies and are appointed by the state. For Islamic chaplaincy, two sending bodies are recognised, the CGI (Contact Group Islam) and the CMO (Contact Group Muslims and State). The rationale for the financing of these chaplaincy services by the state has changed and developed over time. Currently, it is regarded that the state has a positive obligation to enable the exercise of religious freedom for persons in special circumstances, as is

[11] These were *Globale regeling inzake subsidiëring gebedsruimten 1976-1981*; *Tijdelijke regeling inzake subsidiëring gebedsruimten voor moslims 1981-1984*.

[12] See S. van Bijsterveld, 'Equal treatment of religions or differentiation between religions?' in: W. Cole Durham Jr., Javier Martínez-Torrón and Donlu D. Thayer (eds), *Law, Religion, and Freedom. Conceptualizing a Common Right* (London, Routledge, 2021), pp. 229-41.

the case here. Additionally, the rationale accepts that the state also has a responsibility for the spiritual well-being of these persons.

C. Developments of the state towards (the financing of) Islamic communities

Developments in the legislation concerning tax benefits for general interest organisations and the example above concerning the *Westermoskee* already reveal a certain interest of the state in religious communities as such. Such interest is manifest in new legislation that is being proposed to tighten supervision of donations to social organisations, including churches and other religious communities, by requiring rigorous transparency levels for donations.[13] Due to the broad scope of this Bill for a Social Organisations (Transparency) Act [*Wet Transparantie Maatschappelijke Organisaties*] – it encompasses social organisations in general – , its low financial thresholds and its strict requirements, the proposed legislation is quite far-reaching, even though it is toned down somewhat compared to a preparatory draft.

Foreign financing of Islamic communities has been a recurring topic of debate over the last two decades. Over the last few years, these debates have acquired a high level of political intensity and urgency. The 2017-2021 Coalition agreement paid attention to the undesirability of foreign influence through social media or through the financing of social organisations in the Netherlands, and stated as a policy goal to counter money flows from 'unfree countries' as much as possible. The proposed legislation to make money flows transparent mentioned in the previous paragraph must be seen in this perspective. Besides this, specific proposals are being considered to restrict transnational money flows between or to or from religious organisations.[14] A third initiative in this respect is the establishment of a departmental Task Force on Problematic Behaviour and Undesired Foreign Influence [*Taskforce problematisch gedrag en ongewenste buitenlandse financiering*].

[13] Social Organisations (Transparency) Act (Voorstel van Wet transparantie maatschappelijke organisaties), Kamerstukken II, 35 646. See also S. van Bijsterveld, 'Kerken in wetgeving en rechtspraak. Recente ontwikkelingen geduid' (2021) 12/1 *Tijdschrift voor Religie, Recht en Beleid*, pp. 45-68. The desirability for such an Act of Parliament was laid down in the Coalition Agreement of 2017-2021, *Vertrouwen in de toekomst* (Confidence in the Future), p. 4 (under the heading Security) and was specifically related to the desire to counter influence from foreign 'unfree' countries.

[14] At the time of writing, these proposals have been published, but are not yet introduced as legislative proposals. For various legislative amendments to already existing legislation, with the purpose of enhancing transparency with respect to money flows of social organisations and of countering foreign influence, see S. van Bijsterveld, *ibid.,* [12]; for a fundamental rights perspective on potential initiatives of restricting transnational money flows between religious organisations or to or from religious organisations, see A. Overbeeke, 'Het belemmeren van buitenlandse financiering van geloofsgemeenschappen. Een grondrechtengevoelige kwestie' (2018) 9/3 *Tijdschrift voor Religie, Recht en Beleid*, pp. 62-79.

The Lower House of Parliament has installed its own parliamentary Commission, the Parliamentary Commission Investigating Undesired Influence from Unfree Countries (*Commissie parlementaire ondervraging ongewenste beïnvloeding uit onvrije landen (POCOB))*, to explore the extent of foreign influence. The Commission issued its report in June 2020. The report contains factual material as well as concrete proposals that have been made by conversation partners during the preparatory stage as well as during the public hearings of the Commission.[15]

D. Interlocutors

Formal recognition of the Dutch system of church and state relationships does not exist. However, the notion of 'recognition' of religious communities and religions is part of a deeper structure of the law.[16] Thus, recognition plays a role in a variety of ways. Umbrella organizations of Dutch Muslims have indeed been officially 'recognised' by the state. These are the CGI (*Contact Groep Islam* – Contact Group Islam) and the CMO (*Contactgroep Moslims en Overheid* – Contact Group Muslims and State). The recognition entailed a prior assessment of the representativity of the organisations. These organisations serve as interlocutors with the state regarding issues that arise. Formally speaking, they are also – or even primarily – a 'sending body' for the purpose of designating spiritual caregivers in the armed forces and penitentiary institutions.

III. Application of 'Shari'a' and Islamic Cultural Practices[17]

A. Internal legal entity law

Religious rules do not qualify as a source of general law; however, the internal law of legal entities has legal relevance. As Islamic religious communities are usually organised as foundations for the management of a building or the employment of an imam, their internal rules have only limited religious significance.

B. Family law

The Dutch legal system excludes a system of personal laws based on religious affiliation. Such a system would violate the constitutional norm of equal treatment

[15] The Commisson's Report: *(On)zichtbare invloed. Verslag parlementaire ondervragings commissie naar ongewenste beïnvloeding uit onvrije landen* (Den Haag, 2020) <https://www.tweedekamer.nl/sites/default/files/atoms/files/eindverslag_pocob.pdf>.

[16] See Bijsterveld, *State and Religion: Re-assessing a Mutual Relationship*.

[17] The concept of 'Shari'a' is not unequivocal; see M. Berger, 'Sharia in het Westen (I)' (2019) 10/3 *Tijdschrift voor Religie, Recht en Beleid*, pp. 17-31. Nevertheless, certain practices that are generally seen as related to Shari'a will be mentioned here as well as certain Islamic cultural practices in so far as they relate to the law.

regardless of religion or belief. Thus, for example, no system of religious marriages exists with civil effect. In fact, a legislative change of 2020 enables the court to oblige a marriage partner to co-operate in legal proceedings to dissolve a religious marriage.[18] This possibility is especially relevant for Islamic women who have been married abroad and whose religious marriage is legally binding.[19]

In the field of family law, policies are in place to counter arranged or forced marriages and the general criminal offence of 'coercion' has been made stricter with a view to this practice. The minimum age for marriage is 18 years; from 2015 onwards foreign marriages in which a marriage partner is below the age of 15 are not recognised.

Foreign religious marriages with legal status are recognised in the Netherlands, though polygamous marriages are not.

C. Labour law

Practices such as wearing religious signs, the refusal to shake hands with persons of the opposite sex, praying, and attending Friday prayer are regulated by ordinary law. The General Equal Treatment Act (see below) covers many such issues; furthermore, the interpretation of general legal concepts is a way of taking religious liberty into account.

D. Other areas

Within the limits of ordinary law, liberty exists in shaping financial transactions. In a variety of areas, Dutch law has been adjusted to take into account religious cultural practices (see below).

IV. Equal treatment and non-discrimination in labour relationships

A. Equal treatment and non-discrimination legislation

The general legal framework for equal treatment and non-discrimination in labour relationships is formed by the General Equal Treatment Act [*Algemene wet gelijke behandeling*], which entered into force in 1994. It has been amended several times; the EU-Directive 2000/78 has also been incorporated into this Act.[20]

[18] See S. van Bijsterveld, 'De burgerlijke rechter en de religieuze echtverbintenis' (2020) 11/1 *Tijdschrift voor Religie, Recht en Beleid*, pp. 3-6.

[19] The Countering Marital Imprisonment Act (Wet tegengaan huwelijkse gevangenschap), Kamerstukken II, 35 348; this Act also creates obstacles for marriages between cousins.

[20] Council Directive 2000/78/EC of 27 Nov 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 Dec 2000, pp. 16-22.

The basic categories of the General Equal Treatment Act are direct discrimination, which is forbidden on a number of grounds including religion and belief, unless exceptions apply; and indirect discrimination, which is forbidden unless it can be objectively justified. The definitions of these two forms of discrimination are identical to those of the Directive; as far as is relevant in this context, the same is true for the formulation of the grounds for an objective justification of indirect discrimination, namely by a legitimate aim and where the means of achieving that aim are appropriate and necessary.

As clear as these categories may seem, their application in concrete circumstances can be difficult. In particular the assessment of whether an indirect discrimination is justified or not leaves room for interpretation. Thus, in a case concerning the rejection by a municipal authority of an Islamic candidate for the post of client manager on the grounds of his refusal to shake hands with persons of the opposite sex, the Netherlands Institute for Human Rights (formerly the Equal Treatment Commission) and both the Court of First Instance and the Court of Appeal were of the opposite view.[21] The Human Rights Institute held the view in its non-binding opinion that the rejection for the post was not objectively justified: there were other ways in which the candidate could have greeted women. The Court agreed with the municipality that the habit of shaking hands was in general use in Dutch society and that all clients of the municipality, of whatever sex, should be greeted equally by generally accepted customs.

The Court of Justice of the EU issued two rulings in 2017 (Bougnaoui and Achbita) and a ruling in 2021 concerning two cases (WABE and Müller) in which equal treatment of Muslim employees in private enterprises in relation to religion was at stake.[22] In the former case, in which an employee was dismissed on the grounds of wearing a headscarf when in external contact with clients of the company (Bougnaoui), the Court made clear that the direct discrimination was not exempted by Article 4(1) of the Directive as the requirement of not wearing a headscarf in such situations did not constitute 'a genuine and determining occupational requirement'. The Achbita, WABE, and Müller cases are relevant for national courts in so far as the Court of Justice ruled that:

[21] Respectively, Opinion 2006-202 by the former Equal Treatment Commission (now: Netherlands Institute for Human Rights); District Court of Rotterdam [*Rechtbank Rotterdam*], 6 Aug 2008 ECLI:NL:RBROT:2008:BD9643; Court of Appeal [*Gerechtshof 's-Gravenhage*], 10 Apr 2012, ECLI:NL:GHSGR:2012:BW1270.

[22] Respectively *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV,* C-157/15 (ECJ, GC, 14 March 2017, ECLI:EU:C:2017:203) and *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v. Micropole SA,* C-188/15 (CJEU, GC, 14 March 2017*,* ECLI:EU:C:2017:204); *IX v. WABE eV and MH Müller Handels GmbH v. MJ,* joined Cases C-804/18 and C-341/19 (CJEU, GC, 15 July 2021, ECLI:EU:C:2021:594).

> …a difference of treatment indirectly based on religion or belief, arising from an internal rule of an undertaking prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace. (WABE, recital 92)

constitutes indirect discrimination rather than direct discrimination, and thus is justifiable. The WABE and Müller cases are relevant for national courts as they make clear that the employer may legitimately

> 'pursue a policy of political, philosophical and religious neutrality, … provided, first, that that policy meets a genuine need on the part of that employer, which it is for that employer to demonstrate, taking into consideration, inter alia, the legitimate wishes of those customers or users and the adverse consequences that that employer would suffer in the absence of that policy, given the nature of its activities and the context in which they are carried out; secondly, that that difference of treatment is appropriate for the purpose of ensuring that the employer's policy of neutrality is properly applied, which entails that that policy is pursued in a consistent and systematic manner; and, thirdly, that the prohibition in question is limited to what is strictly necessary having regard to the actual scale and severity of the adverse consequences that the employer is seeking to avoid by adopting that prohibition' (WABE, recital 92).

Furthermore, they are relevant because of the fact that the Court has specified the scope for national authorities to take into account, in their own assessments, national law that is more favourable to equal treatment on the grounds of religion and belief, which is relevant for the assessment of Dutch cases by national authorities.

Under the Equal Treatment Act, the former Equal Treatment Commission has also accepted the responsibility of the employer to secure a climate in the workplace in which an employee does not encounter discrimination by co-workers: co-workers must be treated with respect.[23] Speech that constitutes no criminal offence or is not unlawful in terms of ordinary civil law can thus be effectively addressed.

B. **Other legislation**

Issues of discrimination or religious liberty within labour relations can also occur in the context of the interpretation of general legal contexts. An older example concerned a female employee who took a day off for a religious holiday even though the private employer had denied her request. The Supreme Court ruled that the religious freedom of the employee should be taken into account in assessing whether there was indeed a reason for her instant dismissal.[24]

In the sphere of social security law, the question may arise of whether an employee is available or has refused to accept 'appropriate work', which is grounds for limiting welfare support. Interestingly, a different approach to the acceptance of

[23] Opinion 2002-62.

[24] HR 30 March 1984, NJ 1985, 350 (instant dismissal).

wearing religious (read: Islamic) signs can be discerned over the years by courts.[25] Changed conditions with respect to the welfare state, ongoing concern over integration, and debates leading up to the legislative burka ban in certain situations[26] are no doubt factors of influence.[27]

C. Discrimination – the broader context

Discrimination in relation to religion may take other forms than the specific ones discussed above. More subtle forms of discrimination are obviously not restricted to Muslims.[28]

Discrimination by Muslims may take other forms than discussed above as well. One may think of the non-acceptance of behaviour regarding value issues that relate to marriage, male and female relationships or issues of sexuality, or freedom of religion. When this non-acceptance exceeds certain limits, it may be addressed by ordinary civil or criminal law.

V. Exercise of religious freedom and other cultural rights

A. The Construction of Mosques

The construction of religious buildings, including mosques, is regulated by ordinary zoning law. The same type of possibilities and restrictions exist for mosques as they do for other buildings. This also means that the use of a building for religious purposes that is not designated as such is not allowed. As to the size, for instance, of minarets, restrictions are determined by ordinary zoning law. Should zoning law leave no realistic room for communal worship, freedom of religion is at stake.

The Public Manifestations Act [*Wet openbare manifestaties*] enables regulation of church bell ringing and its Islamic equivalent.

B. Islamic rituals

When it became clear that Muslim immigrants were not returning to their countries of origin, a number of laws were adjusted for Muslims to practise their religious

[25] Rechtbank Amsterdam 24 mei 2007, ECLI:NL:RBAMS:2007:BA6917 (in this case reduction in welfare on the grounds of wearing a burka was not regarded as justified); Centrale Raad van Beroep 9 mei 2017, ECLI:NL:CRVB:2017:1639 (in this case reduction in welfare on the grounds of wearing a niqab was regarded justified).

[26] The Act on the so-called burka ban (which is applicable to all facial coverings) in certain situations came into force on 1 July 2019.

[27] For more examples in the sphere of social security, see J. Vleugel, 'Afbakening van de godsdienstvrijheid in de context van sociale voorzieningen' (2019) 10/2 *Tijdschrift voor Religie, Recht en Beleid*, pp. 33-46.

[28] These fall outside the scope of this contribution.

rituals. Burial law, for instance, was amended and the law regulating ritual slaughtering of animals was altered to enable Islamic ritual slaughter. Ritual slaughter has become politically controversial. A parliamentary initiative to ban ritual slaughter *de facto* was rejected in the Upper House of Parliament in 2012.[29] A new Bill to this end was introduced in 2018.[30]

Male religious circumcision has also become controversial. The controversial nature of both ritual slaughter and male religious circumcision is not their religious nature, but rather the increased value attached to principles of animal welfare and human physical integrity and autonomous choice.

C. **Education**

The Dutch education system consists of public sector, religiously neutral education and private education, the latter being overwhelmingly education based on a religion or belief. Private education is funded by the state on the same footing as public sector education. The Constitution prescribes this for elementary education; for other forms of education this is based on ordinary law. Private education is subject to the same regulations and requirements as public sector education, albeit that the law makes allowance for dimensions of education and the organisation thereof that have a connection with the confessional ethos of the education. Thus, private schools may have their own enrolment policy with regard to pupils within the limits stipulated by the General Equal Treatment Act, although this needs consistent application. With respect to the hiring and firing of personnel, the same applies. Many confessional schools have an open admissions policy, that is, they welcome pupils from other faiths or no faiths at all. The confessional element is then on the supply side and not totally on the demand side, although the latter may also be the case.

Muslim pupils often attend Protestant or Catholic schools. In such situations, schools can oblige pupils to follow the religious lessons and take part in the whole curriculum. Unlike public sector schools, which follow the Constitution on education and equal treatment law, confessional schools may, for instance, ban the wearing of headscarves by pupils (and teachers).

Under this dual education system, Islamic schools have been established, both elementary and secondary, as well as institutes for higher education. It is undisputed that there is a right to do so. There is much debate about the desirability of such schools in terms of integration and quality of management and education. An element of discussion that has surfaced over the last two years concerns radical, anti-integrative speech

[29] Initiatiefvoorstel-Thieme over het invoeren van een verplichte voorafgaande bedwelming bij ritueel slachten, Kamerstukken II, 31 571.

[30] Initiatiefvoorstel-Ouwehand over invoeren algehele plicht tot bedwelming van dieren voor de slacht, Kamerstukken II, 34 908.

and opinions, bordering on criminal law. Thus, the law on higher education has been amended to enable the minister to withdraw subsidy from an educational facility in the event of 'discriminatory speech'; this amendment was introduced with problems concerning a specific educational establishment in mind (see below).[31]

There has always been discussion about the dual system of education. However, it is firmly entrenched in the Constitution and there has always been strong support for the system. In recent years, however, fundamental changes have been suggested in the system as such in the political realm, albeit so far by a minority. This does not detract from the fact that a far-reaching change has already been introduced: the notion of 'denominational orientation' as an organising principle in education law has been abolished. No longer do educational institutions need such an orientation – of which a limited number were recognised - to successfully establish themselves. So instead of widening the scope of acknowledged denominational orientations, the concept as such no longer plays a role. This will make it more difficult to establish schools according to a particular denomination, including a religious denomination. Other policy ideas that undermine the general principle of the dual system are the forced acceptance of all pupils by denominational educational institutions, even if they or their parents do not ascribe to the denomination; and the facilitation of changing or abolishing the denomination by parents whose pupils attend a particular denominational educational institution.

D. **Religious Education**

Home schooling is an option for parents on the grounds of *inter alia* religious beliefs, in the event that no school of their denomination is to be found within a reasonable travelling distance. Attempts to restrict this possibility so far have not succeeded. At present a bill is pending that will also bind home schooling on the grounds of religious beliefs to much stricter criteria. The background to these attempts is predominantly concern about the social development and integration of young children into a broader educational and social environment; this concern is especially strong where Muslim pupils are concerned.

Islamic weekend schools, voluntary schools falling outside (educational) law, have been a matter of political concern for some years.[32] The reasons for this are

[31] For the 'saga' of an Islamic institution for secondary education, the so-called *Haga-lyceum*, see M. Laemers, 'Het Cornelius Haga Lyceum in gevecht met de overheid' (2021) 12/2 *Tijdschrift voor Religie, Recht en Beleid*, pp. 7-19.

[32] See, for instance, parliamentary questions and answers: 'Antwoord op vragen van de leden Becker en Rudmer Heerema over het bericht «Turkije gaat weekendscholen financieren in Nederland»', *Tweede Kamer Der Staten-generaal*, 2018-2019 <https://www.tweedekamer.nl/kamerstukken/kamervragen/detail?id=2018Z14601&did=2019D00272> .

fear of what is taught at these schools, potential foreign influence of the education, combined with the lack of supervision. So far, no legislation is in force.

VI. Free Speech and Islam

A. Blasphemy and group discrimination

Controversies over Islam are to a large extent also played out in the area of free speech. This concerns both controversial speech by Muslims and controversial speech about Islam or Muslims. The former issue also ties in with broader concerns over integration and radicalisation and terrorism.

Until 2014 blasphemy was an offence in the Dutch Criminal Code. Although convictions had become unlikely for a number of decades, there was not much concern about the relevant provisions. This changed after the religiously inspired murder in broad daylight of a fierce satirical Islam critic. The then Minister of Justice suggested that blasphemy deserved attention and that, if anything, the law should perhaps be sharpened to some extent. This renewed interest in blasphemy was likely a factor that led to its abolishment. Group defamation on the grounds of religion and belief remains a criminal offence.[33]

A case that was accompanied by much media attention was the case concerning speech by PVV party leader Geert Wilders on a number of occasions; speech which was confrontational to Islam and Muslims. The Court of Appeal was addressed by third parties to obtain a judicial order for criminal prosecution on the grounds of group discrimination, after the Attorney General had decided not to initiate a prosecution. The Court issued such an order. The argumentation of this order practically stated that the Criminal Code was violated. The Court of First Instance where the case was subsequently tried did not find a violation of the Criminal Code.[34]

B. Administrative restriction of free speech

A not entirely uncontroversial legislative amendment was made to the Act on Higher Education and Academic Research. In this Act an article has been inserted that an establishment of Higher Education can lose its accreditation (and therefore also public funding) when its board is responsible for discriminatory speech. In the original Bill, as accepted by the Lower House of Parliament, this was entirely a decision

[33] See Criminal Code, Art 137c, 137d, and 137e. For an overview, see A. Nieuwenhuis, 'Vrijheid van godsdienst en de grens tussen radicale en strafbare uitlatingen' (2015) 6/3 *Tijdschrift voor Religie, Recht en Beleid*, pp. 6-25.

[34] See Court of Appeal (*Gerechtshof Amsterdam*) 21 Jan 2009, ECLI:NL:GHAMS:2009:BH0496 *(opdracht tot strafvervolging van Tweede-Kamerlid Geert Wilders*); and Court of First Instance (*Rechtbank Amsterdam*) 23 June 2011, ECLI:NL:RBAMS:2011:BQ9001 (*eindvonnis in (eerste) zaak-Wilders*).

for the minister, only to be retrospectively tested in court, therefore without a prior judicial review. As a result of the debate in the Upper House, the Bill was adjusted to establish an independent committee to advise the minister in concrete cases. The speech restriction was introduced with a view to a particular institution, the Islamic University Rotterdam, which after the enactment of this feature was also the subject of investigation.

C. Measures to curtail 'hate preachers' and measures to counter terrorism

The immigration law is used to forbid Islamic 'hate preachers' to enter the country and speak as invitees at religious conferences or mosques. Once in the country, mayors have used or tried to use their authority in the specific sphere of maintaining public order to ban the actual attendance of these preachers at these gatherings, to varying degrees of success.

The Temporary Act on Administrative Measures Countering Terrorism (*Tijdelijke wet bestuurlijke maatregelen terrorismebestrijding*) has been enacted to restrict freedom of movement in case of necessity 'with a view to the protection of national security' of a person who 'on the grounds of his behaviour can be connected to terrorist activities or the support thereof'. The purpose of the act is to be able to take measures against persons in the situations as described, even though they are not yet a suspect in terms of criminal law. A measure like this can also in effect curtail speech.

VII. Challenges posed by Islam in the traditional understanding of liberal democracy and Dutch church-state law

A. Developments

Developments in the law relating to religion can be characterised by a single word: restrictions.[35] The area that so far has been untouched by the legislator is that of the legal entity status of the church as such. In the direct spheres outside this entity status, a number of administrative obligations and restrictions, supervisory mechanisms and reporting arrangements have been set in place over the last few years, and further measures are to be expected. Although they are connected to wider developments related to open borders, and the desire to counter the negative effects thereof (international money laundering, terrorism, more anonymity), they are certainly also induced by concerns related to Islam. This is not only the case with respect to religious communities as legal entities: it is the case in practically all areas of law relating to religion, including educational law. Even where religion may not be di-

[35] See S. van Bijsterveld, 'Kerken in wetgeving en rechtspraak. Recente ontwikkelingen geduid', pp. 45-68.

rectly involved, cultural practices from Muslim countries have prompted legislation and administrative measures that until recently were not necessary, such as bans on child marriages, policies countering forced or arranged marriages or so-called 'honour crimes', or the effective ability to change religion. Integration policies aimed at reinforcing majority views on marriage, male-female relationships, gender and homosexuality can be seen in this respect as well. As a spill over effect, all these measures affect the law relating to all religions, including Christianity. Of course, unfamiliarity with Christianity in its various appearances has also diminished.

A few nuances must be noted. Debates on or initiatives aimed at restricting cultural religious practices such as ritual slaughter or religious male circumcision do not seem to be motivated by concerns over religion as such, but fit the times in which other values have gained importance, such as animal welfare and physical integrity or personal autonomy. Non-discrimination and equal treatment are values that have risen in social regard. This in part works for the benefit of individuals. The law relating to non-discrimination and equal treatment is quite strict in guaranteeing equal treatment of the individual on the basis of, among other things, religion. Thus, freedom of religion for the individual is guaranteed in part through equal treatment in a wide array of social situations.

B. **The public/private divide**

During the height of the social welfare state – the 1970s – it was conventional wisdom to regard religion as a private matter. The large state 'filled' the public domain. Thinking about 'private' and 'public' was characterised by a sharp dichotomy. Equating religion with the various forms of Christianity, with which society at the time was still largely familiar, made religion to a large extent 'invisible'. This sharp dichotomy was always defective, but with the financial retreat of the state in the social domain it became more evident; this evidence was further highlighted by the higher social visibility of Islam, which in turn also made the awareness resurface that other religions, including Christianity, were much more than merely 'private'. Nevertheless, the renewed visibility of religion causes disquiet for those who adhere to the idea that religion *should* be merely private. The concern for loss or diminishment of liberal cultural achievements contributes to heightened sensitivity to cultural manifestations of religion, especially of Islam. Experiences with religious radicalisation within Islam with a specific view of preventing and combating terrorism adds to all this.

C. **Changing perceptions of liberal democracy**

Separate from all this, but at least coinciding with it, are changing perceptions of liberal democracy and the status of rights. Various studies have pointed at this development, albeit with different wordings. The core of this development is that rights and liberties are increasingly seen no longer as a pre-given and that law and society

should tolerate minority views and behaviour as a result of that, but also that these rights and liberties are meant for those who are themselves tolerant in their views and behaviour.[36] This view reflects a wider cultural trend, which is not restricted to religious liberty, but which may at least in part be informed by concerns on religion.[37]

[36] See H.-M. Ten Napel, 'Geloof in de liberale democratie' (2017) 8/3 *Tijdschrift voor Religie, Recht en Beleid*, pp. 5-19; F. Mansvelt Beck, 'Franse toestanden? Veranderende visies op religieuze vrijheid in Nederland en Europa' (2016) 7/3 *Tijdschrift voor Religie, Recht en Beleid*, pp. 6-23.

[37] All websites last accessed on 18 Oct 2021.

ISLAM AND HUMAN RIGHTS IN POLAND

Piotr Stanisz[1]

I. Introduction: the social framework

In a relatively homogeneous Polish society Muslims are a small minority.[2] According to estimates, the number of adherents to Islam fluctuates between 25,000 and 30,000 people. Among them, different groups can be distinguished. Besides recent immigrants, a well-assimilated Tatar community should be mentioned in the first place. The Tatars, who have lived in Poland peacefully for several centuries,[3] have formal status as an ethnic minority (see Article 2 (4) of the Act of 6 January 2005 on National and Ethnic Minorities and on Regional Language), which entitles them to – among other things – a greater protection of their culture and traditions. However, during the 2011 National Census only slightly fewer than 2,000 people living in Poland declared that they belonged to the Tatar minority.[4] The majority of Muslims coming to Poland in recent decades consider the Islam practised by the Polish Tatars far removed from the traditional (even though the Polish Tatars declare themselves followers of Sunni Islam of the Hanafi school). Thus, the incoming Muslims do not usually become members of the Muslim Religious Community created by the Tatars.

According to the analysis prepared in 2019 for *Ośrodek Analiz Strategicznych* (Centre for Strategic Analysis – an independent, non-governmental institution), the Arab diaspora constitute the largest group of Muslims living in Poland (12,000-15,000

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[2] M. Rynkowski, 'State and Church in Poland' in: Gerhard Robbers (ed), *State and Church in the European Union* (Baden-Baden, Nomos, 2019), pp. 461-2; P. Stanisz, *Religion and Law in Poland* (Alphen aan den Rijn, Wolters Kluwer, 2020), pp. 15-7.

[3] A. S. Nalborczyk and P. Borecki, 'Relations between Islam and the state in Poland: the legal position of Polish Muslims' (2011) 22/3 *Islam and Christian-Muslim Relations*, pp. 344-9.

[4] Główny Urząd Statystyczny, *Ludność. Stan i struktura demograficzno-społeczna. Narodowy Spis Powszechny Ludności i Mieszkań 2011* (Warszawa, 2013), p. 262.

people). In addition, there are several thousand political and economic migrants from the Balkans, Turkey, Chechnya and Ukraine. There are also economic Pakistani immigrants and relatively small groups of migrants from the former Soviet republics of Central Asia. Polish Muslims also include students at Polish universities from all over the world who have stayed in Poland since their studies and started their (usually mixed) families here. As far as Polish converts to Islam are concerned, their total certainly does not exceed a few hundred people.[5]

There are several mosques in Poland, two of which – those in Bohotniki and Kruszyniany – are historic buildings. In addition, there are about 10 prayer houses or centres for Muslim culture, as well as several Muslim cemeteries, which are usually of historical value or even have the status of so-called historic monuments (although some of them are still in use). Muslim sections are also present in some municipal cemeteries.[6]

II. Institutional recognition by the state

There are several Muslim religious organisations in Poland that have a regulated legal status. Relations between the state and the Muslim Religious Community are defined by the Act of 21 April 1936 (despite the fact that it is clearly anachronistic and conflicts with some provisions of the Constitution, it is formally still in force).[7] Under this Act, it is not only the religious organisation as a whole that has a legal personality, but also its seven individual communities. It is worth emphasising that the representatives of the Muslim Religious Community are aware of the need for a new legal regulation of their relations with the state and in 2008 they applied for an agreement under Article 25 (5) of the Constitution of the Republic of Poland and to have a new law adopted.[8] Although the work was undertaken, no agreement has been signed. The reasons for this state of affairs can be found not so much in the state's

[5] D. Boćkowski, 'Mniejszość muzułmańska w Polsce. Jak zmniejszyć ryzyko radykalizacji oraz kontrolować wpływy salafickie', *Ośrodek Analiz Strategicznych,* 6 Sept 2019 <https://oaspl.org/2019/09/06/mniejszosc-muzulmanska-w-polsce-jak-zmniejszyc-ryzyko-radykalizacji-oraz-kontrolowac-wplywy-salafickie/> .

[6] The data come from the official website of the Muslim Religious Community: <http://mzr.pl>.

[7] As indicated by A. S. Nalborczyk and P. Borecki, the regulations which are contrary to the 1997 Constitution (and are in reality not observed) include provisions for compulsory membership in the Muslim Religious Community for all Polish followers of Islam, governmental ratification of the internal statutes of this community, a system of state administrative supervision over Muslim clergy and internal bodies of the community, state funding for the community and appointing Vilnius as the headquarters of this community ('Relations between Islam and the state in Poland', p. 351).

[8] E. Ignaciuk, 'Realizacja Art. 25 ust. 5 Konstytucji RP w praktyce Departamentu Wyznań Religijnych oraz Mniejszości Narodowych i Etnicznych Ministerstwa Spraw Wewnętrznych i Administracji' in: Piotr Stanisz and Marta Ordon (eds), *Układowe formy regulacji stosunków między państwem a związkami wyznaniowymi (Art. 25 ust. 4-5 Konstytucji RP)* (Lublin, Wydawnictwo KUL, 2013), pp. 225-6.

attitude to Islam as in a lack of determination on the part of the state authorities in implementing the relevant constitutional provision in the face of continuing doubts about a proper procedure to deal with such cases.[9]

Several other Muslim organisations are listed in the ministerial register of churches and other religious organisations, which among other things involves having a legal personality. They are as follows: *Stowarzyszenie Jedności Muzułmańskiej* (the Association of Muslim Unity: Shiites), *Islamskie Zgromadzenie Ahl-Ul-Bayt* (Ahl-Ul-Bayt Muslim Assembly: Shiites), and *Liga Muzułmańska* (the Muslim League: Sunnis). A *sui generis* section of Islam also included in the register is *Stowarzyszenie Muzułmańskie Ahmadiyya* (Ahmadiyya Muslim Association).[10] Some authors also classify *Zachodni Zakon Sufi w Polsce* (the Western Sufi Order in Poland)[11] as a Muslim religious organisation, but this does not seem justifiable given the syncretism of its doctrine. There are some other Muslim organisations in Poland, but they are not religious organisations and operate in the legal form of associations (e.g., *Stowarzyszenie Studentów Muzułmańskich* – the Association of Muslim Students or *Muzułamańskie Stowarzyszenie Kształtowania Kulturalnego* – the Muslim Association of Cultural Development).

One of the main principles of Polish law on religion is the principle of equal rights of churches and other religious organisations (see Article 25 (1) of the Constitution). It also obviously pertains to all of the above-mentioned Muslim religious organisations. In consequence, they cannot be treated by public authorities in a less favourable manner than other religious organisation (this principle, however, does not entail an obligation to treat all religious organisations in exactly the same way: according to the Polish Constitutional Tribunal, not every instance of diversification constitutes an infringement of the principle; in the case of religious organisations 'which do not have a common feature relevant from the point of view of a certain regulation', different treatment is justified – see the judgment of 2 April 2003, K 13/02).[12] Moreover, Islam cannot be treated by public authorities in a less favourable way than other religions, as this would be at odds with the constitutional principle of impartiality "in matters of personal conviction, whether religious of philosophical, or in relation to outlooks on life" (Article 25 (2) of the Constitution).

[9] To date no act has been adopted which would holistically regulate the relations between the state and any of religious organizations pursuant to Art 25 (5) of the Constitution (the acts which today regulate the legal status of fourteen non-Catholic religious organizations were enacted before the adoption of the current Constitution). *See* Stanisz, *Religion and Law*, pp. 27-9.

[10] *See* 'Rejestr kościołów i innych związków wyznaniowych', *Serwis Rzeczypospolitej Polskiej,* <https://www.gov.pl/web/mswia/rejestr-kosciolow-i-innych-zwiazkow-wyznaniowych>.

[11] Nalborczyk and Borecki, 'Relations between Islam and the state in Poland', p. 350.

[12] *Orzecznictwo Trybunału Konstytucyjnego* (2003) Series A, no. 4, item 28.

In accordance with the principles indicated above, insurance contributions of Muslim clergy are subsidised from the Church Fund under the same terms as in the case of other clergy (including Catholic clergy). Muslim religious organisations are also for example entitled to exemptions from corporate income tax and real estate tax, applicable to all religious organisations. Some additional opportunities for the Muslim Religious Community follow from the fact that it represents the Polish Tatars – a recognized ethic minority. According to Article 18 of the National and Ethnic Minorities Act of 2005, it can benefit from subsidies by the competent minister (currently the Minister of the Interior and Administration) for the purposes of protection, preservation and development of their identity.[13] However, the activity of all religious organisations (including Muslim ones) is primarily based on the rule of self-funding (which fully applies to religious activity).[14]

It needs to be noted that some statutory provisions do not fully comply with the principle of equal rights of religious organisations. This claim is also true for some provisions applicable to, *inter alia*, Muslim religious organisations. A case in point will be the provisions concerning the religious form of concluding a civil marriage, which apply only to eleven religious organisations and do not cover Muslim religious communities.[15]

All religious organisations in Poland (and thus also Muslim ones) benefit from the constitutional guarantees of autonomy and independence in matters within their own sphere (Article 25 (3) of the Constitution). For this reason, in one of its judgments the Supreme Court rightly stated that state courts are not entitled to challenge the validity of the decision of the Extraordinary Muslim Congress on the appointment to the position of Mufti of the Muslim Religious Community. The court held that it is an internal matter of this organisation, and thus the judicial route is inadmissible.[16] However, it

[13] In 2015, for example, the Muslim Religious Community received in this way slightly over 70,000 zloty (about 15,000 euro) for purposes associated mainly with its publishing activity. R. Kaczmarczyk, 'Status prawny i faktyczny muzułmańskich związków wyznaniowych w Polsce' (2016) 19 *Studia z Prawa Wyznaniowego*, p. 271.

[14] M. Rynkowski, 'Churches and religious communities in Poland with particular focus on the situation of Muslim communities' (2015) 17/1 *Insight Turkey*, pp. 149-59; Stanisz, *Religion and Law*, pp. 125-33.

[15] *See* P. Stanisz, 'The status of religious organizations in Poland: Equal rights and differentiation' in: W. Cole Durham Jr and Donlu D. Thayer (eds), *Religion, Pluralism, and Reconciling Difference* (1st edn, Abingdon – New York, Routledge, 2019), p. 157.

[16] In this case, the complainant demanded that the appointment of Mufti was considered invalid on grounds of the alleged incompatibility of this act with the internal law of the Muslim Religious Community (*see* the Ruling of the Supreme Court of 12 May 2016, IV CSK 529/15, *LEX* 2080076). The ruling met with the approval of commentators; *see, e.g.,* W. Brzozowski, 'Niedopuszczalność sądowej kontroli prawidłowości stosowania przez związek wyznaniowy własnego prawa. Glosa do postanowienia Sądu Najwyższego z 12.05.2016 r., IV CSK 529/15' (2017) 5 *Przegląd Sądowy*, pp. 117-23; J. Misztal-

is clear that the limit to the autonomy and independence of religious organisations in matters within their own sphere are laws protecting such values as public safety, public order, health, morality or rights and freedoms of others (compliance of internal statutes with these laws is, among other things, a condition for entering a religious organisation in the ministerial register, and a gross violation of law or of the internal statutes provisions is a circumstance that justifies removal from the register).[17]

No institutionalised body exists in Poland whose objective would be to maintain systematic dialogue between the government and the representatives of Muslim communities (although there are several bodies of this kind that provide for dialogue between the government and individual churches or their organisations).[18] Given the challenges potentially facing the development of relations between the Polish state and Muslim religious organisations, this can hardly be seen as a positive fact. It is right to assert that setting up such an institution (modelled along the lines of the existing state-church commissions) would be a "sign of political common sense". At the same time, one could also expect some kind of integration on the part of Muslim communities, if only consisting in establishing a so-called interchurch organization[19] that could represent them jointly before public authorities.[20] It needs to be noted, however, that the special status of the Tatars as an ethnic minority creates some possibility for participation in the dialogue conducted within the Joint Commission of the Government and National and Ethnic Minorities (under Article 24 of the National and Ethnic Minorities Act of 2005, they have the right to delegate their representative to it). Occasionally, an opportunity for dialogue between the representatives of Muslim communities and public authorities is created *ad hoc*. For example, Muslim representatives used to be invited to the sessions of the *Sejm* Commission for National and Ethnic Minorities, when in 2017-2018 it addressed the issue of increasing social anxiety around Islam and anti-Muslim attitudes.

Konecka, 'Postanowienie Sądu Najwyższego – Izba Cywilna z dnia 12 maja 2016 r. (IV CSK 529/15)' (2017) 6 *Orzecznictwo Sądów Polskich*, pp. 59-74.

[17] P. Borecki, 'Autonomia kościołów i innych związków wyznaniowych we współczesnym prawie polskim' (2012) 15 *Studia z Prawa Wyznaniowego*, p. 88.

[18] See P. Stanisz, 'La Commissione congiunta dei rappresentanti del Governo della Repubblica di Polonia e della Conferenza Episcopale Polacca come un modello del "dialogo strutturato"' (2017) 57/1 *Ephemerides Iuris Canonici*, pp. 161-85.

[19] Interchurch organizations can be created under Art. 38 of the Act of 17 May 1989 on the Guarantees of Freedom of Conscience and Belief. They are entered in section B of the register of churches and other religious organizations (at present, there are 5 such organizations in Poland).

[20] P. Borecki, 'Położenie prawne wyznawców islamu w Polsce' (2008) 1 *Państwo i Prawo*, p. 83.

III. Application of Shari'a

Provisions of Polish law only exceptionally make direct reference to the institutions of Islamic law or specific Muslim religious practices. Exceptions are Articles 43-46 of the Act of 21 April 1936 on the Relations between the State and the Muslim Religious Community in the Republic of Poland, which are devoted to *waqf*. According to these articles, the status of *waqf* can be granted to real estates donated or bequeathed for religious, educational or charitable purposes of the Muslim Religious Community and accepted by this community. Whether this status is granted is decided by a resolution by the appropriate authorities and bodies of the Muslim Religious Community, approved by competent public authorities. The consequence of granting *waqf* status to a real estate is the special protection of the right to this estate, which in particular cannot be distrained, acquired by prescription or mortgaged. For this reason, these regulations are rightly considered exceptional under Polish law. At the same time, they are criticised for pertaining only to the Muslim Religious Community and are not applicable to other Muslim religious organisations.[21]

No references to Shari'a principles can be found in provisions of Polish family law or inheritance law. As a result, under Polish law it is inadmissible to apply Shari'a rules of inheritance or implement the *kafala* within Polish jurisprudence. However, it cannot be claimed that the *kafala* is completely irrelevant to Polish law, as it is "recognised" by international agreements ratified by Poland (*see* Article 3 of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children and Article 20 of the Convention of 20 November 1989 on the Rights of the Child). However, any questions regarding the scope of recognition of the effects of *kafala* established in another state, for sociological reasons, still remain merely theoretical under Polish law.[22]

[21] Nalborczyk and Borecki, 'Relations between Islam and the state in Poland', pp. 352-3; M. Zaporowska and Z. Zaporowska, 'Wakuf cmentarny. Zarys problematyki prawnej' in: Jacek Gałaczyński, Jacek Mazurkiewicz, Jarosław Turłukowski and Daniel Karkut (eds), *Non omnis moriar. Osobiste i majątkowe aspekty prawne śmierci człowieka. Zagadnienia wybrane* (Wrocław, Wydział Prawa, Administracji i Ekonomii. Oficyna Prawnicza, 2015), pp. 900-18; M. Tomkiewicz, 'Ograniczenia alienacji nieruchomości Kościoła katolickiego i muzułmańskich wspólnot religijnych – zakres recepcji w prawie polskim' in: Edward Wiszowaty (ed), *In persona Christi: w służbie pasterskiej obecności Chrystusa. Księga Jubileuszowa dedykowana Księdzu Profesorowi Antoniemu Misiaszkowi w 75. rocznicę urodzin* (Olsztyn, Wydział Teologii Uniwersytetu Warmińsko-Mazurskiego, 2013), pp. 439-55.

[22] M. Tomkiewicz, 'Islamska kafala a prawo polskie' in: Jerzy Nikołajew, Paweł Sobczyk and Konrad Walczuk (eds), *Wolność sumienia i religii a bezpieczeństwo i porządek publiczny* (Warszawa, Unitas, 2017), pp. 149-64.

IV. Discrimination of Muslims

There are no available data on the potential discrimination of Muslims in Poland, and Polish law offers effective protection against religious discrimination (which in particular constitutes a crime under Article 195 of the Penal Code, while the Labour Law includes extensive provisions prohibiting religious discrimination in employment).[23] There are especially no known judgments on the discrimination of Muslims in Poland.

V. Exercise of religious freedom and cultural rights

As was stated in the conclusion of the thorough study on the legal position of Polish Muslims by Agata S. Nalborczyk and Paweł Borecki in 2011, 'specialists in Islamic Studies and denominational law as well as Muslims themselves agree that Polish law gives considerable freedom to Muslims to profess and practise their religion'.[24] Although the claim remains valid, this obviously does not mean that there are no difficulties in practising this minority religion in Poland. The most serious crisis in this regard was a temporary ban on ritual slaughter which lasted from November 2012 till December 2014. The chief Mufti of the Republic of Poland called it a disgraceful episode in the 600-year tradition of Islam in Poland, which – as he stated – never before 'had seen a situation when the freedom of religious practices of Muslims was restricted'.[25]

The legal inadmissibility of practising ritual slaughter was a consequence of the judgment of the Constitutional Tribunal of 27 November 2012 (U 4/12),[26] which had been brought about by earlier amendments to the relevant law. Under the first modern law on animal protection in Poland (that is, the Act of 21 August 1997) ritual slaughter

[23] M. Rynkowski, 'Poland' in: Mark Hill QC (ed), *Religion and Discrimination Law in the European Union – La discrimination en matière religieuse dans l'Union Européenne* (Trier, Institute for European Constitutional Law, University of Trier, 2012), pp. 266-70.

[24] Nalborczyk and Borecki, 'Relations between Islam and the state in Poland', p. 354.

[25] Quoted after: J. Cukras-Stelągowska, 'Wokół debaty nad ubojem rytualnym w Polsce – analiza dyskursów politycznych' (2015) 4 *Społeczeństwo i Polityka*, p. 150. However, attempts to introduce a ban on ritual slaughter were made already in the inter-war period (in the context of the mass production of meat coming from ritual slaughter practiced by Polish Jews). See T. J. Zieliński, 'Ustawodawstwo II Rzeczypospolitej wymierzone w wyznawców judaizmu' (2012) 4 *Przegląd Prawa Wyznaniowego*, pp. 29-49; A. Dziadzio, 'Zakaz uboju rytualnego jako naruszenie konstytucyjnej zasady wolności religijnej. Kontekst współczesny i historyczny' (2014) 1 *Forum Prawnicze*, p. 8. The Act of 17 April 1936 on the Slaughter of Farm Animals in Slaughterhouses was an effect of such attempts. The production of meat from ritual slaughter was restricted in such a way as to satisfy the religious needs of Jews (as well as Muslims and Karaites) and to serve export purposes. *See* M. Różański, and P. Szymaniec, 'Debaty wokół zakazu uboju rytualnego w II Rzeczypospolitej Polskiej' (2020) 1 *Przegląd Sejmowy*, pp. 121-41.

[26] In *Orzecznictwo Trybunału Konstytucyjnego* (2012) Series A, no. 10, item 124.

was admissible. Even though this Act introduced a general duty of prior stunning of vertebrate animals before they were killed in the slaughterhouse, under Article 34 (5) this obligation was not applicable 'in cases when animals were slaughtered in special ways prescribed by religious rites'. The regulation was abrogated pursuant to the Act of 6 June 2002 on Amending the Act on Animal Protection. It is worth noting, however, that the government's draft amendment law (whose declared objective was to adjust the Polish regulations to the EU law) did not include a ban on ritual slaughter, and the relevant change was only introduced at the parliamentary stage at the request of some non-governmental organisations. The introduction of this change was not the subject of any extensive parliamentary debate (which at the time rather concerned such issues as transportation of animals, animal experimentation and elimination of stray animals that pose a threat to human health or economy). Soon afterwards, and once more without wider debate, this kind of slaughter was again permitted by the Regulation of the Minister of Agriculture and Rural Development of 9 September 2004 on the Qualifications of Persons Entitled to Professional Slaughter and Conditions and Methods of Slaughter and Killing of Animals. According to its § 8 (2), ritual slaughter once again became an exception to the generally applicable requirement to stun animals before killing.[27] Over the next eight years, § 8 (2) of the Regulation cited above determined the form of the solutions applied in practice. A new situation – as mentioned above – was created by the judgment of the Constitutional Tribunal of 27 November 2012, which was passed at the request of the Attorney General (who had been in turn asked to intervene by several non-governmental organisations). The judgment invalidated the provision of the ministerial Regulation. Indeed, it was issued on the basis of the Act of 21 August 1997 on Animal Protection, which, however, did not authorise the minister to establish such an exception. Although the Tribunal referred to the incongruences in the law-making process rather than to the practice of ritual slaughter itself, its judgment led to the situation in which non-stun slaughter became non-permissible as of 1 January 2013.[28]

In May 2013, the government (formed by *Platforma Obywatelska* – Civic Platform and *Polskie Stronnictwo Ludowe* – the Polish Peasant Party) submitted a draft

[27] Besides that, Art 9 (2) of the Act of 20 Feb 1997 on the Relations Between the State and Jewish Religious Communities in the Republic of Poland recognized and still recognizes the right of Jewish Communities to be concerned with 'the supply of kosher food, canteens, ritual baths and ritual slaughter'. It was (and it is) not clear, however, whether this provision is an independent basis for recognizing the right of Jewish Communities to practice ritual slaughter in Poland.

[28] For a critical discussion of the judgment *see* J. Silver, 'Zgodnie z obyczajami religijnymi (According to Religious Rights): A Dissenting Opinion on the Polish Slaughter Case' (2014) 2 *Oxford Journal of Law and Religion*, pp. 347–53. For the Author, '[t]he effective banning of ritual slaughter by the Polish Constitutional Court represent[ed] perhaps the greatest challenge to freedom of religion in Poland after the fall of communis' (p. 347).

law to the Sejm restoring the admissibility of ritual slaughter. When justifying the proposal, they emphasised the necessity to respect the religious needs of members of specific religious organisations and to protect the interests of Polish meat producers (the draft was formally supported by the Union of Jewish Religious Communities, the Muslim Religious Community and manufacturers of meat and meat products). As for the parliamentary opponents to the permissibility of ritual slaughter,[29] they referred to the obligation to treat animals humanely and to protect them from excessive suffering (the draft law was objected to by numerous animal protection organisations). On 12 July 2013, the Sejm rejected the government-tabled draft law, thus arguing in favour of the ban on ritual slaughter.[30] This decision quickly came under severe and heated criticism from representatives of Jewish communities (both in Poland and abroad). Obviously, the reaction from representatives of Polish Muslims was also highly critical. At the approaching Muslim Feast of the Sacrifice (*Eid al-Adha*), the chief Mufti of the Republic of Poland announced that, irrespective of the legal provisions in force at the time, he would offer up a sacrifice on that day (which indeed happened, causing an outcry from the animal rights advocates present at the venue, disturbance during the ceremony and mutual accusations of breaking the law). It ought to be noted that in a special statement of 25 September 2013 the Presidium of the Polish Bishops' Conference, contrary to the prevailing attitudes of Polish society (according to a study conducted at the time, 65 % of Poles were against the admissibility of ritual slaughter), was highly critical of the Sejm decision made two months earlier and stated that it shared the concern of Jewish religious communities and followers of Islam over upholding and fulfilling basic religious rights, including the right to ritual slaughter of animals.[31]

The existing legal situation was reversed by another judgment of the Constitutional Tribunal of 10 December 2014 (K 52/13).[32] The Tribunal agreed with the application of the Union of Jewish Religious Communities in the Republic of Poland, which acted under Article 191 (1) (5) of the Constitution, and found that the provisions of the Animal Protection Act, to the extent to which they prohibited animal slaughter in slaughterhouses in a particular form prescribed by religious practices

[29] Against the proposal was, in particular the overhelming majority of MPs from *Prawo i Sprawiedliwość* – Law and Justice and the majority of MPs from *Sojusz Lewicy Demokratycznej* – Democratic Left Alliance. The same position was taken by several dozen MPs from the ruling Civic Platform party.

[30] On the course of the legislative procedure, *see* 'Druk nr 1370, Rządowy projekt ustawy o zmianie ustawy o ochronie zwierząt', *Sejm Rzeczypospolitej Polskiej* <https://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=1370>.

[31] The public debate on ritual slaughter at the time is discussed by Cukras-Stelągowska, 'Wokół debaty nad ubojem rytualnym', pp. 143-55.

[32] In *Orzecznictwo Trybunału Konstytucyjnego* (2014) Series A, no. 11, item 118.

of religious organisations (especially non-stun slaughter), were not in line with the Constitutional guarantees of the freedom to manifest one's religion. As a consequence of this judgment, the slaughter of animals in slaughterhouses following procedures prescribed by religious rites has been permitted without restriction in Poland under the directly applicable Article 4 (4) of Council Regulation (EC) No. 1099/2009 of 24 September 2009 on the Protection of Animals at the Time of Killing. Critics of the judgment rightly claim, however, that the Tribunal overstepped the boundaries set by the application submitted by the Union of Jewish Religious Communities, and made a ruling not only with regard to religious needs of inhabitants of Poland, but also for the purposes of export.[33]

In September 2020, a group of MPs from the *Prawo i Sprawiedliwość* political party (together with its leader, Jarosław Kaczyński) prepared another draft law concerning animal protection. Its aim was, among other things, to restrict ritual slaughter in such a way as to safeguard the religious needs of members of religious organisations on the territory of the Republic of Poland, but excluding the possibility of practising this kind of slaughter for export purposes (which is a question of great practical significance as Poland is one of the more important exporters of meat from ritual slaughter).[34] To date (as of 10 August 2021), the legislative procedure has not been completed, although it is at a very advanced stage.[35]

Polish law does not contain provisions that would restrict the possibility of realising other Muslim practices. In particular, there are no laws restricting the wearing of Islamic veils (although it needs to be noted that women belonging to the Tatar minority do not follow this practice). Building Muslim places of worship is undoubtedly covered by the constitutional guarantees of the right to possess 'sanctuaries and other places of worship for the satisfaction of the needs of believers' and is subject to the liberal rules pertaining to all religious communities. Followers of Islam – on the same terms as all other religious minorities – can also be exempted from work or school in order to celebrate religious festivals on days that are not public holidays (see Article 42 of the Act of 17 May 1989 on the Guarantees of Freedom of Conscience and Belief).[36] Islam practised by Muslim religious communities with recognised

[33] *See*, e.g., M. Pisz and P. Ochman, 'Prawne aspekty uboju rytualnego w Polsce (uwagi do wyroku TK w sprawie K 52/13)' (2018) 1 *Państwo i Prawo*, pp. 108-17; E. Łętowska, M. Grochowski and A. Wiewiórowska-Domagalska, 'Wiąże, ale nie przekonuje (wyrok Trybunału Konstytucyjnego w sprawie K 52/13 o uboju rytualnym)' (2015) 6 *Państwo i Prawo*, pp. 53-66.

[34] On the economic aspects of the issue *see* K. Dyda, 'Economic arguments and legal regulations on ritual slaughter in Poland' (2020) 95/375 *Estudios Eclesiásticos*, pp. 955-71.

[35] *See* 'Druk nr 597 Poselski projekt ustawy o zmianie ustawy o ochronie zwierząt oraz niektórych innych ustaw', *Sejm Rzeczypospolitej Polskiej* <https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=597>.

[36] As maintained by A. S. Nalborczyk, Muslims living in Poland often do not wish to make use of this right. *See* A. S. Nalborczyk, 'Status prawny muzułmanów w Polsce i jego wpływ na organizację

legal status can also be taught at schools in general terms[37] and this opportunity is indeed sometimes taken up (in a special report on the availability of classes in minority religions and ethics during school education commissioned by the Ombudsman and prepared in 2014, no discrimination practices pertaining directly to Islam were revealed, although it was generally pointed out that some of the procedures applied made the organisation of classes in minority religions within the system of education rather difficult).[38]

VI. Free speech and Islam

An increase in intolerant and even anti-Islamic attitudes could be seen in Poland at the time of the recent European refugee crisis. Admittedly, Poland was not affected by this crisis, but particular issues such as the question of Polish participation in the EU relocation programmes were widely discussed in Polish public debate (and especially in political disputes) after 2015. Arguments concerning public safety played an important role in justifying the government's stance against accepting immigrants within the EU relocation programmes (illegal migration from North Africa and the Middle East was described as a factor enhancing the operational capabilities of Muslim terrorist organizations).[39] Similar voices were heard in the media at the time. Refugees coming to Europe were often pictured in media coverage as Muslims and presented in such a way as to evoke associations with terrorism and terrorist attacks. This in turn exposed Polish Muslims to suspicion and stigmatisation (although the debates in question almost never concerned Muslims living in Poland).[40] According to the data for 2016, Muslims (or persons whom perpetrators associated with this religion) became the most frequent victims of so-called hate crimes (*see* Article 256 § 1, Article 257 and Article 119 of the Penal Code), while in an identical summary published one year earlier they had occupied the third position. The number of such

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ich życia religijnego' in: Anna Parzymies (ed), *Muzułmanie w Europie* (Warszawa, Wydawnictwo Akademickie DIALOG, 2003), p. 235. For the rules of granting the exemptions at issue *see* P. Stanisz, 'Das Feiertagsrecht in der Polnischen Republic' (2019) 2 *Österreichisches Archiv für Recht und Religion*, pp. 319-21.

[37] See A. M. Abramowicz, 'Teaching of religion in the system of public education and equality of religious organizations' (2015) 3 *Roczniki Nauk Prawnych*, pp. 7-32.

[38] Rzecznik Praw Obywatelskich, *Dostępność lekcji religii wyznań mniejszościowych i lekcji religii w ramach systemu edukacji szkolnej. Analiza i zalecenia* (Warszawa, Biuro Rzecznika Praw Obywatelskich, 2015).

[39] P. Stanisz, 'Securitisation of religious freedom in Poland' in: Merilin Kiviorg (ed), *Securitisation of Religious Freedom: Religion and Limits of State Control – Sécurisation de la liberté religieuse: La religion et les limites du contrôle de l'Etat* (Granada, Comares, 2020), pp. 327-28.

[40] Ł. Bertram, A. Puchejda and K. Wigura, *Negatywny obraz muzułmanów w polskiej prasie – analiza wybranych przykładów z lat 2015-2016* (Warszawa, Obserwatorium Debaty Publicznej Kultury Liberalnej, 2017).

cases investigated by prosecutors amounted to 363 in 2016, almost double the number of cases reported in 2015 (it was slightly smaller in 2017 – 328 cases; however, it needs to be borne in mind when interpreting the numbers that such cases are often substantially underreported).[41] Being aware of this state of affairs, the representatives of Muslim communities in Poland made an appeal to the Speaker of the Sejm requesting initiatives be undertaken in order to counteract the situation (which resulted in analyses of these issues conducted by the Sejm Commission for National and Ethnic Minorities, as discussed below). On the basis of the available information, it can be concluded that these cases primarily concerned offensive comments made via the Internet or in personal communications. However, physical assaults also happened, and in 2017 the Centre for Muslim Culture in Warsaw was pelted with stones. Both courts and the police investigated these incidents in accordance with current practices, which in many cases led to indictments and commensurate sentences.[42]

VII. Challenges posed by Islam in the traditional understanding and application of democracy and rights

As argued by the author of the report on the Muslim minority cited above, not only are there 'no places with a high concentration of radicalised Muslims so far' and no 'radical message' being spread by imams, but the risk of radicalisation of Muslim communities in Poland is also rather small.[43] At present, there is no reason to suspect that Polish Muslims expect anything other than safety, freedom and a level playing field. These aspirations are fully understandable and should be realised. Such conclusions were also arrived at during the work of the Commission for National and Ethnic Minorities, which in 2017-2018 dealt with the growing anti-Muslim sentiment. Unfortunately, the originally drafted desideratum that was supposed to be handed over to the government by the Commission was ultimately not adopted (as it was feared that it might in fact be counterproductive). The discussion, however, consistently focused on the necessity to create an atmosphere of equal opportunities, where Polish Muslims would not feel like second-class citizens. It also emphasised the need to include in school curricula classes that would aim to familiarise students with

[41] Biuro Rzecznika Praw Obywatelskich and Zespół do spraw Równego Traktowania, 'Synteza Informacji Rzecznika Praw Obywatelskich nt. skarg i wniosków oraz interwencji podejmowanych w latach 2015-2017 w sprawach zachowań antymuzułmańskich i islamofobicznych – uzupełniona o informacje nt. aktywności RPO w 2018 r. i najnowsze dane statystyczne, dot. skali przestępczości motywowanej nienawiścią' <https://www.rpo.gov.pl/sites/default/files/Informacja%20RPO%20dotycz%C4%85ca%20spraw%20islamofobicznych%20i%20antymuzu%C5%82ma%C5%84skich.pdf>.

[42] 'Pełny zapis przebiegu posiedzenia Komisji Mniejszości Narodowych i Etnicznych (Nr 73) z dnia 2 lipca 2018 r.', <https://www.sejm.gov.pl/sejm8.nsf/biuletyny.xsp?view=2&komisja=MNE>.

[43] Boćkowski, 'Mniejszość muzułmańska w Polsce. Jak zmniejszyć ryzyko radykalizacji oraz kontrolować wpływy salafickie'.

Islam and Muslim customs and traditions. Moreover, it was also deemed necessary to strengthen the dialogue between public institutions and representatives of Muslim communities. From a broader perspective, it was argued that it was essential to adopt a more comprehensive policy for combatting hate crime, and especially to steadily improve effective fighting of this kind of crime on the Internet.[44] All these postulates are fully justified and can be seen as challenges for Polish public authorities.

VIII. Conclusions: Preferences concerning the state model of co-existence between the secular state and Islam

The Polish model of relations between the state and religious organisations has not yet been challenged by the presence of the Muslim community. This is due to the relatively low number of Muslims living in Poland, their dispersion as well as high degrees of assimilation. Therefore, any conclusions to be drawn on the state model of co-existence between the secular state and Islam on the basis of Polish experiences only concern the situation where followers of Islam remain a clear minority. Bearing these assumptions in mind, it is clear that creating conditions that encourage positive co-existence requires ensuring due safety, equal opportunities and religious freedom to all. Moreover, the positive co-existence between the secular state and Islam will undoubtedly benefit from regular and consistent dialogue between public authorities and representatives of Muslim communities, as well as the implementation of educational programmes that will facilitate understanding of Muslim customs and practices in Polish society (including young people). However, it also seems clear that all these postulates may prove insufficient in the event of a possible mass influx of Muslim migrants to Poland, which has long been the case in a number of states of the Old Continent.[45]

[44] 'Pełny zapis przebiegu posiedzenia Komisji Mniejszości Narodowych i Etnicznych (Nr 73) z dnia 2 lipca 2018 r.'.

[45] All websites last accessed on 10 Aug 2021.

ISLAM AND HUMAN RIGHTS IN PORTUGAL

Jónatas E.M. Machado[1]

I. Introduction

This article sets out to approach, in a necessarily brief and non-exhaustive way, the political, legal and social reality of the Islamic presence in Portugal. Some historical background will be presented so as to provide context. . Next, we will address the fundamental features of the constitutional and legal order of religious freedom and of the relationship between religious denominations and the State in order to understand the inclusion of Islamic communities in Portugal and the efforts made by the legislator towards achieving an integration of the Islamic community into a constitution setting out from perspectives strongly influenced by Judeo-Christian values. While it can be said that the legislator has made some progress and achieved noteworthy results, there is widespread awareness, on the part of experts in this area, that much remains to be done.

II. The Historical and Social Framework

The relationship between Portugal and Islam can hardly be conceived outside of history and in the way it conditions, either consciously or unconsciously, the mentality of the general population. Given the fact that the history of Portugal, since its independence in 1143, is largely identified with the Christian Reconquest, the Crusades, the voyages of maritime exploration and the Christianisation of the peoples found in the new conquered territories, suffice to say that the relationship with Islam would not develop on neutral ground or on a 'level playing field'.[2] It is fruitless to

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[2] D. Ferreira and P. Dias, *O que todos precisamos de saber de História de Portugal* (Lisbon, Verso de Kapa, 1916), pp. 19 ff.; I. Mhomed, 'O Islão Político em Portugal', pp. 13 ff. <https://run.unl.pt/bitstream/10362/36139/1/Imran.pdf>.

deny the existence of a certain "us" and "them" mentality, since it exists and shows few signs of receding. This mentality, pinpointed in multiple sociological studies, should not be surprising. Over many centuries Islam was seen as an alien element, and even until recently it has been mainly associated with immigrants from the former colonies of Guinea-Bissau and Mozambique or from North Africa or Asia. However, the centuries-old establishment of Islamic culture in the Iberian peninsula is clearly evident, having made an indelible mark on Portuguese history, language and culture and can be used not only to build bridges between the present and the past, but also between different religious communities today.

In any case, to be stuck in the past would be wrong. It is important to understand that history is a dynamic and subject to change. History is not just about the past. It is also about the present and the future, since the past has once been present and future. This point is especially important when one considers European history. For instance, in Europe the relationship between Catholics, Orthodox and Protestants was also not exempt from painful misunderstandings. The Great Schism of 1054 and the Protestant Reformation in 1517, caused painful religious, political and social conflicts , which took many centuries to heal and which today can still cause hurt when carelessly handled. Nor should we forget the long-lasting consequences of the earlier rupture between Christianity and Judaism. Here, too, many steps have been taken to make amends for the injury caused. But even here today it is important to address the related problems with great sensitivity and prudence, within the framework of a fundamental commitment to human rights. Fortunately, many of these problems are overcome through constitutional mechanisms based on equal religious freedom, which is the principle affirmed by the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.

There was a period when Portuguese identity was defined by the Catholic faith, to the exclusion of all others, such as the Protestant, Jewish, Islamic, Hindu or Buddhist faith. In fact this was true for most of the history of Portugal. And yet, the relationship that exists today between Catholics and Protestants bears little relation with what existed 100, 200 or 300 years ago. The same also applies to the integration of Muslims into the Portuguese political, economic, social and cultural reality. The same can be said of the political, legal and social status that the Jewish community in Portugal enjoys today. The political, constitutional, legal, social and cultural transformations that have occurred in the last decades, though not erasing all prejudices and stereotypes, have contributed to significantly improving the potential for integration of all religious communities, including Muslim communities, making it increasingly legitimate and plausible to talk of developing a "we" mentality. In fact, if there is any division that tends to be accentuated today, it is between the section of the population that declares itself to be openly religious and that which appears to be fully secularized, with another important section in between that is both religious and secularized. The real picture is complex and cannot be captured by a simplistic analysis.

The changing reality on the ground must also be taken into account. In the last population census, conducted in 2011, we observe that 20,640 respondents declared themselves to be Muslims, which is around 0.2% of a total population of 8,989,849. Although very small, this number is a significant increase compared to that of the 2001 census, in which 12,014 self-declared as Muslims. About two-thirds of Muslims are residents in Lisbon and its surrounding districts. There, 14,202 residents declared themselves to be Muslims from a total of 2,383,995 respondents. Muslims represent 0.6% of the population in the Metropolitan Area of Lisbon. Many come from North Africa (e.g. Morocco, Algeria), and Asia (e.g. Pakistan, Bangladesh). A significant part of the Muslim population is made up of Portuguese citizens. Most Muslims are Sunni, comprising several communities. Shiites mostly include Ishmaelites, Ithna Ashari, Ahmadia and Baha'I.

During the authoritarian regime from 1926 until 1974, there was no official State Church, as had been the case when the Republic was established in 1910. However, there remained a very strong social and cultural bond between the Catholic Church and the Portuguese people, which was politically and legally formalised by the signing of a Concordat with the Holy See in 1940. In 1951, the Portuguese Constitution of 1933 was amended, affirming Catholicism as the 'religion of the Portuguese Nation'. That implied the existence of special privileges, albeit also providing for the legal recognition of other religious communities. However, the Second Vatican Council represented an important change in the position of the Catholic Church in relation to non-Christian religions, as can be seen in the Council declaration *Nostra aetate*, approved by the Council Fathers of Vatican II and promulgated by Pope Paul VI on 28 October 1965. Though we cannot draw any direct link, it perhaps is not entirely coincidental that the Portuguese State officially recognised the Islamic religious community in 1968.[3]

In 1971, a Religious Freedom Act[4] came into force, providing for equal treatment of all religious communities. The social impact and representation of each community was taken into account, ostensibly to strike a balance between formal and substantive equality. According to this perspective, Catholicism was considered the country's traditional religion, thus being entitled to a special legal status, that of the 1940 Concordat. It should be noted that the Religious Freedom Act of 1971, by virtue of affirming equal freedom and dignity of the different religious communities and the non-denominational nature of the State, ended up having a significant impact on the legal and social status of the different religious communities, paving the way for recognising Muslims as a religious minority enjoying full rights as citizens.

[3] Mhomed, 'O Islão Político em Portugal', p. 15.
[4] Act 4 of 21 Aug 1971.

Indeed, a growing international solidarity and openness to the Arab world, largely due to the 1973 oil crisis, resulted in opening new avenues of dialogue and negotiation between the Portuguese State and some Arab countries, giving rise to a cultural policy centred on mutual understanding and recognition. The revolution of 25 April 1974, initially clearly marked by a left-wing political agenda – very anti-colonialist and suspicious of the United States and Israel – consolidated an atmosphere of rapprochement to the Arab world and to the Palestinian cause, though without ever expressing radical opposition to traditional Western allies. Greater openness to Islam, both outside and inside, was favoured as a result, on the one hand, of the clear and uncompromising declaration of religious freedom and the separation of religion from the State in the 1976 Constitution, and, on the other hand, due to the need to receive and integrate displaced Muslims and immigrants who, following decolonization after the 1974 revolution, left the former Portuguese colonies, especially Guinea Bissau and Mozambique, and settled in Portugal.

As of 1975, mosques and other places of religious worship have been built throughout the country, mainly in the Lisbon Metropolitan Area and the Algarve, to the south. In recent decades, immigration from countries such as Senegal, Guinea Bissau, Guinea Conakry, Mozambique and Pakistan has intensified the expansion of different Muslim communities in Portugal, including Sunni and Shiite, for instance, Shiite Ismaili, Shiite Isna Ashari and Iraqi Shiite.[5] The ensuing political discourse thus changed significantly.

III. Institutional recognition by the state

A. Establishing religious freedom

In June 2001[6], a new Religious Freedom Act (RFA)came into force, thanks to the political-legislative initiative of the then Socialist Government, led by Prime Minister António Guterres, the same person who later became Secretary General of the United Nations in 2017. In Portugal, it must be assumed, in fact, that the largest advances in the area of religious freedom have been, until now, at the initiative of the Socialist Party. This legislative act represented a profound qualitative leap on the issue of individual and collective religious freedom and of relations between religious communities and the State, establishing a legal regime of greater freedom, equality, transparency, state neutrality and cooperation regarding the legal treatment of different religions.

[5] Mhomed, 'O Islão Político em Portugal', pp. 20 ff.

[6] RFA, Act 16 of 22 June 2001, successively amended by Act 91 of 31 Aug 2009, Act n.º 3-B of 28 April 2010, Act nº 55-A of 31 Dec 2010 and nº 66-B of 31 Dec 2012.

As expressed in its first Articles, this legislative act is based on the principles of respect for freedom of conscience, religion and worship, equality, separation between religious communities and the State, a non-confessional State, cooperation and of tolerance. This last principle establishes that conflicts between the freedom of conscience, religion and worship of one person and that of another or others will be resolved through tolerance in order to respect as much as possible the freedom of each person. This new legislative act proved to be of the utmost importance for all minority religious communities, including Muslim, which had long been complaining about restrictions and discrimination that affected their exercise of religious freedom. It was an important step towards understanding Portugal as a common home for citizens of different religious beliefs and practices.[7]

B. **Individual religious freedom**

Article 8 of the RFA, endows individual religious freedom with a broad normative programme, covering the right a) to have, not to have and to stop having religion, b) to freely choose, change or abandon one's religious beliefs, c) to practise or not to practise the acts of worship, private or public, proper to the professed religion, d) to profess one's religious beliefs, to seek new believers for them, to freely express and publicise, by word, image or any other means, your thinking in religious matters, e) to inform and inform yourself about religion, learn and teach religion, f) to meet, manifest and associate with others according to your own convictions in religious matters, without any other limits beyond of those provided for in Articles 45 and 46 of the Constitution, g) to act or not to act in accordance with the norms of the professed religion, respecting human rights and the law, h) to give their new-born children a first name according to their religious denomination, and i) to produce scientific, literary and artistic works in the field of religion. As can be seen, this is a right that is widely recognised by all citizens and residents, and that allows a wide margin of religious interpretation. Whoever professes the Islamic faith can freely enjoy all these legal possibilities, without any discrimination.

In addition, Article 9 of the RFA grants all individuals significant protection from public or private action, of a negative or defensive nature, establishing that no one can a) be obliged to profess a religious belief, to practise or attend acts of worship, to receive religious assistance or propaganda in religious matters, b) be coerced into being part of, staying in or leaving a religious association, church or religious community, without prejudice to the respective rules on membership and exclusion of members, c) be asked by any authority about their beliefs or religious practice, except

[7] A. Vakil, *O Portugal Islâmico, O Portugal Multicultural e os Muçulmanos Portugueses* (Lisbon, Coimbra Editora, 2003), pp. 451 ff.

for the collection of statistical data not individually identifiable, nor to be harmed by refusing to answer, or d) be obliged to take a religious oath. It is also careful to ensure that information technology is not used for processing data relating to personal beliefs or religious faith, except with the express consent of the holder or for processing non-individually identifiable statistical data. Here, too, there is a significant protection of religious freedom, open to all members of the Islamic religion as equally dignified and free citizens. These norms protect individuals not only before the State, but also from private entities, such as the religious or other communities themselves, namely those of an economic, social or cultural nature.

Article 10 of the RFA establishes the right, in agreement with the respective ministers of worship and according to the norms of the chosen church or religious community, to join the church or religious community that they choose, to participate in the internal life and in the religious rites practised in common and receive the religious assistance one requests, to celebrate marriage and be buried with the rites of the religion itself and publicly celebrate the religious festivities of the religion itself. For members of Islamic communities in Portugal, this requires the existence of specific Islamic plots in some cemeteries.

The inclusion of Muslims in the Portuguese socio-cultural reality is easier when it comes to people from the former Portuguese colonies, who largely share Portuguese history, language and culture. In general, they do not complain of religious discrimination.[8] Despite the normative and social data presented, the existence, pointed out by some studies, of a persistent and systemic distrust by the population at large regarding the presence of Islam in Portugal -not unlike what happens in other European countries - should not be ignored and underestimated. The subconscious assumption appears to be that Islam is ultimately present in Europe but not part of Europe. Such a discourse frequently seen on social networks is evidence of this.[9]

C. **Legal personality of religious communities**

The RFA[10] provides, that churches and other religious communities of national, regional or local scope, as well as institutions of consecrated life and other institutions, with the nature of associations or foundations, founded or recognised by religious communities, for the pursuit of their religious purposes, or their federations or associations, may acquire legal personality by registering in the register of religious

[8] F. P. B. Ribeiro, *Normas Laborais e Liberdade de Prática Religiosa: o Caso dos Crentes do Islão em Portugal* (Lisbon, FCSH, 2010), pp. 24 ff.

[9] M. Araújo, 'A Islamofobia e as suas Narrativas em Portugal: Conhecimento, Política, Média e Ciberespaço' (2019) 447 *CES, University of Coimbra*, pp. 1ff.

[10] RFA, Art 33 ff.

legal persons. This register was established in 2003 within the Ministry of Justice.[11] The application for registration must be accompanied by documents designating the name of the religious entity, which should allow it to be distinguished from any other existing legal person in Portugal, the constitution, institution or establishment in Portugal of the organisation corresponding to the church or religious community or the formal act of constitution or foundation of the religious entity. Equally important is the identification of a headquarters in Portugal, the specification of the religious purposes pursued and the goods or services that should for part of its assets.

The application is also required to specify the rules on the formation, composition, competence and functioning of its bodies, on the dissolution of the legal person, on the method of designation and the powers of its representatives and the identification of the holders of the bodies in office and of the representatives and specification of the competence of the latter. The application for registration of new religious communities must be accompanied by general principles of doctrine and a general description of religious practice and acts of worship and, in particular, the rights and duties of believers in relation to the church or religious community, as well as a summary of all these elements.. It must also indicate its existence in Portugal, with a special focus on the facts that attest to its organized social presence, religious practice and stable permanence in Portugal.

Churches and religious communities that have a supranational scope may establish an organisation representing believers resident in the national territory, which will require their own registration. This legal order may be interpreted by some as being too inquisitive and intrusive. However, it is generally valid for all private law associations and corporations and follows generally accepted standards of transparency and accountability that must exist across civil society. It allows authorities (and citizens in general) to know who is who in the religious sphere in Portugal. The Halal Institute of Portugal lists more than 50 mosques and Islamic worship sites in all regions of Portugal.[12] Islamic communities frequently generate their sources of financing from Islamic countries, with special emphasis on Saudi Arabia.[13]

D. **Religious freedom in media and institutional contexts**

In accordance with Article 41 (5) of the Portuguese Constitution, the freedom to teach any religion practised within the scope of the respective confession is guaranteed, as well as the use of appropriate media for the continuation of its activities. This

[11] Legislative Decree nº 134 of 28 June 2003.

[12] *Instituto Halal de Portugal* <https://halal.pt/myihp/locais-de-culto/>.

[13] Mhomed, 'O Islão Político em Portugal', p. 16.

means that religious communities can develop their activities using private radio and television outlets and also social media.

In addition, access of religious communities to radio and television services should be highlighted. Article 25 of the RFA[14] establishes that in public television and broadcasting services, churches and other registered religious communities are guaranteed, by themselves, through their respective representative organisations, or jointly, when they prefer to participate as if they were a single confession, time on air, generally fixed for all, for the pursuit of their religious ends. The allocation and distribution of broadcasting time referred to above is made taking into account the representativeness of the respective communities and the principle of tolerance, through agreements between the Commission on Broadcasting Times of Religious Communities and the companies holding public services for television and broadcasting. The Commission on Emission Time of Religious Communities is made up of representatives of the Catholic Church and of the churches and religious communities based in the country or of the federations in which they belong, appointed for three years by joint order of the members of the Ministry/Government body responsible for the areas of justice and the media, after consulting the Religious Freedom Commission. The Islamic community has taken advantage of these possibilities. Among other things, it can broadcast its own content in the weekly and daily TV series "Caminhos" (Pathways)[15] and "A Fé dos Homens" (The Faith of Man)[16] on public television, alongside all other religious communities.

Of course, no media services can, through their broadcasting or programming, incite violence or hatred against groups of people or members of those groups due to sex, race, colour or ethnic or social origin, genetic characteristics, language, religion or belief, political or other opinion, belong to a national minority, wealth, disability, age, sexual orientation or nationality. This rule applies to all media content, whether secular or religious.[17]

[14] See also, Art 52 (2) (a) of Act nº 27 of 30 July 2007, as changed by Act nº 74 of 19 Nov 2020.

[15] "Caminhos" is a weekly information programme dedicated to the activities of the different religious communities represented in Portugal. In addition to addressing the religious activities inherent to each one, it also has a social concern, addressing issues of interest in today's society such as women's rights, moral and religious education in schools, music and young people, the perspective of man for the 21st century, among others. <https://www.rtp.pt/programa/tv/p1248>.

[16] "A Fé dos Homens" is a daily series dedicated to the different religions recognised in Portugal. It is produced by Artémis, Logomedia and Neva, this daily programme includes the participation of the Portuguese Evangelical Alliance, the Orthodox Church, 7th Day Adventist Church, the Islamic Community of Lisbon, the Baha'i Community of Portugal, Vetero-Catholic Church, Catholic Orthodox Church, Roman Catholic Church, Hindu Community of Portugal, among others. <https://www.rtp.pt/programa/tv/p1115>.

[17] Art 27 of Act nº 27 of 30 July 2007, as changed by Act nº 74 of 19 Nov 2020.

Equally noteworthy is the right to provide religious assistance in hospitals,[18] the armed and police forces[19] and prisons.[20] The legal provision regime may vary depending on the number of recipients and providers of that service, within the particular institutional context, but the principle is that everyone should have access to it.

IV. Religious equality and secular law

A. Religious inclusion and interfaith dialogue

At the ceremony to commemorate the 50th anniversary of the Islamic community in Portugal, which took place at the Central Mosque of Lisbon in 2018, the then Portuguese Prime Minister, António Costa, stated that the Islamic community of Lisbon should be seen as an integral part of the country and not as a minority, in a speech in which he defended the idea of Portugal as an example of diversity and tolerance.[21] The Portuguese State has been trying to foster respect for all religions in Portugal, within a framework of inclusion, participation and interfaith dialogue. In fact, the RFA created a Religious Freedom Commission,[22] which works with the Ministry of Justice and serves as an independent consultation body of the Assembly of the Republic and the Government. Its concerns include study, information, opinion and proposals in all matters related to the application of the Religious Freedom Law, with the development, improvement and eventual revision of the same law and, in general, with the law on religions in Portugal.

Its competencies include, inter alia, issuing opinions on draft agreements between churches or religious communities and the State, the establishment of churches or religious communities in the country, the composition of the Commission on Broadcasting Time of Religious Communities and the registration of churches or religious communities required by the religious legal persons registration service. It is also responsible for studying the evolution of religious movements in Portugal and, in particular, gathering and keeping updated information on new religious movements, providing the necessary scientific and statistical information to the services, institutions and interested people, and publishing an annual report on the subject.

[18] Legislative Degree nº 253 of 23 Sept 2009.

[19] Legislative Degree nº 251 of 23 Sept 2009; Despacho nº 9316 of 30 Sept 2020.

[20] Act nº 115 of 12 Oct 2009. The risk of Islamic radicalisation in prisons has been analysed in the light of this legislation. F. Gonçalves, 'A Ameaça Jihadista nos Estabelecimentos Prisionais: Desafios e Dilemas' (2012) 132/5 *Nação & Defesa*, pp. 192 ff. <https://comum.rcaap.pt/bitstream/10400.26/7693/1/NeD132_FranciscoGon%C3%A7alves.pdf>.

[21] A. Lusa, 'Costa salienta que comunidade islâmica é parte do país e não uma minoria', *Observador*, 26 out 2018, <https://observador.pt/2018/10/26/costa-salienta-que-comunidade-islamica-e-parte-do-pais-e-nao-uma-minoria/>.

[22] RFA, Art 52 ff.

These powers are exercised at the request of the Assembly of the Republic or the Government or on its own initiative. It is an important body that transfers to the domain of individual and collective religious freedom some important teachings on the theory of regulation, which include inclusion, participation, information gathering, dialogue and deliberation, according to institutional models and procedures close to co-regulation. It is an option that has proven to be very sound, as it promotes mutual knowledge, friendship, trust and solidarity among different religious denominations, which has had practical effects in several ways.

First, it created an interfaith solidarity network that manifested itself in difficult moments, such as the financial crisis and the Covid-19 crisis. Second, it created channels of communication between the state and the different religious communities that facilitated the legitimation, definition, acceptance and implementation of the restrictions on individual and collective religious freedom imposed by Covid-19. In a world such as ours, which is globalised, integrated and religiously plural, interreligious dialogue is an existential necessity. Such dialogue can and must respect the religious identity of all religious communities and their respective claims of truth. For this reason, the creation and maintenance of a climate of trust and friendship, and of structures for communication and collaboration among leaders of different religious communities is essential. Peaceful coexistence in the world and in states depends largely on peaceful coexistence between religious communities.

B. **Religious practices**

1. ***Marriage***

Freedom of religion and confessional autonomy are not, in any case, absolute. The notion of application of religious law is almost totally rejected in Portugal. Consider, for example, the case of marriage, a matter where religious communities are closely involved. The only recognised marriage is civil marriage, which can be celebrated religiously.[23] The only exception is Catholic marriage,[24] which is expressly recognised by the Portuguese Civil Code. However, even here it is said that the Catholic marriage is governed, in what concerns its civil effects, by the common norms of the Civil Code, unless otherwise stated. Knowledge of the causes regarding the nullity of Catholic marriage and of the exemption of *celebrated but unconsummated marriage* (*ratum sed non consummatum*) is reserved for competent courts and ec-

[23] RFA, Art 19; M. Pimenta de Almeida, *O Instituto do Casamento em Portugal e nos países islâmicos* (Lisbon, 2015), pp. 8 ff. <http://miguelpimentadealmeida.pt/wp-content/uploads/2015/06/O-INSTITUTO-DO-CASAMENTO-NO-ORDENAMENTO-JUR%C3%8DDICO-PORTUGU%C3%8AS-E-NOS-PA%C3%8DSES-ISL%C3%82MICOS.pdf>.

[24] This is due to the Concordats between Portugal and the Holy See, of 1940 and 2004.

clesiastical offices. Under Portuguese law, the minimum age for marriage is 16. This applies to all marriages, thus forbidding forced marriages of children.[25]

In the Catholic cultural tradition, Canon Law and Civil Code defined marriage as a legal union between one man and one woman, based on religious notions of gender equality and complementarity and on the biological reality that all human beings naturally derive their existence and genetic identity from the sexual union between one man and one woman. From these notions, the monogamy principle derives its existence and relevance, seeking to ensure that each human being enjoys an optimal context of family and emotional stability for the development of their personality. Foreign Islamic polygamous marriages are not yet legally recognised because they are perceived as infringing international public order.

However, under the influence of recent postmodern individualistic worldviews, the Civil Code was amended[26] so as to define marriage on subjective values such as individual freedom, equality and privacy. Based on these values, same sex marriage was introduced, irrespective of any idea of gender equality and complementarity or of reproductive sustainability. The monogamous principle was kept, despite lacking any religious or biological foundation. That is why polygamy is still forbidden, being impossible, under the law, to justify based on religious values or subjective notions of freedom to love or privacy. Polygamous relationships may and do exist within the Islamic community, as a matter of fact, not as a matter of law.[27] How long it will be possible to maintain the monogamous principle in a context in which marriage is defined based on the principles of freedom to love and privacy, remains to be seen. Islamic men who want to have several women spouses may see these principles as an opportunity.

Civil effects are recognised in the marriage celebrated religiously before the minister of worship of a church or religious community based in the country. The minister of worship must have Portuguese nationality or European Citizenship or, if being a foreigner from a third State, have a temporary or permanent residence permit in Portugal. Those who intend to marry religiously must declare it, either in person or through a proxy, in the application to initiate the respective publication process at the competent civil registry office, indicating the minister of worship accredited for the act. The declaration for marriage can also be made by the minister of worship, upon request, signed by him. Once the marriage is authorised, the registrar keeps the marriage certificate, ensuring that the bride and groom are aware of the relevant rules of the Civil Code. The certificate must mention this fact, as well as the name and accreditation of the minister of worship.

[25] A. Campina, *Mulheres Muçulmanas em Portugal: (Des) conhecimento; (Des) informaçào e (In) visbilidad, Musulmanas y derecho a la cultura. Tradición y modernidade* (La Xara, 2011), pp. 31 ff., 38.

[26] Act nº 9 of 31 May 2010.

[27] Campina, *Mulheres Muçulmanas em Portugal*, p. 38.

2. *Halal food*

Unlike in Christianity, which understands that 'What contaminates man is not what enters the mouth, but what comes out of the mouth, this is what contaminates man[28]', for Muslims, food is fundamental for the salvation of the soul. For them, food, lifestyle, ethical conduct and worship are closely related. The Islamic motto can almost be described as 'healthy food, healthy body, healthy soul'. Above all, it is about living well with others, with animals, with nature and with the Creator. It is in this context that the absolute importance of Halal food and, consequently, the certification of its authenticity must be understood. For this reason, the protection of religious freedom in the Islamic community must be extremely sensitive to the Islamic perspective. As far as religious slaughter of animals is concerned, the law prescribes that it must respect the legal provisions applicable to the protection of animals.[29] The future of this problem is uncertain, because the political left that defends the rights of animals and is tenaciously opposed to bullfighting, tends to support multiculturalism, and thus it is of interest to see how the Zibh and Kosher slaughter of animals will be considered.

C. **Religious inclusion through legal agreements**

The natural inclusion of Islam in Portuguese society is clearly manifested in the agreement signed between the Portuguese State and the Shia Imami Ismaili Muslim community, a worldwide religious community that has a history of active participation on international stages such as the League of Nations and the United Nations, nowadays through the Aga Khan Development Network.[30] In 2005, the Patriarchate of Lisbon and the Aga Khan Portugal Foundation signed a partnership agreement that provides for collaboration within an urban community development programme, with a view to producing innovative responses to problems arising from social exclusion. This agreement reflects the shared commitment of the Patriarchate of Lisbon and the Aga Khan Portugal Foundation, an agency of the Aga Khan Network for Development, in improving the quality of life of populations, including immigrants and ethnic minorities.[31] In March 2006 a protocol was signed between the Portuguese State and the Ismaili Imamat, fostering cooperation in social, cultural and economic fields. In 2009, an agreement resulting in the implementation of Chapter V of the Religious Freedom Act allowed the Ismaili Imamat to create religious schools without any

[28] Mathew 15:11.

[29] RFA, Art 26.

[30] A. Vadil, 'Comunidade Islâmica em Portugal' in: Fernando Cristovão (ed), *Dicionário Temático da Lusofonia* (Lisbon, Associação de Cultura Lusófona-Texto Editores, 2005).

[31] Ribeiro, *Normas Laborais e Liberdade de Prática Religiosa: o Caso dos Crentes do Islão em Portugal*, pp. 41 ff.

monitoring by or supervision from the Portuguese State. It was aproved by the Parliament in the following year.[32]

On 3 June 2015, an Agreement was signed between the Portuguese Republic and Imamat Ismaili with a view to establishing its headquarters in Portugal, which would be approved by the Portuguese Parliament in October of that year.[33] This Agreement, perceived as an international Agreement between a State and an international non-governmental organization, acknowledges the legal personality and capacity of the Ismaili Imamat to act in international relations and welcomes the decision of the Imam to establish the Seat of the Ismaili Imamat in Portugal. It establishes the privileges, immunities and facilities extended by the Portuguese Republic to the Ismaili Imamat, the Imam, the Senior Officials and the Staff Members, as well as to its Seat and assets, with a view to ensuring the performance of their official functions in Portugal and facilitating the same internationally. The Portuguese State agreed to ensure the conditions for the establishment of the Seat of the Ismaili Imamat within its territory as well as for the exercise of its functions.

Article 10 of the RFA states, among other things, that religious freedom encompasses the right to publicly celebrate religious festivities of the religion itself. This provision necessarily points to the existence of duties of accommodation of workers' religious practices by private employers. The RFA, under Article 14, provides that State employees and agents and other public entities, as well as workers on an employment contract, have the right, at their request, to suspend work on the weekly rest day, on festivities and in the time periods prescribed for them by the confession they profess, under the following conditions: a) they are working under flexible working hours; b) they are members of an enrolled church or religious community that sent, in the previous year, to the member of the Government responsible for the matter, the indication of the said days and time periods in the current year, and c) there is full compensation for the respective period of work.

This standard applies to individual members of different religious denominations, such as Jews, Islamists or Seventh-day Adventists. The requirement to compensate for lost working time results from the need to harmonise and balance, reasonably and fairly, the rights and interests of the employer and the worker. The Portuguese Supreme Court[34] considered that the refusal, on the part of the worker, to compensate the employer for the lost working time constitutes a just cause for dismissal.

The same Article 14 also provides for a special regime for the provision of academic and school tests, provided that, in the previous year, religious communities have been sent to the competent Government member, the indication of the said

[32] Resolução da Assembleia da República nº 109 of 24 Sept 2010.
[33] Resolução da Assembleia da República nº 135 of 27 Oct 2015.
[34] Case nº 449/10.0TTLSB.L1-4, 15 Dec 2011.

days and time periods. This requirement has been significantly mitigated by the Supreme Court in the case of providing evidence for admission to the Portuguese Bar Association,[35] reasoning that, ultimately, it is not legitimate to impose a duty or a burden of communication on churches or religious communities, ultimately very difficult to implement, requiring them to identify an indefinite set of institutions or entities as a unique means of ensuring and realising, in practice, the legitimate and free exercise of the right to religious freedom of its believers.

It is likely that, as has been observed, the practical possibilities of exercising religion in the workplace depend on some variables, such as the legal status of the worker, namely, whether he/she is self-employed or employed, his/her socio-economic status. or the characteristics of the sector of activity in which he/she operates.[36]

V. Conclusion

Portugal intends to establish itself politically and legally as an inclusive constitutional community, a shared home for free and equal citizens. Although Portuguese history, culture and identity were strongly marked by Christianity, it is also the case that in all these elements, the influence of Islam cannot be ignored and underestimated in any way. On the other hand, the reality of decolonisation and migration has contributed to making the Islamic religion an integral part of the Portuguese social and cultural reality today.

For this reason, the constitutional principles of religious freedom and the separation of religious communities from the State must be read, interpreted and applied in a manner favourable to social integration and to the peaceful and productive coexistence of all individuals of Islamic faith, as equal and full members of the political community, and must reasonably accommodate religious and ethical imperatives. This ideal is pursued through the guarantee of a wide individual and collective religious freedom, understood not only as a right of defence against the State, but above all as a right to be realised through the positive, factual, normative and regulatory intervention of the State. Although this result cannot be considered to have been achieved, this article shows how in several areas the Portuguese legislator has made a significant effort in this regard. The relative social and legal peace that is experienced both inside and outside the courts would appear to be a good indication.[37]

[35] Case nº 01394/06.0BEPRT, 8 Feb 2007.

[36] Ribeiro, *Normas Laborais and Liberdade de Prática Religiosa: o Caso dos Crentes do Islão em Portugal,* pp. 11 ff.

[37] All websites last accessed on 24 June 2021.

ISLAM AND HUMAN RIGHTS IN ROMANIA

Emanuel Tăvală[1]

I. Introduction: the social framework

A. Numbers of Muslims, both old and new immigrants

The practice of Islam in Romania is related to the establishment in the 13th century of the Turkish-Tatar population. Thus, in 1241, the Tatars of the "Golden Horde" khanate established their domination in various areas in the vicinity of the Carpathian Mountains.

Between 1262 and 1264, the Byzantine Emperor Michael VIII Palaiologos granted the Turkish captains Izettin Keyaus and Saru Saltâk Dede the right to set up their military camp in Dobrogea, with the mission of protecting the borders of Byzantium from invasions from the north. This is how the Seljuk Turks appeared in the area of today's Babadag town. The first Muslim communities on the territory of Romania emerged only in the XIV-XV centuries as a result of the establishment of the suzerainty of the Sublime Porte over the Romanian Principalities, developing in particular in Dobrogea and in some localities along the Danube.

It was not until 1877 that the Muslim religion in Romania was organised into four muftiates. Between the two world wars, only two remained through merging, and in 1943, the muftiates from Tulcea and Constanţa were unified, forming a single muftiat (religious centre), based in Constanţa.

The practice of the Islamic religion consists in: performing daily services (namaz); the fast of Ramadan 30 days a year; a visit to the Kaaba in Mecca and a pilgrimage to Muhammad's tomb; helping the needy; keeping awake in memory of the confession of faith and its daily utterance.

Religious activity is led by the mufti, who is elected (by secret ballot) from among the imams. In addition to the mufti, who has a consultative vote, there is a synodal college called Sura Islam with 23 members, which meets regularly to resolve administrative and disciplinary issues of the religion.

[1] Law Faculty, Sibiu.

The basic unit of worship is the community, which includes all the Muslim believers in a locality and is led by a committee of 5-7 members elected for a period of four years. In Romania, there are 50 Muslim communities and 20 branches distributed in the counties of Constanţa (63 units), Tulcea (4) and one unit in the counties of Brăila, Galaţi and Bucharest.

Muslim places of worship in Romania fall into two categories: the mosque and the messiah; there are a total of 81 places of worship.

There are also historical monuments: the central mosque and the Hunchiar mosque, both in Constanţa; the mosque of Esmahan Sultan of Mangalia; the mosques of Medgidia, Hârşova, Amzacea, Babadag and Tulcea. Additionally, there are the tombs of Gasi Ali Pasha and Saru Saltâk Dede of Babadag.

Muslim clerical posts in Romania consist of: hatips, imams, muezzins. Today, there are 35 imams.

According to the 2011 census, there are 64,337 Muslim believers in Romania, the vast majority of whom live in Constanţa County, some in Tulcea County, and the rest in various urban centres, such as Bucharest, Brăila, Galați, Călărași, Giurgiu, Oltenița, Turnu Severin, etc.

The Theological Seminary of the Muslim Religion operated in Babadag and afterwards in Medgidia from 1880 until 1967, when, due to a lack of students, it suspended its activity. As of the 1993-1994 school year, the theological seminary in Medgidia resumed its activity, having set up a pedagogical section.

Muslims are represented in the Romanian Parliament by one member by statute.

B. Muslim minorities in Europe (distinction between traditional historic minorities and immigrant communities)

The case of Romania is quite instructive for those who want to understand the political issues of Islam. There is an Islamic (Turkish-Tatar) community here, which, like all very old and endangered communities, shows a restrained and introverted gentleness. From the great legacy of Ottoman Islam, these Muslims with ancient local roots have preserved only the dimension of interiority. As everywhere in the Balkans, where the Turkish Slavs formed much larger communities, the Muslims in Romania are partly secularised and assimilated, being reluctant to promote any identity politics.

In Romania, we have been witnissing precisely this conflict for at least 10 years now. The old Muslim community seems to be becoming increasingly uncomfortable with newcomers sponsored by various Arab countries who urge outward statements such as ostentatious public prayers or various forms of protest in coordination with those in Arab countries.

The official leader of the Muslim religion in Romania, Mufti Iusuf Murat, reflecting on the turbulent atmosphere, revealed the intense conflict between his community and the newcomers who do not recognise his authority at all and organise themselves

completely independently. According to the mufti, they set up cultural associations that would be just an front for organising an Islamic cult parallel to the official one. In Bucharest, for example, there is only one mosque, but there are, in fact, more than 17 unofficial places of worship.

The problem is not so much the legality, but the fact that the new Muslims adopt a very aggressive identity stance.

In Romania we can see, in microcosm, the way two Islamic communities are run, one old, indigenous, which assumes religion primarily as a form of education of the soul (or as a spiritual commitment) and a new one, related to recent immigration, which tends to render religion in particular a platform for identity politics. The former is rather shy and introverted, the latter seems extroverted and eager for political assertion.

In Romania, at the level of the Muftiat, the official representative institution of Islamic worship and culture, a traditional Sunni Islam is promoted, from the perspective of the Hanafi school.[2] One can discuss a certain culturalisation and beneficial integration of the Muslim Turkish-Tatar community in Romania, but often even assimilation within the Romanian society. Emphasis on coexistence, dialogue and tolerance can be included within a humanistic approach, but not a liberal or progressive one. Humanistic attitudes are not systematically theorised in a progressive register, but are rather assumed as pre-religious and cultural assumptions, partially confirmed by a selective reference to the officially assumed (Hanafi) Islamic tradition.[3] However, it is of note that the only progressive Muslim author to give lectures in Romania, Abdulaziz Sachedina, was invited to attend various events organised by Muftiat.

Consolidating the beneficial but insufficiently theoretically structured orientation of the Muftiat through the theological and philosophical tools of progressive interpretations could, ideally, stabilise and more rigorously establish the positive interreligious and social relationship manifested within the general Turkish-Tatar communities up to now. The same humanistic approach, though not liberal or progressive, is found in informal Sufi groups (and Shia-oriented ones), due to the mystical dimension inherent in these Islamic interpretations. We note here the Fattabiouni project, carried out against the background of a reference to the classical Sunni tradition enriched by a Sufi vision focused on purifying the heart. The operation with precepts related to morality, love, inner spiritual development, interreligious and interfaith tolerance only partially overlaps with certain tendencies of progressive Islam by reactivating

[2] See also S. Frunză, M. Frunză and C. Herteliu, 'The Situation of Islam in Romania' in: Beatriz Molina Rueda (ed), *Studying and Preventing the Radicalization of Islam. What School Communities Can Do? Final Reports Bulgaria, Morocco, Romania & Spain* (Granada, Universidad de Granada, 2009).

[3] A. I. Alak, 'Interpretări liberale și progresiste în islamul contemporan' (2015) XV/3 *Romanian Political Science Review*, pp. 472-73.

the ethical dimension of Islam. However, there are limits to accepting a thorough reform of pre-modern Islamic jurisprudence.

Another interesting case is that of a non-governmental organisation of Romanians who converted to Islam (ARCI), though in-depth or officially certified Islamic studies are lacking. Other Romanian Islamic non-governmental organisations - probably the most active culturally and religiously - and the main source of making available the Islamic literature in Romanian, undertake many charitable actions. These organisations, including Islam Today, The Islamic and Cultural League of Romania, The Association of Muslims of Romania, The Association of Muslim Sisters, adopt a specific perspective of neo-traditionalism, consolidated in the second half of the last century, Neo-traditionalism is quite popular in many other Islamic organisations in Europe, though it is received with hostility by indigenous Muslims of Turkish-Tatar ethnicity. The fierce conflict between the Mufti and these organisations underlines the clash in the ways of understanding Islam that show clear differences in four key variables that drastically determine the ideological complexion of Islamic interpretation: relations with non-Muslims, relations with other Islamic groups, the status of women and attitude to secular legislation. The Mufti has excellent relations with representatives of other religions and a discourse consistently rooted in the acceptance of religious pluralism and internalised, practised tolerance; the non-sectarian attitude is to be appreciated, as is the greater openness to women's freedoms, according to contemporary egalitarian assumptions. The Mufti never officiates polygamous marriages, respecting the laws of the Romanian state. However, a different situation exists within NGOs, with a different culture permeating current Islamic practices. Given the fact that the Muftiat's position on this from an Islamic perspective lacks clear argument, NGOs dominate the discourse by promoting more systematic and organised Islamic neo-traditionalism.

The actual space of the Muslim communities in Romania is, with the exception of rather marginal or, certainly, less vocal influences, as presented above, largely dominated by the Salafi vision, explicitly or indirectly, by involuntarily assuming some Salafi influences in the absence of equally visible and promoted alternative sources of Islamic knowledge. Progressive Islamic tendencies and attitudes exist especially among some Muslim converts engaged in the individual study of their own religion, and among officially unorganised Muslims, who are relatively isolated from the majority Muslim communities.[4]

The Muslim communities in Romania are marked by heterogeneity, lack of unity, internal fragmentation, sectarian and ideological rivalry, similar to other Balkan countries that have a local Muslim population attached to a specific stable tradition.

[4] More details about the different identity configurations of the various Muslim communities in Romania in A. I. Alak, 'Types of Religious Identities within Romanian Muslim Communities' (2015) 14/41 *Journal for the Study of Religions and Ideologies*, pp. 148-73.

The absence of more visible and strong alternative Islamic discourses has facilitated the rise of Salafism and neo-traditionalism, at least in certain segments of the Muslim community, critically calling into question the traditional, strongly ethnic-influenced way of being Muslim.

II. Institutional recognition by the state

A. Legal form of Islamic communities (legal personality)

Islam is recognised an official religion in Romania through the law 489/2006.

Article 10. - (1) of the religions' statute stipulates that according to Law no. 489/2006 on religious freedom and the general status of cults, the Muftiat has legal personality, and is the only religious institution that represents the faithful of the Muslim religion in Romania, operating according to the laws of the Romanian state and the provisions of this statute, as well as the organisation regulations and operation of the Muftiat.

Religious activity is led by the mufti, who is elected (by secret ballot) from among the imams. In addition to the mufti, with a consultative vote, there is a synodal college called Sura Islam with 23 members, which meets regularly to resolve administrative and disciplinary issues.

The basic unit of worship is the community, which includes all the Muslim believers in a locality and is led by a committee of 5-7 members elected for four years. In Romania, there are 50 Muslim communities and 20 branches distributed in the counties of Constanţa (63 units), Tulcea (4) and one unit each in the counties of Brăila, Galaţi and Bucharest.

Muslim places of worship in Romania fall into two categories: the mosque and the messiah; there are a total of 81 places of worship.

B. Financing Islamic communities

The material basis of worship is through voluntary contributions from believers, donations and grants from the state and international Islamic religious organisations, fees for religious services, sales of leaflets, brochures, illustrations, fees for visiting Islamic monuments, income from various land and buildings owned by the Islamic community, etc.

The Muslim religion is one of the 18 religions officially recognised under law 489/2006, whose organisations are eligible for financial support and other forms of state support. They have the right to teach religious classes in public schools, to receive government funding to construct places of worship, to receive partial payment of the clergy's salaries with funds from the budget, to broadcast religious programmes on radio and television, and to be granted broadcasting licenses for their own stations. According to the law, the level of funding received by the religions depends on the

number of followers compared to the last census, as well as on the ‚real needs of the respective religious denomination', which are not defined by law.

C. Are there any institutionalised bodies which communicate with the Government?

The Muftiat is the structure that has legal personality, being the only religious institution that represents Muslim worshippers in Romania. It operates according to the laws of the Romanian state and the provisions regarding the status of the religion, as well as the Regulation on the organisation and functioning of the Muftiat.

> In the particular case of the Turks and Dobrogean Tatars, at the initiative of representatives of secular-oriented generations formed during the communist period, since December 1989 the foundations of a common representative organisation have been laid on the basis of the Turkish-Islamic identity component, with some official incorporation of religious identity into the ethnic one.
>
> On the basis of the decision of the Initiative Committee of December 28, 1989, and confirmed by the Constituent Assembly of December 29, 1989, the Turkish Muslim Democratic Union in Romania was established. This union was meant to unite in a single national minority organisation the entire Tatar and Turkish population in Romania, based on the community of ethnic origin, language, historical tradition and Islamic faith.
>
> As a result of the creation of the Turkish Ethnic minority Union in Romania (U.M.E.T.R.), a split took place within the Turkish-Tatar community in Romania on April 12, 1990. At the express request of this organisation, through the District 1 Tribunal of Bucharest, the organisation changed its name on July 23, 1990, to the Democratic Union of Turkish-Muslim Tatars in Romania.

III. Discrimination of Muslims (and by Muslims)

The major tensions concerning the Islamic perspective adopted by the Turkish-Tatar community and the newer vision promoted by a number of NGOs representing the immigrant and converted communities in Romania, who also aim at co-opting Turkish-Tatars in their sphere of influence, reflect the existence of two modes of identity construction. The first model, of the 'indigenisation' of the religious identity, specific to the Turkish-Tatar community, invokes regional particularities, historical continuity, and, most importantly, religious practice as modelled by local tradition, religion thereby constituting a personal choice with a strong ethnic and symbolic dimension. The ecumenism practised by the Muftiat, manifested through tolerance towards other denominations and religions, is repeatedly justified by reference to local history and this particular form of traditional Hanefism. Built on an axis of opposition, the 'Islamisation' model proposes as a fundamental element of the identity of the Muslim the religion (Islam), conceived here in its universal aspect, free from any ethnic, regional or national traditions. The discourse on 'Islamisation' focusses

on the identification of a unique and universal Islam that cannot be altered by these 'inauthentic' children, that is to say, autochthonous, rooted in the traditions of the Turkish-Tatars in Romania. Inherently, the control and exclusivity claimed implicitly or explicitly by the Dobrogean institutional discourse, end up being challenged, and the conflict is transferred, amplified, authenticated and justified in the religious register by invoking nominal common theological norms, but understood quite differently. The institution of the Muftiat is recognised and supported by the Romanian state and has managed to ensure the free practice of the Islamic religion in the context of a non-negotiable observance of the laws and provisions of a democratic, secular regime. The current Mufti, Yusuf Muraat, has reported in recent years on the inability of the legislature to oversee what is happening vis-à-vis immigrant Muslim communities, who came to study in the 1970s or open businesses, after 1990, as well as converts. Specifically, the grievances concerned only certain non-governmental organisations, registered as cultural and/ or humanitarian associations or foundations. These organisations would carry out mosque-specific religious activities, disseminating Islamic teachings through regular sermons, lectures, or published books, which, given their purely religious nature, should have been authorised by the Mufti. Some of them operate as different organisations, but are based on the same founding members and the same ideological orientation disavowed by the Mufti, considered to be incompatible with local Islam. It should be noted that other NGOs run by people from countries with Muslim populations have managed to collaborate with the Mufti and have not been caught up in this conflict.

IV. Application of Shari'a and its relationship to fundamental rights and human dignity

A. In labour law

Migrant workers in Romania have different experiences when it comes to abuse, exploitation and discriminatory treatment. Several have reported illegal behaviour related to individual employment contracts (not having a contract, having fewer working hours registered in the contracts or lower payment recorded in the contract, not being paid for overtime work or delays in receiving their salary) or cases of exploitation (for instance, having to work for longer than 12 hours per day with no weekly rest days). Job scarcity, low wages, lack of language proficiency, and lack of recognised academic degrees and other certifications often result in unemployment or employment without a legal contract and its related benefits and protections. As the population's attitude has become more intolerant towards immigrants, particularly Muslims, NGOs have pointed out that immigrants with more cultural and historical affinities with Romania (such as those coming from Moldova) are viewed as being more privileged than other groups in the labour market. This is also true for more educated immigrants and those who speak English.

A recent study on discrimination towards immigrants in Romania, which interviewed 30 third-country nationals, pointed out that some racist or xenophobic attitudes, especially towards individuals with a different skin colour or those coming from the Middle East, can result in limiting the immigrants' access to certain professions.[5] Also, persons interviewed who had or have small businesses (especially Arabs) complained about being targeted for controls by the Tax Inspectors.[6] Given the low number of immigrants interviewed and the lack of comprehensive data and studies on exploitation of migrant workers in Romania, we should be careful in drawing conclusions.

B. Shari'a and the rights of children and women

In recent years, Islamophobic and anti-immigrant articles and campaigns have appeared, especially in nationalist and tabloid media outlets, while the activities in cyberspace of anti-Islam activists and sympathisers of extremist political parties have continued to spread hate speech towards Muslims. Hate crimes and cases of incitement of hatred remain underreported. Few official complaints are made compared to the large number of people reportedly experiencing incidents of racial/ethnic or religious discrimination. Moreover, public authorities in Romania do not collect disaggregated data on hate crimes and other types of violence directed at immigrants. The most significant development affecting Muslims in education during the reporting period has been the legislative proposal launched by 26 MPs for banning face covering with any material that prevents facial recognition in educational institutions. At the time of writing this report, the proposal was still up for review in Parliament. In recent years, there have been no employment-related incidents recorded regarding Muslims. Studies have pointed out however that as the population's attitude has become more intolerant towards immigrants, particularly Muslims, immigrants who have cultural and historical ties with Romania are perceived as being favoured in the labour market.

V. Exercise of religious freedom and other cultural rights

A. The legal framework for the establishment and functioning of mosques

With regard to mosques in Romania, they operate according to the provisions of the statute on the Muslim religion, as approved by the state. It provides in Article 14 paragraph 1, that movable and immovable property belonging to the Muslim com-

[5] L. Lazarescu *et al.,* 'Discrimination, Abuse and Exploitation: Immigrants' Access to Civil Rights' (Între discriminare, abuz si exploatare. Accesul imigrantilor la drepturi civile), Oct 2015, p. 52 <http://sar.org.ro/wp-content/uploads/2015/11/DIM_Raport-cercetare_final_26_10_15.pdf>.

[6] L. Lazarescu *et al.*, 'The Impact of Immigration upon the Romanian Labour Market' (Impactul Imigrației asupra Pieței Muncii din România), Sept 2016, p. 100 <https://cdmir.ro/wp/wp-content/uploads/2018/12/EMINET_Raport-Impactul-migratiei-pe-piata-muncii.pdf>.

munities will be administered by the local committees of the mosques, under the control of the Muftiat.

Places of worship belonging to the Muslim communities in Romania come under 3 categories: a) mosques; b) geamis; c) mesgids. The mosques and the mesgids are established with the approval of the Muftiat and, according to Article 15 paragraph 1, shall be administered by their committees, under the control of the Muftiat. Places of worship may be used only for religious purposes. If there is a parish house, it will be used by the imam.

A special case is represented by the ‚Carol' Mosque and the ‚Hunkar' geami that are administered by the Muftiat according to Article 3 paragraph 1 lit. j of the status of the religion.

Almost 65,000 Muslims live in Romania, accounting for 0.34% of the total population. The presence and integration of Muslims in Romania remains, as with immigration as a whole, a marginal issue on the political and public agenda. National and international developments during the last two years have facilitated a growing trend of racism and discrimination in Romania. According to 2016 data, 84.6% of Romanians were against refugees or immigrants settling in Romania while in a 2017 study, 24% of respondents were against Arabs coming to Romania, a 6% increase compared to 2015. The so-called European refugee crisis and the government's decision to approve the building of a large mosque in Bucharest in 2015 were the most high profile and divisive issues concerning Muslims in the last three years in Romania. Protests against refugees and Muslims were organised by small nationalistic parties during this period and media coverage used stereotypical depictions of Muslims and overemphasized the 'Islamic threat.' We observe a general trend within centrist political parties to co-opt the Islamophobic discourse of right-wing political parties. The former president of Romania, Traian Basescu, proclaimed in a debate on a mosque in Bucharest that this was 'a risk to national security,' and argued that 'part of the Islamisation of Europe is building mosques everywhere.'[7] During a local council election in Bucharest in June 2016, several leading Bucharest mayoral candidates argued for a referendum on the mosque, amongst them the current mayor Gabriela Firea of the Social Democratic Party (Partidul Social Democrat – PSD).[8]

[7] C. Dinu, 'Băsescu nu vrea moschee la Bucureşti şi-l trimite pe Iohannis să se facă muftiu la Sibiu. România trebuie să rămână creştină' (Băsescu Doesn't Want a Mosque in Bucharest and Sends Iohannnis to Become a Mufti at Sibiu. Romania Must Remain Christian), *Gândul*, 26 March 2016, <https://www.gandul.ro/politica/basescu-nu-vrea-moschee-la-bucuresti-si-l-trimite-pe-iohannis-sa-se-faca-muftiu-la-sibiu-romania-trebuie-sa-ramana-crestina-15154001>.

[8] 'Firea: Moschee în Bucureşti doar după un referendum local/Orban: Nu voi autoriza moscheea lui Ponta', (Mosque in Bucharest Only After Local Referendum / Orban: I Won't Authorize Ponta's Mosque), *Euractiv*, 25 March 2016 <http://www.euractiv.ro/politic-intern/firea-despre-construirea-uneimoschei-la-bucuresti-doar-dupa-un-referendum-local-3920>.

B. Prohibition of Islamic rituals (e.g. slaughtering and Halal)

There is no special legal stipulation in Romania.

C. Education of Muslim pupils

The education of Muslim pupils takes place in the general framework of the education system in Romania. There are no special cases like in Western Europe.

D. Religious education of Muslims

Religious education is organised in the legal framework for the pupils who are members of the Muslim community, taking into account that Islam is a recognised religion in Romania.

Discrimination in educational institutions is rarely observed due to the small number of Muslims. However, some incidents were recorded when certain university lecturers made inappropriate comments on Islam-related matters. In October 2017, a professor of Political Science at the University of Bucharest was accused of discrimination after asking a Muslim student not to wear the Islamic veil during class. The professor has stated that he is determined to collect 100,000 signatures for a legislative initiative that will ban the symbols of any religion in public institutions.[9] The Turkish minority representative in Parliament, Husein Ibraim, has filed a complaint against the professor at the National Council for Combating Discrimination. In December 2017, a legislative proposal for banning face covering with any material that prevents facial recognition in educational institutions was launched by 26 MPs.

VI. Free speech and Islam

There were no major legal developments affecting the rights of Muslims in 2017. The most significant development was registered in December 2017 when a group of 26 MPs from three parliamentary parties (Partidul Miscarea Populara (Popular Movement Party) - PMP, Partidul Alianta Liberalilor si Democratilor (Aliance of Liberals and Democrats Party) - ALDE and Partidul National Liberal (National Liberal Party) - PNL) initiated a legislative proposal banning face covering with any material that does not permit facial recognition in educational institutions for the prevention of violence and terrorism. If this law passes, the burka, niqab or other clothing used to cover the face for cultural (religious or ethnic) or other reasons, save for medical purposes, will be banned

[9] 'Profesor de la Universitate, acuzat de discriminare la adresa unei studente musulmane' (University Professor Accused of Discrimination of a Muslim Student), *Ştirile ProTv*, 26 Jan 2018, <https://stirileprotv.ro/stiri/actualitate/un-profesor-de-la-universitatea-bucurec-ti-e-acuzat-de-discriminare-la-adresa-unei-studente-musulmane-ce-i-a-cerut.html>.

in educational institutions. Anyone does not comply with these rules will not have free access to schools or universities and could be fined up to 50,000 lei (10,000 Euro).[10] Critics of the proposal have pointed out that there are very few women in Romania who wear such coverings.[11] Furthermore, the president of the national equality body has stated that 'the association of the Islamic veil with terrorism is proof of hate speech against a minority culture in Romania'.[12] High-ranking politicians have made discriminatory statements about ethnic minorities in order to gain political capital during the reporting period. The national equality body, namely the National Council for Combating Discrimination (NCCD), has been active in addressing high profile discrimination cases and taking public positions against racist and populist conduct, thus significantly increasing its visibility. However, the NCCD so far has not developed a mechanism to monitor infringements of the legislation or compliance with its decisions. Hence, it is difficult to assess the effectiveness of its mandate and the effectiveness of its sanctions.

VII. Challenges posed by Islam in the traditional understanding and application of democracy and rights in Europe

A. Political demands stemming from Muslim communities? More than equal treatment?

Discussion of Islamophobic Incidents and Discursive Events, Politics. Discriminatory statements and negative attitudes towards Muslims were mostly related to discussions about the flow of refugees and their integration, and the building of a mosque in Bucharest. This topic gradually became less discussed during the reporting period and no new developments have been registered. During campaigning for the local elections in June 2016, leading Bucharest mayoral candidates argued for a referendum on the mosque. Mayor Gabriela Firea of the Social Democratic Party (Partidul Social Democrat, PSD), who won the elections, supported a referendum.[13] Politicians, including former President Traian Basescu, criticised the government's

[10] Chamber of Deputies, Legislative Proposal for the Modification and Completion of National Education Law no. 1/2011 (Propunere legislativa pentru modificarea şi completarea Legii educaţiei naţionale nr. 1/2011), 18 Dec 2017 <http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=16761>.

[11] According to Islamic studies expert Alina Isak Alak, there are only a handful of women wearing the Islamic veil in Romanian educational institutions. Another expert, Fatma Ylmaz, has pointed out that according to data received from the Ministry of Internal Affairs no person wearing the Islamic veil has been registered while issuing ID documentation. See: F. Iosip, 'Lege antiburka în şcolile din România: măsură pentru siguranţă sau o manifestare a urii faţă de islam' (Antiburka Law in Romanian Schools: Measure of Security or Manifestation of Hate towards Islam?), *Adevarul*, 22 Dec 2017 <https://adevarul.ro/educatie/scoala/lege-antiburka-scolile-romania-masura-siguranta-manifestare-urii-fata-islam--1_5a3bdf44d7af743f8d957e58/index.html>.

[12] Iosip, 'Lege antiburka în şcolile din România'.

[13] *Ibid*, [8].

decision to allocate an 11,000-square-metre plot of land in Bucharest to the Muslim community for the construction of a mosque. The former president called the mosque 'a risk to national security', also stating that the number of Muslims in Bucharest did not justify the mosque, and that 'part of the Islamisation of Europe is building mosques everywhere.'[14] Nationalist organisations such as the New Right (Noua Dreapta) sponsored street protests that were low in turnout and impact.

B. The Justice System

Based on the sources consulted, no information on racially motivated violence and incidents directed at Muslims came to light during the reporting period. Representatives of NGOs who were interviewed mentioned that public authorities in Romania do not collect disaggregated data on hate crimes or other types of violence directed at Muslims. The latest report by the Fundamental Rights Agency (FRA) also raised concerns about Romania's data collection activity when it comes to hate crimes. Of all the EU member states, Romania was the only one which does not collect data according to the alleged motivation of the crime (sex/gender, ethnic affiliation, sexual orientation, disability, etc.). The absence of information on hate crimes must be seen from the point of view of the authorities' obligations towards the victims of such crimes, and from the perspective of combating such phenomena.[15] The absence of any data collection on hate crimes on the part of the Romanian justice systems reflects the lack of interest in the phenomena. Although reports on the activity of the police, prosecution and courts are published each year, these documents do not include data on hate crimes.[16] The OSCE ODHIR's (Office for Democratic Institutions and Human Rights of the Organisation for Security and Cooperation in Europe) reporting on hate crime in Romania also illustrates the shortage of data. No information is available for 2017 while the only such incident recorded involving Muslims was the March 2016 assault on two young Muslim women in Bucharest for wearing the hijab.

C. The connection between Islamophobia and anti-immigration political movements and the adoption of anti-immigration policies and party manifestos

Romania features mostly as a country of emigration, making immigration a non-issue for political parties, which remain silent on the subject. Not being a Schengen

[14] *Ibid*, [7].

[15] EU Agency for Fundamental Rights, *Making Hate Crime Visible in the European Union: Acknowledging Victims' Rights*, 2012, p. 8 <http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf>.

[16] The lack of data collection was also highlighted by the Center for Legal Resources in its report 'Combating Guide for Hate Crimes Practitioners and Decision-makers' (2015). The report is available at <http://www.crj.ro/wpcontent/uploads/2015/01/Combating-hate-crimes.-Guide-for-practitioners-and-decision-makers.pdf>.

member state and being bypassed on the main migration route from Turkey to Central Europe, coupled with poor social services and a low income level, Romania is an unattractive destination for migrants. This is the main reason for the consistently low numbers of asylum seekers and third-country nationals. The presence and integration of immigrants in Romanian society remains marginal in political and public debates. According to data in the last Romanian (2011) Census,[17] 86.45% of the population declared themselves to be Eastern Orthodox, 4.6% Roman Catholic, and 3.19% Reformed Protestants. Muslims accounted for 0.34% of the population. Islam is one of the 18 registered religious denominations specified under Romanian law.[18] According to the 2011 Census there were 64,337 registered Muslims in Romania, 49,795 of whom were living in urban settlements. The largest Islamic community is that of Turks and Tatars: 20,561 Turks and 14,376 Tatars live in urban areas, and 6,342 Turks and 5,684 Tatars are registered in the villages of southern Romania. Most Muslims are located in the county of Constanta (43,279) and Bucharest (9,037). Although Muslims represent under 1% of the total population, extensive media reporting over the last two years on the European debate of the so-called refugee crisis, the terrorist attacks in European countries, and populist speeches by politicians have shifted the coverage towards underlining the dangers posed by immigrants. A 2016 survey indicated that over 84.6% of respondents were against refugees or immigrants settling in Romania.[19] Moreover, a 2017 survey on the perception of interethnic relations in Romania noted a significant increase in the percentage of Romanians who feel that Arabs should not come to Romania (24% in 2017 vs 18% in 2015).[20]

VIII. Conclusions: Preferences concerning the state model of co-existence between the secular state and Islam – Critique

The presence of Muslims in Romania remains a marginal issue on the political and public agenda. Although no major internal developments affecting Muslims have been registered during the reporting period, stereotypical portrayals of Muslims in

[17] National Institute for Statistics, '2011 Census–Religion', Oct 2013 <http:// ww.insse.ro/cms/files/publicatii/pliante%20statistice/08-Recensamintele%20despre%20religie_n.pdf>.

[18] Religious Freedom and the General Status of Religions, Law 489/2006.

[19] M. Bărbulescu, INSCOP Survey: 84,6% of Romanians Are against Refugees/Immigrants Settling in Romania (Sondaj INSCOP: 84,6% dintre români nu sunt de acord ca refugiații/ imigranții să se stabilească în România), Agerpres, 18 Apr 2016 <https://www.agerpres.ro/social/2016/04/18/sondaj-inscop-84-6-dintre-romani-nu-sunt-de-acord-ca-refugiatii-imigrantii-sa-se-stabileasca-in-romania-12-08-39>.

[20] Romanian National Institute for the Study of the Holocaust in Romania "Elie Wiesel", *Opinion Poll on the Holocaust and Perception of Interethnic Relations in Romania* (*Sondaj de opinie privind Holocaustul din România și percepția relațiilor interetnice*), Oct 2017 <http://www.inshr-ew.ro/ro/files/Kantar_TNS_ Raport_INSHR_2017.pdf>.

the media and populist speeches by politicians have facilitated a growing trend of incidents of intolerance and hate speech towards Muslims, as reflected in public discourse and opinion polls. Small, emerging nationalistic and populist parties have used Islamophobic discourse for electoral purposes. Their impact has been so far minimal but this type of political agenda could gain traction in the future, as reflected by the so called 'anti-burka' legislative proposal launched in December 2017 to ban headscarves in educational institutions. No significant incidents involving Muslims have been registered during the reporting period. The national equality body, the NCCD, has been active in addressing high profile cases of discrimination but few official complaints have been made compared to the large number of people reportedly experiencing incidents of racial/ethnic or religious discrimination. Devising special measures to assist specific minority groups and collecting disaggregated data on ethnicity in different areas should be addressed by the authorities. Based on the findings of this report, the following recommendations are, therefore, put forward: • Organise pre-departure programmes through partnership agreements between Romania and the migrants' countries of origin in order to provide information on Romanian labour legislation, relevant institutions and mechanisms to notify and sanction cases of abuse, exploitation and discrimination. • Devise a comprehensive data collection system on the application of criminal law provisions against racism and racial discrimination. Such a system would record the number of investigations opened by the police, the cases referred to the prosecutor, the number of cases pending before the courts, and their final decisions, broken down per reference year and per relevant criminal law provision. • Introduce measures to prevent and combat discrimination among immigrants in the national strategies for immigration and discrimination, such as information campaigns and raising awareness on discrimination and the remedies available when facing discrimination. • Initiate collaboration between competent authorities in the field of immigration, labour and institutions combating discrimination, in order to refine integrated public policies. • Sign cooperation protocols and set up efficient case referral mechanisms between state institutions and NGOs. • Implement a long-term monitoring mechanism to prevent ethnic and Islamophobic hatred in the mass media and cyberspace. • Improve mechanisms for recognising, recording and sanctioning hate speech. • Political parties and politicians should strengthen initiatives for cooperation with the Muslim community in Romania and highlight successful cases of Muslim integration.[21]

[21] All websites last accessed on 1 June 2022.

ISLAM AND HUMAN RIGHTS IN THE REPUBLIC OF SLOVENIA

Blaž Ivanc[1]

I. Introduction: the social framework

As of October 2020, Slovenia had a population of 2,111,461 inhabitants, with around 7,9 per cent of the total population being foreigners.[2] Data on the religious and denominational structure of the population were only gathered during 1991 and 2002 censuses of population (during the latter Census each respondent had the option of declaring their religious affiliation), both based on field research. The fact that a register-based population census in Slovenia fails to make provision for data on religious affiliation is a major obstacle to offering a deeper insight into the development of modern societies from this perspective. Thus, we are only able to observe a clearly increasing trend in the growth of the Muslim population in Slovenia from 29,361 (1,5 % of total population) in the year 1991 to 47,488 (2,4 %) in the year 2002. One may assume however that, two decades on from the last 'traditional' census, and after many migrants moved to Slovenia, mainly from Bosnia and Herzegovina, during this time, the number of Muslims in Slovenia has increased.

The first mosque in Slovenia was a small Sunni Mosque, erected in 1916 near the village of Log pod Mangartom (Municipality of Bovec in northwestern Slovenia). It was constructed – with the approval of the military authorities – by Bosnians soldiers that served in the Austro-Hungarian army. After the Bosnians soldiers returned to Bosnia, the building was left to deteriorate and was eventually demolished in 1920 by the Italian authorities. However, the first modern mosque in Slovenia's capital city, Ljubljana, was only constructed in 2020. Since February 2020, Muslim believers have been using the mosque for common prayers, though it was not officially opened to the public until June 2020.

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[2] B. Razpotnik, 'Population, Slovenia, 1 October 2020', *Statistical Office of the Republic of Slovenia*, 29 Jan 2021 <https://www.stat.si/StatWeb/en/News/Index/9347>.

Muslims in Slovenia, who almost exclusively belong to Sunni Islam,[3] constitute an immigrant community, whose members moved to Slovenia mainly from other republics of the former Yugoslavia. Only a small number of Muslims immigrated to Slovenia from other countries. The Muslim population in Slovenia is ethnically diverse. The vast majority of Muslims in Slovenia immigrated from Bosnia and Herzegovina and have declared themselves as Bosniaks (19,923), Bosnians (9,328) or *Muslimani* (the old term used during censuses before 2002 for the nationality of Bosnia and Herzegovina) (5,724). The second largest group of Muslim believers in Slovenia are Albanians (5,237), which mainly immigrated from Kosovo and North Macedonia. There are also Slovenians (2,804) and other ethnic groups (Roma, Montenegrins, and others) that have fewer than 1,000 members.[4]

Because Muslims are not a traditional religious and ethnic minority in Slovenia, they do not have a special representation in the national Parliament (the 1991 Constitution[5] only provides such representation for members of the Italian and Hungarian minority). There is no public data on religious affiliation of members of the Parliament.

Muslims in Slovenia do not tend to segregation. A vast majority of Muslims have successfully integrated into Slovenian society in all areas of life. A crucial factor for the integration is that they are mostly Slovenian citizens.[6]

II. Institutional recognition by the state

The Religious Freedom Act – RF Act (2007) guarantees that persons of the same religious belief have the rights to establish a church or other religious community to exercise their religious belief (Article 8), whereas all registered churches and other religious communities are legal persons governed by private law (Article 6 section 3).[7] Thus, the Islamic communities are entitled to acquire legal personality if they fulfil basic statutory requirements, which are rather low. Namely, just ten adult members,

[3] M. J. Osredkar, 'Teološki in kulturološki razlogi za islamski pluralizem v Sloveniji (Theological and cultural reasons for Islamic pluralism in Slovenia)' (2011) 71/3 *Bogoslovni vestnik*, pp. 357, 367 ff.

[4] M. Komac (ed), *Priseljenci: Študije o priseljevanju in vključevanju v slovensko* družbo *[Immigrants: Studies on Immigration and Inclusion into Slovenian Society]* (Ljubljana, Inštitut za narodnostna vprašanja, 2007), p. 525 (Table 8).

[5] Ustava Republike Slovenije (Constitution of the Republic of Slovenia), Official Gazette RS, Nos. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, and 75/16 – UZ70a.

[6] A. Pašić, *Islam in moderni zahod – integracija islamskih skupnosti v moderne zahodne* družbe *[Islam and the modern West - the integration of Islamic communities into modern Western societies]* (Kranj, Gorenjski glas, 2008), p. 77.

[7] Zakon o verski svobodi (Religious Freedom Act), Official Gazette RS, Nos. 14/07, 46/10 – odl. US, 40/12 – ZUJF, and 100/13.

citizens of Slovenia or foreigners with permanent residence in Slovenia, may apply for registration. In their application they must provide some basic data about founding members, representatives, description of religious belief, basic religious texts, fundamental act, and the establishment act.

In March 2021, there were three registered Islamic communities in Slovenia: 1. The Islamic Community in the Republic of Slovenia (*Islamska skupnost v Republiki Sloveniji* – ICRS), 2. The Slovenian Muslim Community (*Slovenska muslimanska skupnost* – SMC), and 3. The Slovenian Islamic Community of Mercy (*Slovenska islamska skupnost milosti* – SICM). The oldest with the largest membership is the ICRS, which was registered in 1976.

In July 2007, the Government signed the Agreement on the Legal Status of the Islamic Community in the Republic of Slovenia. The Agreement enshrines provisions that guarantee: freedom of activities, legal personality of private law, freedom to establish branches of the ICRS with their own legal personality, freedom of organisation, freedom to conduct religious and educational activity, freedom to form its structures and appoint persons to run them, freedom of access to public media and the establishment of own media, freedom to establish and maintain contacts with the Islamic Community in Bosnia and Herzegovina and with other Islamic communities in Slovenia or abroad, freedom to create associations, freedom to establish educational institutions, co-operation in preservation of historical and cultural heritage, general rights and religious activities in hospitals, nursing homes, the armed forces, the police and special institutions, and provision of equal status of Islamic charity organisations with other such organisations. Although the SMC and the SICM did not conclude a similar agreement, they enjoy the same legal guarantees due to the RF Act. According to Article 5 of the Agreement, the ICRS is traditionally connected with the Islamic community in Bosnia and Herzegovina. This provision is important not only for historical reasons, but also because the Statute of the ICRS provides that the ICRS is an integral part of the Islamic community in Bosnia and Herzegovina (Article 2) and its *Riaset* plays a decisive role in the dispute around the appointment of the mufti of the ICRS (Article 111).[8] In May 2005, the former mufti Mr. Đogić challenged the decision for not being re-appointed as mufti and initiated judicial proceedings. The Higher Court dismissed his application, because it had no jurisdiction. Subsequently, in 2006 the former mufti registered a new SMC that is not linked with the Islamic community in Bosnia and Herzegovina, and operates separately from the ICRS. The SICM was registered in 2018. It proclaims strict religious rules according to Wahhabism teachings. Thus, the SICM activities are not welcomed by the ICRS. We may conclude that there is not much cooperation between the three registered Islamic

[8] Decision of the High Court in Ljubljana No. I Cp 101/2006 (1 Feb 2006).

communities, because of great differences in regard of their position, membership operations and teaching. Some Muslims gather also in small associations of private law that are not registered as religious communities.

Self-financing is the most significant source of financing for all churches and religious communities in Slovenia. The RF Act provides that a religious community may be financed by donations and other contributions made by natural and legal persons and from their property as well as through the contributions of international religious organisations they belong to. They may collect voluntary contributions. The state may also provide material support if the activities of a religious community contribute to the benefit of all (Article 29).

The greatest financial challenge for the ICRS was the construction of the Islamic Religious and Cultural Centre (the mosque in Ljubljana is an integral part). Beside the donations of believers (around 4 Million EUR from believers in Slovenia and a similar amount from believers from Bosnia and Herzegovina) the main funding came from the State of Qatar, which contributed around 25,8 Million EUR (the whole investment cost around 35 Million EUR).

Slovenia is a secular state and must observe neutrality towards Islamic communities, which derives from the constitutional principle of the separation of State and Church that is enshrined in the Article 7 of the Constitution. The state must provide that churches and religious communities have equal rights and that they may freely pursue their activities. In principle, the state may not express an opinion on religious issues, and it may not interfere in the organisation and activities of Islamic communities except in cases laid down by the law, e. g. when a religious community conducts prohibited activities such as discrimination, incitement of religious hatred and intolerance or other activities proscribed under the Penal Code (see RF Act Articles 4 and 3).

The registered Islamic communities in Slovenia (ICRS, SMC and SICM) have not established any institutionalised body (e.g., Islamic Council) that could communicate with the Government due to historical, ideological, and operational disputes. It should be noted, however, that the ICRS issued common statements with some Christian churches or with the Council of Christian churches regarding the following issues: definition of the family and same-sex marriages and the issue of adoption (2010; with the Catholic church), opposition to the enactment of the draft Family Act (2012; with the Orthodox church and the Catholic church), and real estate tax and changes of the RF Act (2013; with the Council of Christian churches).

The Office of the Government of the Republic of Slovenia for Religious Communities made provisions for a dialogue with churches and religious communities, including Islamic communities for a longer period, from 1993 to 2020. In 2020, the Government dissolved the Office for Religious Communities (which operated within the Ministry of Culture), following criticism from the ICRS for the Council's work on the dialogue on religious freedom (the Council had been established in 2015 under the centre-left Government and replaced the Government's Commission for dialogue

with religious communities). The ICRS argued that the Council failed to address any of the open questions (e. g. social security contributions for imams and their legal status, special food requirements in schools, religious assistance in closed–type public institutions, boys' circumcision) and called for a real change. Subsequently, the new centre-right Government decided to abolish this model of dialogue and organised separate meetings with religious representatives of major churches and religious communities. In March 2021 the Prime minister met with the mufti of the ICRS. In 2021, the Government established a new Council to resolve open question with the Catholic church; it would appear that this approach might also be used in relation to other churches and religious communities.

III. Application of Shari'a and its relationship to fundamental rights and human dignity

In Slovenia, Shari'a law is only relevant for relations within Islamic communities. It does not, in principle, have effects on relations in society that are governed by the state law. This is also the case for the area of family law. The Family Code (2017) provides that, in marriage, the spouses are equal (Article 21), they must be of different sexes and have to declare their mutual consent to enter into marriage before the competent state authority.[9] A civil marriage is not valid if there are errors in the statement of their free will due to the use of force or serious threat, or if a marriage has been concluded with a person whose identity was wrong. According to the Article 24 of the Family Code, a child cannot marry. However, the state civil court may, for justified reasons, allow a child who has reached the age of 15 to be married if he or she has reached such physical and mental maturity that he or she can understand the meaning and consequences of rights and obligations arising from marriage.

Religious marriages have no validity under civil law. Churches and religious communities are not authorised to conclude marriages with civil validity. A religious marriage may be concluded before the civil marriage takes place.

Under Article 132.a of the Penal Code, a forced marriage, or a a similar forcible cohabitation constitutes a criminal offence for which the perpetrator shall be punished with imprisonment for up to three years. When such an act is committed against a minor or a defenceless person, the perpetrator shall be punished by imprisonment for a term not exceeding five years. Bigamy is a criminal offence according to Article 188 of the Penal Code, which determines that whoever is already married and enters a second marriage or enters into a marriage with a person who they know to be already married, shall be punished by a fine or imprisonment for not more than one year.

[9] Družinski zakonik (Family Code), Official Gazette RS, Nos. 15/17, 21/18 – ZNOrg, 22/19, 67/19 – ZMatR-C, and 200/20 – ZOOMTVI.

According to the provisions of Article 6 of the RF Act, the activities of (Islamic) communities must be in accordance with the legal order of Slovenia and known to the public. Consequently, the application of Shari'a legal rules must stay within the provisions of the State's Family and Penal law. In 2019, the High Court in Maribor upheld the decision of the 1st instance Court that dissolved the marriage of a Syrian couple. The marriage was concluded before the Shari'a court and the Slovenian court relied on the provisions of the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.[10]

The Slovenian Inheritance Act has no provisions that would explicitly provide for the implementation of Shari'a legal rules.[11] Deciding on inheritance is a matter that exclusively comes under the jurisdiction of the state court.

The Slovenian Labour law provides some accommodation for the use of religious rules. Namely, the Employment Relationships Act also accommodates differential treatment (based on one's personal circumstance such as religion or belief) if, due to the nature of work and the circumstances in which the work is performed, differential treatment constitutes an essential and decisive condition for work and is proportionate and justified by a legitimate aim (Article 6 section 5 ER Act).[12]

Although the (Muslim) boys' circumcision is not prohibited by a statute, the National Medical Ethics Commission, in January 2010, issued an opinion about this medical procedure and claimed that, in Slovenia the ritual circumcision of boys for religious reasons is ethically and legally unacceptable.[13] None of the three Islamic communities agrees with this opinion and demand that this issue should be addressed by the legislator.

IV. Discrimination of Muslims (and by Muslims)

The 1991 Constitution prohibits discrimination and guarantees equality before the law (Article 14), and prohibits incitement to national, racial, religious, or other discrimination. Inflaming of national, racial, religious, or other hatred and intolerance,

[10] Decision of the High Court in Maribor No. III Cp 360/2019 (16 Apr 2019).

[11] Zakon o dedovanju (Inheritance Act), Official Gazette RS, Nos. 13/94 – ZN, 40/94 – odl. US, 117/00 – odl. US, 67/01, 83/01 – OZ, 73/04 – ZN-C, 31/13 – odl. US, and 63/16.

[12] Zakon o delovnih razmerjih (Employment Relationships Act), Official Gazette RS, Nos. 21/13, 78/13 – corr., 47/15 – ZZSDT, 33/16 – PZ-F, 52/16, 15/17 – odl. US, 22/19 – ZPosS, 81/19, 203/20 – ZIUPOPDVE, and 119/21 – ZČmIS-A).

[13] Komisija Republike Slovenije za medicinsko etiko (The National Medical Ethics Commission), 'Načelno mnenje o etični nesprejemljivosti verskega obrezovanja dečkov (cirkumciziji)', 9 Jan 2010 <https://www.gov.si/assets/ministrstva/MZ/DOKUMENTI/KME/Uradna-stalisca/Stalisce-KME-o-eticni-nesprejemljivosti-verskega-obrezovanja-deckov-cirkumciziji.doc>.

and any incitement to violence and war are unconstitutional (Article 63). Consequently, the RF Act determined that the following acts are prohibited: 1. any incitement to religious discrimination, incitement to religious hatred and intolerance, 2. any direct or indirect discrimination based on religious belief, expression, or exercise of such belief (Article 3 sections 1 and 2). Muslims (and all other religious groups) in Slovenia must not be subjected to such treatment. At the same time, they may not initiate and conduct such activities. A broad protection against discrimination is provided by the Protection Against Discrimination Act (PAD Act), which harmonised Slovene law with the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2 December 2000, p. 23). According to Article 13, section 4 of the PAD Act there is an exemption from the prohibition of direct discrimination in the case of unequal treatment regarding employment[14]due to a person's religion or beliefs during professional activities in churches or other religious communities and public or private organisations, whose ethics are based on religion or belief and shall not constitute discrimination if religion or belief are a legitimate and justifiable vocational requirement for performing one's duties in such an organisation.[15]

Also, the RF Act provides for a difference in treatment based on religious belief in employment and the work of religious and other employees of churches and other religious communities. In cases when the nature of a professional activity of the Islamic (or other) religious community or the context in which it is carried out, the religious belief constitutes a major legitimate and justifiable professional requirement in respect of the ethics of churches and other religious communities, discrimination may be tolerated (Article 3 section 3).

The debate regarding the draft Family Act showed that Islamic communities in Slovenia to a great extent share the traditional views of the Catholic church concerning gender and sexuality issues. The State law does not regulate religious clothing. Religious exemptions are not explicitly enshrined in the Education law.

[14] The bill relates to the following situations of unequal treatment:
- determination of conditions for obtaining employment, self-employment, and profession, includingselection criteria and employment conditions, notwithstanding the type of activity or the level of occupational hierarchy, including promotion,
- access to all forms and all levels of career orientation and consulting, vocational and professionaleducation and training, further vocational training, and retraining, including internship,
- employment and working conditions, including termination of employment contracts and wages,
- membership and inclusion in workers' or employers' organisations or any organisation whose members perform a certain vocation, including benefits provided by such organisations.

[15] Protection Against Discrimination Act (PAD Act) (Zakon o varstvu pred diskriminacijo), Official Gazette RS, Nos. 33/16, and 21/18 – ZNOrg.

V. Exercise of religious freedom and other cultural rights

Although the construction of religious buildings was not impossible during the Communist period (1945–1990), it was strongly disapproved of by the state authorities. Nowadays, the RF Act provides for freedom of construction and use of premises and buildings for religious purposes under the provisions of Article 26, which reads as follows:

> '(1) Churches and other religious communities shall have the right to build and maintain the premises and buildings for worship service, other religious ceremonies and other gatherings and shall have the right to free access to them. (2) In new urban areas, particularly in housing and residential areas, the drafting of spatial planning documents referring to the design of such areas should take into consideration and by mutual agreement also adjust the needs, recommendations and interests of churches and other religious communities while observing the number of the Members of the church and other religious communities. The authors of spatial planning documents shall estimate the need for religious buildings in their draft documents. (3) Spatial planning documents … shall be duly supplemented or amended in reasonable time if there exists the interest and the need of churches and other religious communities present in the areas to which these spatial documents refer.'

Interestingly, the location for the construction of the first mosque was a matter of constitutional review. The Constitutional Court did not allow a referendum to take place on the location of a mosque, because of the unconstitutional goal, which – in the Court's opinion – was:

> '… to prevent members of the Islamic Religious Community from professing their religion, individually or in a community with others, in a building that is usual and generally accepted (i.e., traditional) for the profession of their religion and the performance of their religious rites'.[16]

In 2018, the Constitutional Court reviewed the constitutionality of the second section of Article 25 of the Animal Protection Act, which completely prohibited any slaughter of unstunned animals. In this case, initiated following a petition from the SMC, the Court, *inter alia*, argued that:

> 'Within the framework of balancing proportionality in the narrower sense, the constitutional weight of the benefits gained from the second paragraph of Article 25 of the APA is strong. The absence of the rule determined by the second paragraph of Article 25 of the APA in the legal order would signify that, by exception, unstunned animals can be slaughtered, which would expose animals to be slaughtered in such a manner so as to inflict additional pain, stress, and suffering from the moment their neck is cut to the moment they lose consciousness. On the other scale, however, access to halal

[16] Constitutional Court of the Republic of Slovenia, Decision No. U-I-111/04 from 8 July 2004), Official Gazette RS, Nos. 51/04, 62/04 (corr.), 77/04 and OdlUS XIII, 54 (Point 34 of the Reasoning).

> meat is rendered more difficult, which has additional weight in conjunction with the importance of the donation and consumption of such meat during the celebration of Eid-al-Adha in conformity with religious obligations. The consequences of the challenged provision for religious freedom are limited already due to its religious neutrality. Furthermore, access to halal meat is merely rendered more difficult for Muslims but not impossible. According to the first petitioner, the ritual slaughtering of animals during Eid-al-Adha can be ordered abroad.'[17]

Consequently, Muslim believers in Slovenia must import *Halal* food from other countries of the European Union or from abroad. Perhaps, at least an academic reader of the Court's judgment may not be completely satisfied with the argument from the above cited part of the judgment that strives to convince him/her on the very limited 'collateral damage' for individual and collective religious freedom of Muslim believers in Slovenia.

The education of Muslim pupils is provided in public or in private primary and secondary schools. However, segregated schools that would enrol Muslim-only pupils do not exist in Slovenia. Because the Parliament adopted an unwavering interpretation of the separation of State and Church principle in the domain of education, religious courses remain explicitly prohibited in all public schools under the provisions of Article 72 Education Act.[18] The Slovenian School Law lacks provisions that would accommodate the religious rights of Muslim children and/or their parents. The intention of the ICRS is to establish publicly recognised primary and secondary schools for Muslim pupils within the new Islamic Religious and Educational Centre in Ljubljana.

Religious education of Muslim pupils is only provided in private institutions that operate within the Islamic communities. Such religious education has no formal validity. The ICRS organises elementary religious education (*maktab*) in 20 Slovenian cities. Elementary religious education is also provided by the SMC and the SICM once per week.[19]

The Ministry of Culture co-financed the translation of the Quran's text from the Arabic original. The translation was published in 2014 but is not certified by Islamic communities.[20] The ICRS opposed the translation, and Slovene language experts were critical of the translation.

[17] Constitution Court of the Republic of Slovenia, Decision No. U-I-140/14 from 25 Apr 2018, Official Gazette RS, No. 35/2018 and OdlUS XXIII, 6 (Point 34 of the Reasoning).

[18] B. Ivanc and R. Torfs (eds), *Religion and law in Slovenia [International encyclopaedia of laws, Religion]* (Alphen aan den Rijn, Kluwer Law International, 2015), p. 147.

[19] U. Jeglič, 'Mekteb v Sloveniji (Maktab in Slovenia)' (2021) 76/1 *Edinost in dialog*, p 277-89 [288].

[20] M. P. Alhady (transl) and M Alhady (transl), *Korán: prevod iz arabskega izvirnika [Quran: translation from the Arabic original]* (Ljubljana, Beletrina, 2014).

VI. Free speech and Islam

The freedom of expression is a constitutional guarantee assured, *inter alia*, to individual Muslims and to Islamic communities (Article 39 Constitution). Islamic communities have not (yet) established their own radio or television that would operate as a public media.

The terrorist attacks perpetrated by Islamic fundamentalist abroad and the many immigrants, who were mainly passing through Slovenia, contributed to a more heated public debate about Islam over the last decade. One of the main topics was the construction of the mosque (in 2016, an unknown perpetrator threw pig heads at the mosque construction site twice). In May 2021, the Centre for Human Rights of the Human Rights Ombudsman in the Republic of Slovenia published an analysis of the actual practice as regards the prosecution of criminal offences of public incitement to hatred, violence, or intolerance under Article 297 of the Criminal Code (KZ-1) carried out by the Slovenian State Prosecutor's Offices in the period 2008–2018. The analysis of 145 cases shows that 115 cases were relevant, whereas in 7 cases the alleged criminal acts were directed against Muslims. In five cases, the prosecutor dismissed the complaint because not enough evidence of a criminal offence being committed was met. In one case, the prosecution of a perpetrator was postponed and replaced by the carrying out of community work (the perpetrator made hostile comments on Facebook directed against Bosnians in relation to the construction of a mosque). The perpetrator, who tried to burn the Koran in front of the Parliament building, received a six-month suspended sentence with a probation period of two years.[21] If a religious community, through the pursuit of its activities, seriously violated the Constitution, and incite national, racial, religious or other inequality, to violence or war, or inflame the national racial, religious or other hatred or impatience or prosecution, the Court may prohibit its activities. This may occur also in the case in which the purpose, goals, or manner of carrying out religious doctrine, religious mission, religious rites or other activity of a particular religious community is based on violence or uses violent means, endangers life or health or endangers other rights and freedoms of its members other persons in a way which severely violates human dignity (Article 12 RF Act).

[21] M. Horvat *et al.,* 'Kazenskopravni pregon sovražnega govora v Sloveniji po 297. členu Kazenskega zakonika (KZ-1): analiza tožilske prakse pregona kaznivega dejanja javnega spodbujanja sovraštva, nasilja in nestrpnosti v obdobju 2008-2018' (Criminal prosecution of hate speech in Slovenia under Article 297 of the Penal Code (KZ-1): Analysis of the prosecutorial practice of criminal prosecution acts of public incitement to hatred, violence, and intolerance during the period 2008-2018) (Ljubljana, Varuh človekovih pravic Republike Slovenije, 2021), p. 34 <https://www.varuh-rs.si/fileadmin/user_upload/pdf/Razne_publikacije/Sovrazni_govor_knjizica2.pdf>.

VII. Challenges posed by Islam in the traditional understanding and application of democracy and rights in Europe

The main expectations or demands made by the Islamic communities in Slovenia are related to the following issues:

- full implementation of the Agreement with the ICRS,
- financial support for imams who are not Slovenian citizens
- positive action of the state regarding the schooling system for Muslim pupils,
- more favourable legal regulation of ritual slaughter and Halal food requirements and availability of special food in schools,
- regulation of Muslim feast days,
- legal regulation of boy's circumcision,
- better access of imams to various public institutions.

Until now, Slovenia has not been among those countries that have directly experienced attacks motivated by Islamic fundamentalism on their own territory. This does not mean that the authorities should address security issues of security with less vigilance and seriousness. In 2019, the Government adopted the National Strategy for the Prevention of Terrorism and Violent Extremism, which perceives religious communities as necessary partners in the prevention of radicalisation and partners in the programmes for re-integration.[22] Because of the neutral position of the state, it is immaterial whether terrorist attacks are motivated by Islamic or Islamophobic fundamentalism that uses violence. The prevention of violent fundamentalism of any kind is a basic duty of the state, which derives from its constitutional goal to effectively protect human rights and values (Article 5 of the Constitution).

According to the Government's strategy on migrations, several persons that came to Slovenia as part of the refugee wave were checked for links with foreign terrorism; these suspicions were only confirmed in two cases where migrants were reportedly involved in terrorist attacks in the target countries.[23]

VIII. Conclusions

Muslims in Slovenia are well integrated into the society. The Slovenian state model of co-existence between the secular state and Islam is still evolving. First, this is true for Slovenian Islamic communities themselves. Noticeably, there are some open

[22] Vlada Republike Slovenije, 'Nacionalna strategija za preprečevanje terorizma in nasilnega ekstremizma (The National Strategy for the Prevention of Terrorism and Violent Extremism)', 2019, point 3.1.3 <http://vrs-3.vlada.si/MANDAT18/VLADNAGRADIVA.NSF/71d4985ffda5de89c12572c3003716c4/aa41ad1d42937a21c12584c8002fc448/$FILE/53svNacio.doc>.

[23] Vlada Republike Slovenije, 'Strategija Vlade RS na področju migracij' (The Strategy of the RS Government on migrations), 2019, p. 57 <https://www.gov.si/assets/ministrstva/MNZ/SOJ/STR17072019.pdf>.

issues that will have to be addressed by the legislator in due time. The lawmaker may find more appropriate solutions that accommodate the rules of the secular State and religious rules of Islamic communities. The state courts have not yet dealt with noticeable cases, which would result in new judicial case-law. In the past, the state policy towards Islamic communities has remained rather passive. This attitude could change, and this might lead to a more co-operative model. The state will have to put forward a new platform for a pluralistic religious dialogue and actively resolve open issues.[24]

[24] All websites last accessed on 9 Sept 2021.

THE LONG AND WINDING ROAD OF SPANISH ISLAM

Agustín Motilla[1]

I. The Social Framework

In relation to the number of Muslim people in Spain, we must consider the difficulties in providing exact numbers.

— First of all, statistics are based on the number of immigrants from Muslim countries. The Spanish Constitution does not allow asking directly for the religion of the person.

— Secondly, many Muslim immigrants are in Spain illegally (almost 60 % of Muslim population), and therefore they are not recorded by public authorities.

Despite this, we do have an approximate estimate of the number of Muslims in Spain through official statistics and scholarly studies. The 2007 Poll Census of the National Institute of Statistics gave the number of 769,826 Muslims in Spain,582,923 of whom from Morocco. If we consider both legal and illegal residents, other sources estimate that about 1,500,000 Muslims live in Spain. The *Andaluci Observaturium* 2020[2] report stated that two million Muslims were settled in Spain.

Whichever the case, it is certain that the Islamic religion is the second largest in Spain. In general, this is due to the increase in immigration of people from the Maghreb countries since the Eighties and, in particular, due to the right of family reunification since 1985. Muslims represent between 3 % and 4 % of the Spanish population.

Approximately 86 % of Muslim immigrants in Spain come from Morocco. Of the remaining 14 %, 43.7 % come from Algeria, 33.9 % from Pakistan and 10 % from Mauritania. There are about 6,000 Spanish converts to Islam.

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[2] Observatorio Andalusí, *Estudio demográfico de la población musulmana. Explotación estadística del censo de ciudadanos musulmanes en España referido a fecha 31.12.2019* (Madrid, UCIDE, 2020); 'Estudio Demográfico de la Población Musulmana 2019', *UCIDE*, 20 Feb 2019 <http://ucide.org/es/content/estudio-demogr%C3%A1fico-de-la-poblaci%C3%B3n-musulmana-2019>.

II. Institutional recognition by the State

In reference to the requirements for a church or religious society to obtain legal recognition in Spain, churches, denominations and religious communities and their federations acquire legal personality as a legally recognised denomination once registered in the Registry of Religious Entities [RRE] created for this purpose and kept at the Ministry of Justice (Article 5 (1) of the General Act 7/1980 of 5 July, of Religious Liberty [ARL]).[3] They may create and promote, to accomplish their purposes, associations or foundations that can acquire legal personality by being registered in the RRE (Article 2 (2) of the Royal Decree 594/2015 of 3 July, concerning the Organisation and Functioning or the RRE).

In order to register, it is necessary to present a constitutional document, duly authenticated, with the Statutes of the entity accompanied by several provisions. These include the denomination of the entity, address, religious objectives, rules of operation and representative organisms, and a list of names of persons who legally represent the organisation.

The number of churches, denominations and religious communities legally recognised in Spain has reached several thousand.[4]

The degree of co-operation with the religious denominations depends upon the degree of recognition by the State.

Religious denominations registered in the RRE enjoy some advantages in Spanish Law. For instance, penal protection of worship (Article 523 of Spanish Criminal Code), their ministers do not require working authorisation in order to live in Spain (Article 41(h) General Act 4/2000 of 11 January, concerning the rights and liberties of foreign workers in Spain), and their highest representatives do not have to declare in person as witnesses in military courts, as they can do it in writing (Article 173 (13) of General Act 2/1989 of 13 April, of Arm Forces Process). In order to enjoy the civil effects of religious marriage (Article 59 of Civil Code), it is necessary to be registered in the RRE and those persons who have, furthermore, the status of 'well established in the country' can sign a co-operation agreement with the State (Article 7 ARL).

In fact, the agreements allow religious denominations to reach full co-operation with the State. For instance, they can obtain special protection for places of worship, their religious officials may be granted social security and religious marriage may

[3] 'Churches, Faiths and Religious Communities and their Federations shall acquire legal personality once registered in the corresponding public Registry created for this purpose and kept in the Ministry of Justice.'

[4] The General Director of Relationships with Religious Denominations on 27 Nov 2008 issued the number of two thousand major denominations registered in the official Files. See Ministerio de Justicia, *Guía de Entidades Religiosas de España: iglesias, confesiones y comunidades minoritarias* (Madrid, 1998).

have civil status. Moreover, they are permitted to organise religious chaplaincies in public institutions such as prisons, hospitals or in the Armed Forces and to teach religious studies in public schools. Members may also carry out their religious duties in festivities and their artistic and historic patrimony is protected by the State.

Broadly speaking, only religious denominations with an agreement in force with the State enjoy a substantial and truly privileged status of co-operation in Spanish Law.

Spanish Islam is thus divided into numerous communities that are not well coordinated amongst themselves. It is hard to be precise as to the number of followers of each community because this information is not required of the RRE for registration.[5] More than one thousand Islamic communities are registered in the official files.

In 1989, the Spanish Government bestowed on Islam the status of 'well established in the country', and sought to sign an Agreement with the Islamic representative entity. Nevertheless, the Government decision had not taken into consideration the evidence available as required by the Act of Religious Liberty. These include the number of followers, the number of years that these communities had been established in Spain or the distribution of their communities in Spain. Indeed, the Government mentioned only the historical roots of Islam in Spain –present in Spain between 8th century to its official expulsion from Spain in the 17th century- and the contribution of this religion to the culture and the traditions of Spaniards.

Islam in Spain enjoys legal recognition under a co-operation Agreement that was signed in 1992. To the best of my knowledge, it is one of the first countries in Europe that has signed an agreement of this kind with Muslims.

In this sense, we can say that the so-called 'Islamic Commission of Spain' (further on ICS), the entity that signed the Agreement with the State, is the official body representing Islam. However, the problems begin at this point: the inoperativeness of the ICS has impeded the enforcement of the Agreements.

The ICS was created in 1992. It is a supra-federation that includes two other federations representative of the greater part of Spanish Islamic communities: the Spanish Federation of Islamic Religious Entities (FEERI) and the Union of Islamic Communities of Spain (UCIDE). In the preliminary contacts between the Government and the Islamic communities, the Government applied pressure on the communities to form a single federation. Due to the pluralistic configuration of Islam in Spain, the Spanish Government did not wish to sign a great number of agreements but only one with a single representative body.

Consequently, the ICS is merely a cosmetic institution charged only with the administrative functions assigned to it by the Agreement, whereas the true representa-

[5] Art 6 (2) of Royal Decree 594/2015 permits the denomination to mention in its foundation documents the number of followers of the entity to be registered.

tive bodies of Spanish Islam -or of a great part of it- are the Federations. This has meant that the tasks of the ICS have been completely paralysed. For a long time now, the ICS has neither issued a single certificate nor ruled, nor intervened in other tasks within its competence under the terms of the Agreement. In practice, the representative bodies that have been functioning were the single federations –the FEERI and the UCIDE- and not the ICS.

What have been the reasons for ICS's shortcomings?

The ICS was constituted as a supra-federation over the FEERI and the UCIDE. Both federations had an equal power inside the ICS. As a result, originally there were two Secretaries and the same number of representatives from each federation in the Standing Committee. Furthermore the acts of the ICS to enforce the Agreement needed to be signed by the two General Secretaries.

The lack of understanding and the personal friction between these have had serious consequences. There has been a continuous conflict between the two federations belonging to the ICS and, especially, between the two Presidents. This has practically paralysed the functioning of the executive committee of the ICS, creating several controversies:

Firstly, many of the Islamic communities recently established in the country and registered in the RRE are not part of the ICS and therefore do not enjoy the legal advantages of the Agreement and particularly the tax exemptions [despite both the FEERI and the UCIDE being run to gain the support of new communities and thus achieve power within the ICS; at present, 590 belong to UCIDE and 477 to FEERI].

Take for example Catalonia, which is the Spanish region with the highest number of Muslim people. It has created a singular framework of Islamic communities out of the national one. What is known as the 'Consell Islamic de Catalunya' is constituted by most of the communities. The 'Consell' is the main representative body of Islam and has developed a special relationship with the regional Government; in 2002 the Consell signed an Agreement with the 'Generalitat de Catalunya'. In exchange for financial incentives from the Generalitat, the Consell committed itself to teaching the Catalonian language to its members and to issue publications in this language. The aim is integration into the cultural and national context.

In 2011 more than 30% of the Islamic communities of the RRE were outside the ICS, forcing the Spanish Government to intervene. A Royal Decree for initiating the incorporation of new communities in the ICS was approved.[6]

Regarding the second problem of the ICS, it has neither issued a single certificate nor ruled nor intervened in other tasks falling within its ambit under the ruling

[6] Royal Decree 1384 of 14 Oct 2011, applying Art 1 of the co-operation Agreement with the ICS. In my opinion, the Government ruling is against Art 1 of the Agreement and violates, as well, the religious Federations' autonomy.

of the Agreement. I will give one example. Over a number of years the educational authorities were unable to provide the names of the teachers of Islamic religion in public schools because each federation had presented separate lists. Even today in 13 Spanish Regions there is no consensus on the proposal of teachers of Islamic Religion in public schools!

From 2006 until 2015 Tatary (President of UCIDE) and Benjelloun (President of FEERI) were unable to reach an agreement on the functions of the ICS. Certainly, the problems multiplied. In 2015 the Government threatened both secretaries that a new statute would be imposed by law. In fact, such a project for this was drafted by the Direction of Religious Affairs. The aims of the project were the democratisation of the ICS –through the representation of all the communities in the governing bodies- and the fostering of decision-making among the ordinary management: this created a single position of president. FEERI was strongly opposed to the State's intervention. Despite this, the FEERI President, Benjelloun, agreed to meet Tatary and find a solution. In September 2015 they agreed the partial reform of the ICS Statutes. Both Secretaries were overlooked and a new President was put in charge of the Commission, Tatary being elected as President-; a new Permanent Commission, which reflects the number of communities inside the ICS, was elected. Both undertook to present a new Statute within six months.

Lamentably these actions were not the end of the internal disputes of the ICS. Afterwards, Benjelloun and the FEERI felt deceived and betrayed by Tatary and the UCIDE -which currently controls the ICS –with the Government's blessing-. The FEERI filed a complaint against the proceedings before the Spanish courts of justice. The announcement of the court's decision is still pending.

On this point, it should be underlined that the Spanish Government's intervention to resolve the quarrels inside the ICS by proposing a new Statute, which would have granted the leadership of this supra-federation to the federation with the most communities or persons, runs, in my opinion, contrary to freedom of religion and the autonomy of religious entities. The problem of communication inside the ICS must be resolved by the member communities themselves.

On the other hand and in defence of the Spanish Government, we could mention some actions to enforce the Agreement or to benefit Islamic activities (all denote sources of public financing of Islam).

— The Agreement between the Spanish Government and the ICS with regard to the State financing of Islamic teachers in public schools, approved by Resolution of 23 April 1996. According to this, if more than ten students ask for Islamic religion in each course or level of education, the ICS shall propose the names of several teachers and the educational administration chooses one of them. The teacher is then appointed by the educational authorities, signs an annual contract with the school and is paid as an interim teacher.

— The imams and the representatives of the communities belonging to the ICS are protected by the Social Security system. As stated by the Royal Decree of 10 February 2006, they are considered employees of the communities which should pay the main part of the Social Security.
— Regarding religious chaplaincy in the prisons, the Royal Decree of 9 June 2006 establishes the conditions of the imams and ministers of other denominations to be authorised to enter prisons.
— A public Foundation called 'Pluralism and Living Together' under the Minister of Justice, covers the cost of printing Islamic religion books that studied in public schools.

III. Application of Sharia and its relationship to fundamental rights and human dignity

Muslims in Spain may apply *Sharia* law when carrying out family and business activities within the context of family Law, since it concerns their free will, provided it does not exceed the limits of Spanish public order, i.e., without violating the vital institutions and basic rights established in the Constitution. Specifically, a marriage performed according to Islamic Law will be valid with civil effects, '… if the parties meet the capacity requirements set out by the Civil Code' (Article 7 of the cooperation Agreement with the ICS). Following the reform bill of 2015 law[7] which amends paragraph 3 of Article 7, each future party must obtain a certificate of capacity which certifies the meeting legal requirements prior to the wedding. Once this is obtained, the imam will take the certificate of capacity to the wedding so that it can be registered in the Civil Registry. According to the principle established by the Constitutional Court, the legal force of the marriage is subject to this registration: one that is not registered does not confirm capacity and thus, the marriage is considered invalid in Spain. Therefore, registration is a *conditio sine qua non* for civil effects.

When family activities and businesses are carried out in Islamic countries by nationals of those countries who later emigrate to Spain – a frequent occurrence given the high rate of Muslims who retain their original nationality – there is a tendency to be flexible regarding public policy of the jurisdiction, thus guaranteeing people's basic rights. This is reflected in two areas:

1. Spanish Law determines which law is applicable in each case (Spanish or that of the foreigner's country of origin -- which favours the Islamic immigrants' cultural identity) when there is a choice between that of the residence or domicile. This allows foreigner to invoke Spanish law. For example, it allows women to

[7] Ley 15/2015 of 2 July 2015, de Jurisdicción Voluntaria. Vid., its development, by Order JUS/577/2016 of 19 April 2016, regarding inscription in the Civil Registry.

invoke the *lex fori* even though their personal law may not afford them equality in the case of dissolution according to the family codes in Islamic countries- (Article 107 (2) del Cc). [8]

2. The 'soft application of public order', by which certain effects of foreign Law contrary to national public order are accepted in order to avoid negative consequences for the 'weaker members' of the relationship, that is, the children and the woman. Examples of those situations are the effectiveness relative to Spanish legislation and jurisprudence granted to institutions accepted in Islamic Law but contrary to the local law such as polygamy and repudiation or unilateral dissolution of the marriage by the man. In the case of polygamy, the right to a pension for each widow is recognised, with the pension being divided equally among the wives. [9] In the case of the effects of unilateral repudiation, these are recognised in Spanish Law under certain conditions: when a public authority intervenes throughout the procedure that lead to the dissolution; safeguarding of the wife's will and the degree of acceptance of the dissolution she demonstrates – the principle of autonomy-. In addition, the guarantee of the upholding of the woman's rights and her position of equality must be guaranteed. [10] Once the separating effect of the sentence of foreign divorce is established, the Spanish courts carry out a rigorous monitoring of its indirect financial and parental effects, in order to ensure that the woman will receive sufficient alimony and will continue to exercise parental rights over the children she shares with the father.

A. **Inheritance Law**

With regard to Inheritance Law, under Spanish law the national law of the deceased at the moment of his or her death is applied. This may mean that acts or judicial decisions from third countries that derive from the principles of Islamic Sharia Law may have effects in Spain. In any case, as above, by invoking public order a limit is placed upon any act that would be contrary to basic rights or that discriminate on the basis of religion, affiliation or sex. [11] This clause generally prevents certain provisions of Islamic Law from having civil effects. Examples of such include: hereditary succession in cases of apostasy [12], the reciprocal prohibitions on inheriting ab intes-

[8] In accordance with Organic Law 11/2003 of 29 Sept 2003.

[9] This is stated in the Supreme Court Sentences of 24 Jan 2018 and 17 Dec 2019, under the terms of the Agreements with Morocco (1979), and with Tunisia (2001).

[10] Vid., Supreme Court Sentence of 25 Jan 2006.

[11] Recognized limit in the applicable regulation, Ley 29/2015, regarding international legal cooperation in civil matters.

[12] Art 657 of the Cc establishes death and a judicial declaration of death as the only causes.

tato of Muslims and non-Muslims; the prohibition of children considered illegitimate from inheriting from their parent; or the Sharia rule by which the percentage inherited by males is twice that inherited by women with equal degrees of parentage with respect to the deceased (although in this final case the same result can be reached by raising the amount inherited by male offspring and descendants using the third part that can be freely assigned to increase the legally required inheritance and the third part that is freely assigned).

B. **Labour law**

In the area of Labour Law, the Agreement with the ICS refers to the issue of the right to time off from work and religious holidays. Article 12 of the Agreement establishes the right of Muslim employees to have a break from their duties on Fridays between 13:30 and 16:30 for collective prayer; to end their workday one hour before sunset during the month of Ramadan; and to substitute national holidays (which are mostly Christian in origin) for Islamic ones, each being paid and not to be made up at another time; the Article then lists the six main Islamic feast days to be included. In all three cases, an agreement must be reached with the employer, which makes for a weak guarantee given the power the employer wields in the relationship. The fact that there is no right to time off for religious holidays and prayer breaks for Muslim workers explains why the courts have not addressed their claims demanding that their right to religious freedom be respected[13] and that agreements have rarely been reached. In only one city with a large Muslim population[14] or in one sector, such as agriculture, do the collective agreements in some regions of Spain recognise religious holidays or the adjusted schedule of the workday during Ramadan.[15]

[13] The Madrid Supreme Court, Social Chamber, in a Sentence of 27 Oct 1997 found that such loyalty and good faith were missing in the case of an employee hired as a shop assistant for a duty free *boutique,* belonging to Aldeasa, in Madrid's Barajas Airport. One month after being hired, having never revealed her Muslim faith and the work requirements that derived from her religious beliefs, she sent a letter to management laying out a series of requests. Among other demands, she asked to absent from her post for three hours for collective prayer every Friday afternoon and to end her shift one hour before sunset every day during the month of Ramadan. The Court denied her petition, noting that the employee had not acted with loyalty and in good faith, '...consisting in – what the claimant did not do – when applying for the position was to indicate beforehand her religion and the special work schedule it implied, so that the future employer could consider whether that special situation could be accommodated in their specific infrastructure...' (F.J. 2º).

[14] In the city of Ceuta, in the Collective Bargaining Agreement for Metalwork, Construction and Hostelry.

[15] Thus, the Collective Bargaining Agreement for Fieldworkers Sector of the Balearic Islands, starting in 2003.

IV. Discrimination of Muslims (and by Muslims)

The situations which, in my opinion, have most clearly entailed possible cases of discrimination based on Islamic beliefs were those caused by the religious attire donned by women: the Islamic scarf or *hijab* and the complete covering (*niqab* and *burqa*).

With regard to the first, the *hijab*, it should be noted that the controversies raised by girls wearing the Islamic scarf have actually been very rare. The general view is that young Muslim women attend school with this garment (in the city of Melilla up to 50 % of the female students wear them), without any problem whatsoever. Whenever there have been issues, they have been resolved through negotiation.[16] In the cases where there was a conflict between the school's rules that prohibit garments that cover the head, the educational Administration has given priority to the student's right to an education over the school's internal regulations. If the problem arose in a subsidised private school, the solution consists in facilitating the student's enrollment in a local public school.[17] If the situations occurred in public schools, the corresponding Regional Department of Education usually rules that the student will attend school with the *hijab*.[18] Only in situations that lead to non-attendance in classes where wearing the Islamic scarf would be incompatible with the activity, for example in specific physical education classes or in laboratories, would the right-obligation of the student to regularly participate in those classes take priority over the right to religious freedom.

In the case of the *niqab* and the *burqa*, which was prohibited in public spaces in several municipalities in Cataluña,[19] the Supreme Court issued a ruling on 14 February 2013, which annulled those municipal ordinances because, among other issues, it found that the local councils had exceeded their competencies when regulating aspects of basic rights – to wear certain clothing for religious reasons- protected by the Spanish Constitution.

V. Exercise of religious freedom and other cultural rights

A. Establishment and operation of mosques, places of worship and cemeteries

Article 2 of the Agreement with the ICS defines mosques and places of worship as those buildings exclusively dedicated to Islamic prayer, religious teaching or religious

[16] For example, in the case with arose in a government subsidized private school in El Escorial (Madrid) the School's managing board reached an agreement with the student Khadira Aharran so that she can make her way to school with her headscarf and then inside the school wear the school uniform without the scarf.

[17] Thus, in the case of Fatima Elidrisi, in El Escorial (2002).

[18] The cases of Shaima (2008) and Najwa Malha (2010).

[19] For example, Lérida, Barcelona, Tarragona, Mollet del Vallés and Santa Coloma de Gramanet (Provincia de Barcelona), Cunit (Tarragona), Balaguer and El Vendrell (Lérida).

assistance. It is the responsibility of the ICS to certify, when requested by the property owner, the quality of the Islamic place of worship. Upon certification, the Agreement recognises certain guarantees and fiscal benefits: inviolability, pronouncement of the ICS before a forced expropriation, exemption from real estate taxes…[20]

It is estimated that there are twelve newly constructed mosques in Spain, built according to the principles of Arabic architecture.[21] These buildings house, in addition to their prayer rooms, areas for Islamic education and a variety of services. There are also numerous prayer centres,[22] generally found in storefront in areas outside the cities. The establishment of both types of centers initially met with the neighbours' opposition to having them near their homes. In any case, the general criteria have been to apply general zoning regulations to Islamic places of worship, which is to say having them built in land designated for infrastructure, public services and facilities, require building and operating licenses, etc.

In the Agreement, Islamic cemeteries are treated, for all intents and purposes, like places of worship, given the importance that the moment of passing on to another life has for this religion. The Islamic communities own some cemeteries to be used exclusively for the burial of members of their faith.[23] On most occasions, however, they are given sections of the municipal cemeteries in the cities where they have a large population: Madrid, Barcelona, Zaragoza, Valencia, Granada, Ceuta and Melilla…

B. **Food regulations (ritual sacrifice and halal food)**

Article 14 of the Agreement contains a series of regulations that are intended to make it easier for Muslims to fulfil their obligations with regard to food, which are very important in Islam. These regulations allow them to preserve the state of purity that every believer must maintain.

— It gives the ICS the authority to certify that food is prepared according to Islamic law; the *Registro de Marcas* (Trademark Register) will issue the *halal* label to this effect. Due to the problems with the workings of the ICS, a community, *la Junta Islámica* (the Islamic Board -an association that is part of FEERI-), has charged with the task of creating el *Instituto Halal* (the Halal Institute) which certified products that are fit for consumption by Muslims.

— It allows that animals be sacrificed, while observing Spanish sanitary regulations, by draining the blood from the veins without any previous blow to the

[20] Art 11(3) (a) of the Agreement.

[21] In Madrid (2), Valencia, Andalucía (3), Ceuta (4), Melilla (2).

[22] From 800 to 1000.

[23] In Griñón (Toledo), Granada, Sevilla, Ceuta, Melilla…

head to reduce suffering, in accordance with the religious ritual, and it may only be carried out by the person designated by the Islamic authorities.[24]

— It establishes that in public establishments (prisons, military bases, educational centres) an effort will be made to provide food that meets Islamic religious principles. Therefore, the enforcement of this law is left to the discretion of the Administration, with Muslim prisoners having no objective right to demand it. Only some autonomous communities, such as Madrid, are committed to serving halal food in hospitals and schools with a significant number of Muslim patients or students.[25]

C. **Muslim religious education**

The Agreement with the ICS establishes the right of Muslim parents to have their children receive Islamic education in public and government subsidised private schools [in the case of subsidised private schools, this is only applicable when such teaching would not contradict the orientation of the school (Article 10)]. Aspects that should be highlighted are:

— Islam education is taught as an extracurricular activity, outside the regular mandatory curriculum (unlike Catholic religious education, which falls within the mandatory curriculum).

— The course contents and textbooks are proposed by the ICS and approved by the Ministry of Education. An Order of 1996[26] approved the curricula for Islamic religious education at the different educational levels. In 2006 the textbook "*Descubrir el Islam*" ("Discovering Islam") was published. It was the result of collaboration between the UCIDE and the public foundation "*Pluralismo y Convivencia*", which financed the book's publication. It is the first textbook on the Islamic religion written in the language of an EU country (Spanish).

— Teachers are appointed by the ICS. Under Resolution of 23 April 1996, which approves the Agreement on the economic arrangements of teaching staff, the Government will provide ICS with a certain number per class hour taught whenever more than 10 students of the same or different grade level request Islamic religious education. Beginning in 1998 that statute on religious education teachers was unified by an Agreement: these teachers would be directly hired by the educational Administrations and, therefore, receive a salary. Currently

[24] According to RD 54/1995 of 20 Jan 1995, which transposes the EU regulation contained in Directive 93/119/CE of 22 Dec.

[25] Clause 3(e) of the Bargaining Agreement between the Autonomous Community of Madrid and UCIDE, 3 March 1998.

[26] Of 11 Jan 1996.

there are approximately 80 Islamic religion teachers working in the various autonomous communities with greater Muslim populations.[27]

— Paragraph 6 of Article 10 of the Agreement mentions the right of ICS and the communities that make it up to direct educational centres with an Islamic orientation. Up until now, no such centre, private or subsidised, of this type has been founded: indeed, there are schools in Madrid that are affiliated with the embassies of some of the Islamic countries (such as Saudi Arabia), that function outside the Spanish educational system as authorised foreign schools.

VI. Free speech and Islam

With regard to the relationship between Muslim believers and the rest of the population, or in relation to other churches and religious societies in particular in the country, the terrorist attacks of Madrid (March 2004) and Barcelona (August 2017) have hardened the attitude of the Spanish population towards Muslim immigration. In data published by the Royal Institute "*El Cano*" (from 2006 until present) the Islamic religion is perceived in the most negative light by the Spanish people. Indeed 57% think that Muslims are violent. Moreover, the number of people in favour of deporting those immigrants from Morocco from the country was three times greater than in 1996. That said, no legal cases on defamation, hate speech and intolerance have been reported.

However, a very small number of imams have been investigated and convicted for fomenting gender violence. In 2004 the imam of the mosque in Fuengirola was found guilty[28] of incitement to violence against women while, in his book '*La mujer en el Islam*', ('Women in Islam') he justified women being physically abused by men by citing verses from the Quran. Later, the imam of Tarrasa was investigated for a hate crime because of his preaching in favour of violence against women, and the imam of Cunit (Tarragona) was convicted for threats and coercion against a municipal mediator who was not wearing an Islamic headscarf. The underlying problem with many Islamic leaders is the lack of a democratic education: the majority are Moroccans who speak very little Spanish and preach the very conservative *maliki* type of Islam in their mosques; worse still, some are sponsored by the Saudi regime and present one of the most extreme fundamentalist interpretations of Islam, known as *wahabism.*

[27] By far, the most teachers are hired in the Autonomous Community of Andalucía (23), and the Autonomous City of Ceuta (14) (Vid., Observatorio Andalusí, *Estudio demográfico de la población musulmana,* pp. 10-11). In contrast, and despite the number of children and teens who are enrolled, Catalonia has not hired any; however, for the 2020-2021 academic year the Generalitat (Catalonian government) has begun a pilot project to offer Islamic Religion classes in some public schools in Barcelona, Bajo Llobregat, Gerona and Tarragona (Daily newspaper '*El Periódico'*, 2 Sept 2020).

[28] Sentence of 12 Jan 2004 Criminal Court nº 3 of Barcelona.

VII. Challenges posed by Islam to the traditional understanding and application of democracy and rights in Europe

The Report of the UCIDE (one of the two national federations of Islamic communities) has been published every year since March 2007 denouncing the so-called "islamophobia" of Spanish society. It reflected the following facts: the difficulties in constructing Islamic mosques in Spain; the harassment by Spanish police of imams when investigating information on Islamic terrorism; the lack of facilities that employers give to Muslim workers who want to observe religious festivities; and the lack of Islamic Religious teaching in public schools, where most of the students -about 90 %- cannot choose the subject in their school. With regard to relationships with the Roman Catholic Church, the Report complains of the reluctance of ecclesiastical authorities in allowing Muslim believers to pray within Catholic chapels. The most controversial aspect of this matter has been the refusal of the Bishop of Cordoba to allow Muslims to pray inside the Cathedral (which once was the famous Great Mosque of Cordoba).

A. Radicalisation and security

Security against Islamic terrorism as a real threat to western society has justified those countries affected by these terrible acts, in adopting emergency measures –in the sense that they go beyond the normal boundaries of political action- to eradicate them. Generally speaking, they focus on increasing government powers of surveillance of individuals or groups operating inside the country: communication, financial transactions of associative activities, bank data, immigration, etc. Consequently, several fundamental rights are affected: the right to free speech, the inviolability of one's residence, privacy -especially regarding communication-, freedom of assembly … and, due to the nature of the goals followed by these groups under suspicion –*jihadists*-, the right of religious freedom.

Anti-terrorist laws were brought in western countries, amending old ones or promulgating new texts. In Spain, the terrorist laws implemented against the Basque Country conflict and ETA are employed.

Enforcing the law is taken extremely seriously in the Spanish Supreme Court jurisprudence.

It has been firmly established that individuals and organizations that justify violence and *jihad* against interests, goods or people frequently use the *Internet* to recruit followers and broadcast their messages. This situation raises a question that is key in pluralist-democratic societies, that of the limits of freedom of expression. Established principles, for example, that of the Supreme Court's Ruling of 12 April 2011 regarding the dissemination of ideas promoting genocide, is that freedom of expression in a democratic system also safeguards ideas outside of the political system, within the limits of respect for others, and the concept of Penal Law as the *ultima ratio* of the

Rule of Law. Provocation is an illegal act, whether it constitutes indirect incitation to carry out acts against groups or individuals due to their race, religion or other personal condition, or if there is a danger that it will generate a hostile environment that leads to those acts of violence or hate. These are the cases known as glorification of *jihadism* or terrorist indoctrination.

In the cases raised by the Supreme Court's Ruling of 29 March[29] and 5 July 2017[30] the sentence imposed by the National High Court for the crimes of glorification of terrorism and indoctrination. Several individuals were sentenced for uploading videos and propagandistic documents in support of *Daesh* on social media, including some which depicted executions carried out by that terrorist group and commentaries praising those acts and humiliating the victims. Their goal was to impose Islamic law in the West and in Arabic countries by means of terror. The High Court states categorically that to promote or encourage, even indirectly, actions that put people or the system of freedoms in danger cannot be protected by the rights of freedom of expression or information. The Court also rejected any appeals and upheld the court's sentences *a quo* in each of the resolutions which sentenced the accused for the more serious crimes of membership of a terrorist organisation, (the Ruling of 26 April 2017[31] finds that the subject constituted a jihadist group in Spain and collaborated with *Al Qaeda* through financing and recruiting new members, using social media) and recruitment and indoctrination of subjects for terrorism (stated in the Sentence of 5 October 2017,[32] the convicted individual recruited women, who he convinced to travel to Syria and join Daesh). Many other cases have been dealt with based on these criteria.

On the other hand, the Supreme Court's ruling in the Sentence of 15 November 2017,[33] was acquittal. In this case, the court takes into account the accused's plea and considers that a simple comment on *Facebook*, clicking a "like" on the Islamic State's *webpage* and keeping texts and images with *jihadist* propaganda on one's cell phone is not sufficient proof to find someone guilty of the crime of terrorist indoctrination. Such acts do not constitute that crime if there is no recruitment or incitement of violence.

In 2015 the Interior Ministry drew up the first National Strategic Plan against violent radicalisation, mainly aimed at combatting jihadist terrorism, and establishing

[29] Nº 221/2017.

[30] Nº 512/2017.

[31] Nº 297/2017. The convicted individual was a prisoner in Guantanamo after being capture in Afghanistan. He was transferred to Spain during Obama's presidency.

[32] Nº 655/2017.

[33] Nº 734/2017.

a series of actions to be taken. These included all the Administrations and, mainly, the State Security Forces, in cases of detection of activities involving radicalisation.[34]

The suppression of Islamic terrorism goes hand in hand with "soft" measures of prevention of radicalisation. We may point out some of these in the Spanish arena. First of all, the surveillance of imams and their influence on believers:[35] imams performing Islamic chaplaincy in prisons must be authorised by the Spanish Government.[36] Secondly, the State´s financing of the publication of Islamic Religion books which are studied in public schools. In this last example the *nihil obstat* of public authorities was required before publishing it.

B. The connection between islamophobia and anti-immigration political movements or adoption of anti-immigration policies and party manifestos

During the last general election only one national party included in its platform a series of measures specifically aimed at combatting what it considers Islamic fundamentalism. That party is *Vox*, an extreme right wing party similar to movements that have arisen in other European countries. Points 22 and 25 of the *Vox platform* are part of what the party calls its '100 urgent measures'.[37] Standing out among them are the ideas of stopping immigration from Muslim countries and giving priority to immigrants who are closer to the Spanish culture – referring to Latin Americans without saying so directly-, closing fundamentalist mosques and expelling fundamentalist imams, limiting their financing by countries that promote *wahabism* (Saudi Arabia) or *salafism*, prohibiting Islamic religious instruction in public schools and forcing Islamic leaders to collaborate in the detection of cases of radicalisation among the faithful. That is, they are promoting a program in line with those tenets of "islamophobic" movements. The increase in the votes received by the party constituted the biggest surprise of the Parliamentary election held in November of 2019, and made the party the third most powerful group with 52 representatives (with 15.1% of the votes).[38] This means that this issue, along with others that deeply divide Spanish society, will surely become one of the most important issues in the current legislature.

[34] 'Plan Estratégico Nacional de Lucha contra la Radicalización Violenta', *Ministerio del Interior and Gobierno de España*, 31 Jan 2015, <http://www.interior.gob.es/documents/10180/3066463/CM_mir_PEN-LCRV.pdf/b57166c1-aaaf-4c0d-84c7-b69bda6246f5>.

[35] We must not forget for example, that in the terrorist attacks of 17 Aug 2017 in Barcelona the police investigation pointed to the imam in a town in Girona, Ripoll, as the one who had instructed and directed the group of young men who carried out the terrorist acts.

[36] See Royal Decree 710/2006 of 9 June 2006.

[37] '100 medidas urgentes de VOX para España', *VOX*, 6 Oct 2018 <https://www.voxespana.es/noticias/100-medidas-urgentes-de-vox-para-espana-20181006>.

[38] In the previous election, Vox had been the fifth most voted party, taking 24 seats in the Lower Chamber (*Congreso de los Diputados*) (with 10,26% of the votes).

C. Programmes for mutual understanding and inter-religious dialogue in Europe

In 2004, the then President of the Spanish Government, Rodríguez Zapatero, spoke before the 59th General Assembly of the United Nations and proposed the creation of an Alliance of Civilizations to promote dialogue between Islam and the West. The idea was endorsed by the Organisation, which named a High Representative to develop the plan. In Spain, several National Plans aimed at advancing and fostering debate forums and meetings among diverse cultures and religions were established. The real results, however, have been very modest.[39]

[39] All websites last accessed on 22 Sept 2021.

ISLAM IN SWEDEN

Lars Friedner[1]

I. Muslims in Sweden

There is no historic Muslim minority in Sweden. In a population census in the 1930s, only a few persons were registered as Muslims. Later in the 20th century a greater number of people with Muslim origin immigrated to the country, but Sweden has no public registration of its inhabitants' religious affiliation. It is nowadays forbidden even for the authorities to ask anyone about his or her religion.[2] So, when one wants to know the number of Muslims in Sweden, it is necessary to look for other sources.

The Swedish Agency for Support for Faith Communities,[3] which has the task of giving economic support to religious communities,[4] regularly tries to identify the number of persons in different religious communities. The normal way of doing this is to ask the religious community its number of members. But some communities, including most Muslim communities, have no actual membership, as is true of most Christian communities. For this reason, the Agency in these cases counts the numbers of persons "served" by the community instead. Such counting cannot be as exact as that based on membership but gives an approximation. The last public estimate by the Agency regarding the number of Muslims in Sweden is from 2017 and arrived at 170,000 persons. As there is an ongoing influx of people of Muslim origin into Sweden, the number today may well be somewhat higher. Another fact that might provide a greater number than the Agency's figure is that the Agency only counts persons served by communities which belong to the existing institutionalized bodies

[1] Former judge of appeal and former general secretary of the Church of Sweden.
[2] Form of Government (Sw. Regeringsformen) 2:2.
[3] Sw. Myndigheten för stöd till trossamfund.
[4] See below.

of Muslim communities.[5] There are smaller communities which are not members of these bodies and whose served persons are thus not included in the Agency's numbers.

Another estimation of the number of Muslims in Sweden arrived at a figure of 800,000 in 2016.[6] This seems to have been based on a simple question: "which religion do you adhere to, if any?" There has then been further work to explore from which countries people have emigrated to Sweden, and investigate/calculate the later influxes of immigrants from these countries.

From the author's point of view, the 2016/2017 estimation gives the number of people in Sweden who have roots in predominantly Muslim countries or who – in other words – have a Muslim background. It is a matter of debate whether all these persons are to be seen as Muslims or not. It has also to be discussed whether an estimate of the number of Muslims in Sweden should only count those who are permanently resident or include those who are still asylum-seekers or have time-limited permission to stay in the country.

There are mosques in all cities and in towns and other municipalities where a considerable number of Muslims have settled. There are no statistics, however, on the number of mosques.

As there is no official registration of an inhabitant's religion, one cannot know the religious affiliation of Sweden's politicians, whether regional or national. However, a look at the names of, for instance, Sweden's members of Parliament or Government would reveal several family names showing a Muslim background. But again, one could not say with any certainty – without asking them personally – whether they regard themselves as Muslims or not.

II. Institutional Recognition

In Sweden, any religious community may register and thus receive legal personality as a registered religious community.[7] Many Muslim communities in the country have done so, but religious communities are also free to appear as other legal persons, as associations, foundations, or companies. There are no statistics on the matter of which legal form Muslim communities have chosen.

Religious communities may receive state support or state subsidies.[8] It is the decision of the Government to which religious communities this opportunity applies. Eligible religious communities may choose either to receive state support indirectly through receiving the amount paid for membership fees from the tax authorities after having included such fees paid to the religious community as part of their income

5 See below.

6 'Europe's Growing Muslim Population', *Pew Research Center,* 29 Nov 2017 <www.pewforum.org>.

7 Religious Communities Act (Sw. lagen om trossamfund) 1998:1593, Art 7.

8 Act on Support to Religious Communities (Sw. lagen om stöd till trossamfund) 1999:932.

tax contribution[9] or as direct economic subsidies.[10] No Muslim community seems so far to have applied for the use of the tax system, but some receive state subsidies.[11] Not every religious community is eligible for state support. The provisions include a minimum number of members, 'stability' (which means that the community must have been active in Sweden for two/a number of years or be a part of an international community), and 'support to upholding and strengthening the basic values on which the democratic society rests'.[12] As far as is known, no Muslim community has been denied state support for failure to fulfil the provisions.

The Swedish state is religiously neutral[13] but has stated that in general it is in favour of religious activities.[14] This favourable opinion vis-à-vis religion has resulted in the aforementioned state support for religious communities. The state has not expressed any particular views on Islam or Muslim communities.

There are some bodies that organise a number of Muslim religious communities.[15] When the state desires contact with the Muslim religious community, it is often made through these bodies. The Government has a *Council for Contact with Religious Communities*,[16] which does not have the right to make any decisions but is merely a forum for discussion.[17] The Islamic communities are represented on the Council.[18]

III. Application of Shari'a

There is no separate legal system for Muslims in Sweden. Swedish civil law and penal law apply to everyone in the country.

On the other hand, it is possible for a person (or a family) within the existing/established legal system to make provisions which suit *Shari'a*. An example is in the area of inheritance, where it is possible to make provisos through a will. The legal limitations to a will, e.g. the right for children to inherit from their parents to some extent,[19] apply though for such wills.

[9] Religious Communities Act, Art 16.

[10] Act on Support to Religious Communities, Art 4.

[11] Ordinance on Support to Religious Communities (Sw. förordning om stöd till trossamfund) 1999:974, Art 3.

[12] Religious Communities Act, Art 16; Act on Support to Religious Communities, Art 3.

[13] Form of Government 1:1, 2, and 9.

[14] Regeringens proposition 1998/99:124, p. 60.

[15] E.g. Islam Co-operation Council (Sw. Islamska samarbetsrådet); Sweden's Muslim Council (Sw. Sveriges Muslimska råd); United Islamic Associations in Sweden (Sw. Förenade islamiska föreningar i Sverige); Islamic Culture Center Union in Sweden (Sw. Islamiska kulturcenterunionen i Sverige).

[16] Sw. Regeringens råd för kontakt med trossamfunden.

[17] Ku2000:F.

[18] See e.g. Kommittéberättelse 2019/20.

[19] Interitance Code (Sw. ärvdabalken), Art 7 (1).

According to Swedish law, some Muslim communities have the right to celebrate marriages.[20] A wedding ceremony, whether civil, Muslim, or Christian, must, however, follow the state-set provisions.[21]

Divorce, custody of minors, and other matters within family law are all handled by the courts and authorities.[22] The same provisions apply in these cases for Muslims as for any other inhabitant.

Rumour has it however that *shari'a*-law is used within some Muslim communities. This may be the case, but decisions made in such a way will not be respected or executed by the authorities.

The question of wedding-gifts, *mahr*, has on occasion become a question for the courts.[23] Wedding-gifts are not a part of Swedish legal tradition, but they are by no means forbidden. Notwithstanding, in these cases the courts have attempted, to the best of their ability, to interpret the intentions of the parties at the time of the gift. Thus, wedding-gifts have been handled as any other kind of a contract between two parties.

IV. Discrimination

Sweden has no statistics on employment related to faith. Thus, one cannot prove whether Muslims have particular problems within the area of work. It is a well-known fact, however, that newly arrived immigrants, many of them Muslims, are less likely to be employed than groups who have spent longer in the country. From this fact, it becomes evident that Muslims as a group are less likely to be employed than others.

As Sweden adheres to the European Union directive of non-discrimination, it is forbidden for employers to discriminate against a job-seeker on the grounds of his or her religion. This EU-directive is implemented through Swedish legislation.[24]

On the other hand, religious communities are also forbidden to discriminate, e.g. on the grounds of gender or sexual orientation, when they hire people.[25] There is, however, a small legal exception for religious communities regarding priests etc.[26]

[20] Act on Right to Celebrate Marriages in Religious Communities (Sw. lag om rätt att förrätta vigsel inom trossamfund) 1993:305.

[21] Matrimony Act (Sw. äktenskapsbalken), Art 4 (2).

[22] Matromony Act, Art 5 (1), (2), (4), and (5).

[23] E.g. NJA 2017 s.168, where, however, the *mahr* was regarded as invalid due to the fact that it – according to Swedish law – was to be seen as contract on future partial partition of joint property, which is not accepted.

[24] Discrimination Act (Sw. diskrimineringslagen) 2008:567.

[25] Discrimination Act, Art 1 (4) and 2 (1).

[26] Discrimination Act, Art 2 (2); Regeringens proposition 2007/08:100, p. 160.

V. Religious Freedom

There are no special provisions regarding mosques. The building of mosques must, however, follow the stipulations that apply to any building project. There are no exceptions for religious buildings when it comes to the municipalities' decisions on the suitable location of a building or its appearance. It is commonly known that mosques in some smaller towns where the number of Muslims is limited are sometimes opened as "basement-mosques", meaning that the mosque is just a room in a building which has another purpose. Fire prevention measures apply to mosques as they do to other buildings where people meet.

A debate on the matter of establishing mosques has occurred regarding calls to prayer. Neighbours have in some cases protested against the expected "noise" from the mosques. Up to now, the volume and intensity of calls for prayer has been a matter for the police.[27] In a well-known case one weekly call to prayer was allowed, which decision seems to have satisfied the Muslim group as well as the neighbours. (It should be mentioned, however, that the sound of church bells sometimes leads to local authority decisions too. In some cases, the Lutheran parish has been obliged to decrease the number of chimes.)[28]

Animal slaughter without anaesthesia is forbidden in Sweden.[29] This provision seems to have caused no problems for Muslim groups in the country (but has for some Jewish groups, who have had to import meat slaughtered in a way acceptable to them).

Public schools in Sweden are the responsibility of the municipalities. But anyone, including religious communities, may start a free school, which still has to follow the state-mandated curriculum. Free schools are supported economically in principle to the same extent as public schools.

Some free schools have a religious focus, among them some are Muslim.

According to the common curriculum for schools, education in religion is non-confessional. But a religious free school might also provide confessional education beyond the lessons prescribed by the curriculum.

The system of free schools with a religious focus is, however, under discussion. A Government report on the matter was presented in 2019.[30] The report contains a proposal according to which there would be a ban on establishing new free schools with a religious focus. The report states, however, that such a decision would prob-

[27] Order Act (Sw. ordningslagen) 1993:1617; after claims, the Second Administrative Court in Gothenburg (Sw. Kammarrätten i Göteborg) concluded that the permission given – a prayer call of 3 minutes and 45 seconds every Friday – was accetable (case 5873-15).

[28] E.g. Environment Appeal Court (Sw. Miljööverdomstolen) 2002:3.

[29] Animal Protection Act (Sw. djurskyddslagen) 2018:1192, chapter 5, s. 1.

[30] SOU 2019:64.

ably conflict with Sweden's adherence to international conventions as well as Swedish legislation on non-discrimination. So far, there has been no decision from the Government as to whether the proposal will be presented to Parliament.

In compulsory education at primary and secondary schools no pupil may opt out of any part of the education, whether lessons in religion or e.g. sports or swimming lessons.

Muslim communities are free to provide religious education to their members and other interested persons as is any other religious community.

VI. Free Speech and Islam

According to penal law, agitation against a group of people, e.g. of a certain religion, is forbidden.[31] There are, however, no guiding court decisions on the matter of agitation against Muslims.

Blasphemy is not a crime in Sweden any longer.[32] However, the artist *Lars Vilks*' portrait of Mohammed as a dog is a much-discussed issue.

The matter has its background in the fact that, some years ago, sculptures of dogs came to appear on traffic roundabouts in different parts of the country. The origin of this idea is unclear, but the public found it somewhat funny. The dog sculptures were probably not the result of an organised "movement" but of individual initiatives and were called 'roundabout dogs'.[33]

Lars Vilks created a series of portraits showing the prophet Mohammed as a "roundabout dog". These pictures were actually not displayed on any roundabout, but – after being rejected for several exhibitions – one of them was finally published in a newspaper in 2007. The portraits caused much anger in Muslim communities in Sweden as well as abroad. The artist has lived under police protection ever since and has also been physically attacked. One might assume that the artist's purpose was to be provocative and to test the limits of free speech. It is not supposed that he had any hatred against Muslims.

At the time of writing, two other events have occurred in Sweden. Another Swedish artist, *Dan Park,* had invited a Danish right-wing politician, *Rasmus Paludan,* to come to Malmö, near the Danish border, to publicly burn a copy of the Koran. *Paludan* seems to have arranged several similar events in Denmark. They were, however, refused permission for this by the police authorities in Malmö. The reason for the decision is said to have been a fear of public unrest. Furthermore, *Rasmus Paludan* was stopped by the police just after he had entered Sweden from Denmark.[34]

[31] Penal Code (Sw. brottsbalken), Art 16 (8).
[32] Act on Changes in the Penal Code (Sw. lag om ändring i brottsbalken) 1970:225.
[33] Sw. "rondellhundar".
[34] Foreigner's Act (Sw. Utlänningslagen) 2005:716, Art 8 (11).

In the same police authority decision he was forbidden to re-enter Sweden for the following two years.[35]

Nevertheless, supporters of *Paludan* came to Malmö and arranged the planned burning. Some were detained/arrested by the police on suspicion of the crime of *agitation against a group of people*. There is now much public debate on the question of whether the burning should be regarded as criminal or not. So far, there has been no decision, neither from the police nor from prosecutors or courts. Looking at previous cases regarding the Jewish faith,[36] it is assumed the burning of the *Choran* will be regarded as a crime. The burning caused riots in Malmö and elsewhere in Sweden, although not with Muslim believers as perpetrators, but the more typical rioters. Christian and Jewish organizations in Sweden have protested against the burning.

Another event is the decision by a municipal board in southern Sweden that praying during work-time is forbidden for the employees of that municipality. Although the decision talks about praying in general, it is obviously directed at Muslims. This occurred as a right-wing party formed the board majority at the time of the decision.

When a resident of the municipality took legal action against the decision, it was annulled by the First Administrative Court.[37] The court discussed the matter of freedom of religion and said that an employee cannot argue for a leave on religious grounds. On the other hand, the municipality's decision was so formulated that it forbids any praying during working hours, including during breaks, which the employees have a right to take according to the Working-Time Act.[38] The court concluded that the municipality's decision was against the law.

As in other European countries, the issue of Islamic extremism and its links to terrorism has been a subject of debate in Sweden during recent years. It has raised the fear of Islamic terrorism alongside the fear of left-wing and right-wing terrorism.[39] Actually, there have been two Islamic terrorist attacks in Stockholm city centre.[40] The fear of radicalisation among Muslims also led to the 2019 decision to expel some Muslim leaders from the country.[41]

35 *Ibid.,* 8:23.

36 E.g. NJA 1996, p. 577.

37 Sw. Förvaltningsrätten i Malmö.

38 Sw. Arbetstidslagen.

39 Swedish Security Service (Sw. Säkerhetspolisen) judgement for 2020.

40 2010 and 2017.

41 According to Act on Special Security Check for Foreigners (Sw. lag om särskild utlänningskontroll) 1991:572.

VII. Conclusion

From being more or less unknown in Sweden, Islam is today a religion of some importance in the country. The secular state seems to look upon Islam as it does to any other religion, taking into account Sweden's long history as a Christian country.

Even though one could find examples of individuals who are against Islam, the overriding impression is that Islam as a religion does not cause any offence to the public.

Legally, the question of religiously operated free schools may become an issue. It is not clear that a ban on religious organisations running schools is in accordance with the constitution or Sweden's adherence to the European convention on human rights and basic freedoms.[42]

[42] All websites last accessed on 1 July 2021.

ISLAM AND THE CHANGING CHALLENGES TO HUMAN RIGHTS IN THE UK

Paul McDonough[1]

Compared to most European countries, the UK is notable for its relatively long history of Muslim communities, and the near absence of formal barriers to the participation of Muslims in public life. There have been Muslim communities and institutions in the UK since the late 19th century. Today, for example, British Muslims serve in Parliament; there are no serious controversies over Muslim symbols or attire; and there are at least a few thousand mosques, schools, advocacy groups and other Islamic organisations in the UK. The main challenges regarding the human rights of Muslims come instead in the form of social disadvantage, including underrepresentation, and discrimination, including Islamophobia.

On average, British Muslims, many of whom arrived as immigrants from poorer countries, are less wealthy than other UK citizens; in areas such as politics, civil service, and leadership roles in education or industry, there tend to be about half as many Muslims as their prevalence in the general population would suggest. Discrimination, both overt and systemic, persists, and recent years have seen a marked increase in reported acts of violent Islamophobia. Strong anti-discrimination laws exist and are enforced, but there are also concerns over a perceived tendency of state institutions to treat Muslims as first of all a potential security risk, which can discourage communities from engaging with the state. Otherwise, there are institutional frictions in areas such as education and employment, but these tend more to focus on how to accommodate Muslim practices, than on restricting them.

I. Introduction: the Social Framework

Due in large part to its trading, imperial and industrial history, England has been home to Muslim communities for centuries. Ongoing relations with the Ottoman Em-

[1] Cardiff University.

pire led from at least the early 17th century until the mid-19th century to some English and Ottoman citizens choosing to live long term in the other country; some religious conversions, in either direction; and to identifiably Muslim communities becoming established in England. In the 19th century growing commerce between the UK and its imperial possessions resulted in sailors from the Indian subcontinent working on British vessels, with some remaining in the UK after their voyages.[2] After the second world war, the UK encouraged Commonwealth citizens to immigrate for work, which, combined with the upheavals around the independence first of Pakistan and then of Bangladesh, led to significant numbers of arrivals from South Asia. Later measures to restrict immigration for work prompted a change in the character of migration toward family reunification.[3] As a result, most Muslim communities in the UK are geographically concentrated, both in the UK and in terms of their regions of origin.

A. Numbers of Muslims: longtime residents and new immigrants

Demographic data in the UK, including for Muslims, is somewhat dated. The last decennial census was in 2011 (another is in progress). Much of the most thorough academic work on Muslims in the UK dates to around 2010-2015. However, broad trends seem to be continuing; the effects of the 2015-2016 crisis in the European asylum system were relatively small in practical terms, and politically insignificant beside the issue of the UK's departure from the EU. By 2016, Pew estimated there were over 4.1 million Muslims in the UK (6.3 %).[4] The 2011 census of England and Wales counted about 2.7 million Muslims from an overall population of 56.1 million (about 5 %),[5] an increase from 1.5 million (3 %) in 2001, the first time the census asked about religion. The 2011 census found that two thirds (68 %) of British Muslims are of Asian ancestry (predominantly from Pakistan, 38 %, and Bangladesh, 15 %), and about 47 % were born in the UK. Among census groups of religious identity, Muslims were the youngest, with 48 % younger than 25 years old, and 88 % under 50; 52 % were men. The British Muslim population is geographically concentrated. About 38 % of British Muslims live in London, comprising 8 % of the total London

[2] Reflecting increasing global trade, Muslim communities developed around port cities, until by the end of the 19th century about 10,000 Muslims lived in Britain. S. Gilliat-Ray, *Muslims in Britain: An Introduction* (Cambridge University Press, 2010), p. 32 (citing Ansari 2004).

[3] J. R. Bowen, *On British Islam: Religion, Law and Everyday Practice in Shari'a Councils* (Princeton University Press, 2016), pp. 10-11.

[4] 'Europe's Growing Muslim Population', *Pew Research Center*.

[5] Unless otherwise noted, references to the 2011 census of England and Wales are based on the analysis presented in, 'Full Story: What does the Census tell us about religion in 2011?', *Office of National Statistics,* 16 May 2013 <https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/religion/articles/fullstorywhatdoesthecensustellusaboutreligionin2011/2013-05-16>.

population, and as much as a third in some northeastern boroughs.[6] Outside London, regions with over 20% Muslim populations include 'Blackburn with Darwen in the North West (27.0 per cent), Bradford in Yorkshire and the Humber, Luton in East of England, Slough in South East, and Birmingham in the West Midlands'.[7] Mosques and other manifestly Muslim communal centres are part of the ordinary fabric of the larger British cities, with for example over 1,500 buildings in England specifically designated for use as mosques.

British Muslims serve in national and local elected offices, most prominently Mayor Saddiq Khan of London. The 2019 national election returned 18 Muslims to the House of Commons (the most ever), ten of them women.[8] All were elected to constituencies in England, fourteen for the Labour Party and four for the Conservative Party.[9] This represents under 3% of the House, less than the share of the UK population who are Muslims, which may in part reflect the uneven geographic distribution of Muslims across the UK, in combination with first past the post voting. An estimated 380 and 208 Muslims were elected to local councils in England at quadrennial local council elections in 2018 and 2019, representing respectively about 8.6% and 2.3% of councillors elected in those years.[10] Muslim officials are generally elected with broad mandates to govern and provide local services, rather than specifically to represent Muslim interests. However, British communities with a large proportion of Muslim residents also tend to have particular concerns, such as provision for religious education; outreach to Muslim women; and the impacts of policing and security policies. The short-lived Respect party, which originated in opposition to British involvement in the 2003 war in Iraq, enjoyed some electoral successes in constituencies with

[6] 'Religion in England and Wales 2011', *Office of National Statistics*, 11 Dec 2012 <https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/religion/articles/religioninenglandandwales2011/2012-12-11> (34.5% in Tower Hamlets; 32% in Newham; over 20% in both Redbridge and Waltham Forest).

[7] 'Religion in England and Wales 2011', *Office of National Statistics,* 11 Dec 2012 <https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/religion/articles/religioninenglandandwales2011/2012-12-11>.

[8] H. Chapman, 'Record 18 Muslims elected, majority women', *The Muslim News*, 27 Dec 2019 <https://muslimnews.co.uk/newspaper/top-stories/record-18-muslim-mps-elected-majority-women/>.

[9] H. Chapman, 'Record 18 Muslims elected, majority women', *The Muslim News*, 27 Dec 2019 <https://muslimnews.co.uk/newspaper/top-stories/record-18-muslim-mps-elected-majority-women/>.

[10] E. A. Buaras, 'Exclusive: 400 Muslim councillors elected', *The Muslim News*, 8 June 2018 <http://muslimnews.co.uk/newspaper/home-news/400-muslim-councillors-elected/>; E. A. Buaras, 'Over 200 Muslim councillors elected in local elections', *The Muslim News*, 31 May 2019 <https://muslimnews.co.uk/newspaper/home-news/200-muslim-councillors-elected-local-elections/>. In the 2018 elections, Labour gained seats and vote share, while in 2019 it lost both in the face of Liberal Democratic Party gains.

significant Muslim populations.[11] However today, the Labour Party holds the bulk of the elected offices in these regions. British Muslim communities also participate politically through organising to address specifically Muslim concerns of public life, and by civil society advocacy through associations such as the Muslim Council of Britain (MCB), an 'umbrella organisation with over 500' mosques and other Muslim associations as members.[12]

B. **Muslim minorities in the UK**

In the 21st century, the British Muslim population is increasingly diverse, particularly in London and the southeast. However, trends in varieties of belief, language, national and ethnic origins are visible. Sunni Muslims predominate, with older communities from South Asia joined by immigrants from elsewhere in Asia and from Africa, with many of the newcomers arriving from Afghanistan, Somalia, Sri Lanka and the Middle East,[13] as well as via conversions to Islam. There are relatively few Shia Muslims in the UK, although their numbers have increased significantly in the 21st century, with immigration from Iraq.

To an extent, the UK Muslim community is actually about five main communities, each consisting of a pair of cities, one in the UK and the other abroad. Due to historical connections, most British Muslims have their ancestral origins in a few regions in northern Pakistan, predominantly around Mirpur, and in the Sylhet district in Bangladesh.[14] Today, the majority of Muslims in the midlands and the north of England are from Pakistani families, although London is the city with the most immigrants from Pakistan. British Muslims with Bangladeshi roots are concentrated in East London, in or near Tower Hamlets. These can be seen as transnational meta-communities, as for example families and social networks might more tightly link British Muslims living in Tower Hamlets to Sylhet, than to British Muslims in Bradford, who have similar ties to Mirpur. The lines between immigrant and native born communities are not distinct; rather, the social distinctions run more along ethnic lines, or religious

[11] P. Akhtar and T. Peace, 'The party is over for Respect, but George Galloway could find a home again in Labour', *The Conversation*, 23 Aug 2016 <https://theconversation.com/the-party-is-over-for-respect-but-george-galloway-could-find-a-home-again-in-labour-64263>.

[12] 'Who we are', *Muslim Council of Britain* <https://mcb.org.uk/about/>.

[13] 'British Muslims in Numbers: A Demographic, Socio-economic and Health profile of Muslims in Britain drawing on the 2011 Census', *Muslim Council of Britain,* Jan 2015, p. 24 <http://www.mcb.org.uk/wp-content/uploads/2015/02/MCBCensusReport_2015.pdf>.

[14] Bowen, *On British Islam: Religion, Law and Everyday Practice in Shari'a Councils,* p. 12 ('Most of the Pakistanis came from a small set of places: Mirpur district in Azad Kashmir, parts of Peshawar, certain villages and towns in northern Punjab, especially Gujrat and Jhelum, and Attock district. Most Bangladeshis came from one district, Sylhet').

beliefs or practices.[15] Nonetheless, a British Muslim identity has emerged, distinct both from wider UK society, and from Muslims in other parts of the world.

The main theological and legal interpretations of Islam among British Muslims draw on 19th and 20th South Asian revival movements, especially the Deobandi and Barelwi. The first formed as a school of Sharia and *hadith* studies in the town of Deoband in northwestern Uttar Pradesh, grounded in the Hanafi school of jurisprudence, with some Sufi influence.[16] The Deobandi approach encourages following the rulings of a sheikh, rather than applying the holy texts unaided.[17] The Barelwi movement, also originating in Uttar Pradesh and Hanafi, is much more in the Sufi tradition, emphasising 'the importance of venerating saints' and seeking their aid.[18] In the UK, the Deobandi movement is institutionally more established and influential, but 'Muslims with *Barelwi* sympathies have been more significant numerically'.[19] The Barelwi movement is less structured than the Deobandi, but the practice of Islam in Barelwi-similar forms 'overlaps with membership of various Sufi orders, the most prevalent of which in Britain is the *Naqshbandi* order (and its sub-branches)'.[20] A third significant influence on Islam in the UK is the growth and outreach work in recent decades of Salafi groups founded by teachers and activists from the Middle East. Like the Deobandi and Barelwi movements, the Salafis aspire to a pure, older Islam, based on the holy texts and influenced by the Hanbali school of jurisprudence. Salafi groups in the UK are most prevalent around London, reflecting the presence there of relatively wealthy Arab immigrants and communities.[21] Among Shia Muslims in the UK, Twelver Ja'fari is the predominant sect. All of these ideological groupings are reflected in the range of Islamic institutions across the UK, including mosques, seminaries, schools, and charitable and advocacy organisations.

II. Institutional Recognition by the State

The British legal and political system is conducive to the participation of Muslim individuals and communities in public life. Religious institutions in the UK are not regulated as such (with the major exception of the Church of England). Muslims,

[15] Bowen, *On British Islam: Religion, Law and Everyday Practice in Shari'a*.

[16] Bowen, *On British Islam: Religion, Law and Everyday Practice in Shari'a*, pp. 28-9 (the Deobandi schools follow al-Ghazali in 'combin[ing] the two Islamic roles of the scholar and the sheikh', both providing rulings and exemplifying and prescribing devotional practices).

[17] Bowen, *On British Islam: Religion, Law and Everyday Practice in Shari'a,* p. 29.

[18] Bowen, *On British Islam: Religion, Law and Everyday Practice in Shari'a,* p. 29.

[19] Gilliat-Ray, *Muslims in Britain,* p. 92. Estimates in the 1990s indicated about half of British Muslim individuals and organisations 'reflect[ed] a general *Barelwi* worldview'. *Ibid.,* p. 94 (citing Raza 1991, Geaves 1996).

[20] Gilliat-Ray, *Muslims in Britain*, p. 94 (citing Ansari 2004).

[21] Gilliat-Ray, *Muslims in Britain,* p. 83.

like other residents, may freely form associations including religious organisations. Institutionally, the UK recognises and regulates Islamic communities similarly to any other type of organisation. Patterns of legal form and financing mirror those of the UK generally, under laws applicable for example to charitable bodies, corporations, trusts, or political associations. Muslim organisations are regulated concerning issues such as building or land use permits; education and organised child care; or incorporation, rather than formal status as a religious institution. Consequently, it is difficult to know exactly how many religious schools, mosques, and similar exist in the UK, although estimates (in the thousands) have been made.

A. **Legal form and financing of Islamic communities**

Muslim associations, mosques and schools have existed in the UK since the 19th century. The first purpose-built mosque was established in Woking in 1889, and several Muslim societies and foundations date back to the same era. These organisations take various legal forms, most often as registered charities, or simply operate as informal associations. Financing consists largely of donations and membership fees, as well as some fees for services such as counselling or mediation. Global Muslim outreach and educational organisations also provide financial support and expertise to institutions in the UK. There are periodic campaigns to encourage more Muslim communities to register as charities. This is seen as a way to improve their financial standing through tax benefits, but also has raised concerns as a potential way for the state to monitor the activities of Muslims.

B. **Islamic communities and the state**

The British state's stance toward Islamic communities and Muslim residents is complex. While there are no particular bars to political participation, when the state does proactively engage with Muslim communities, it is today often seen as taking a security and anti-terrorism oriented outlook. At the same time, large and prominent organisations such as the MCB are able to wield significant political influence, through participating in policy initiatives that relate to the Muslim community; contributing submissions in response to calls for policy consultations; and outreach and advocacy activities. Historically the regionally concentrated Pakistani (especially Mirpuri) and Bangladeshi communities wield most of the institutionalised political influence of Muslims in the UK, particularly the long established Deobandi movement. Since about 2005 however, the locus of Muslim influence in UK politics has diffused significantly, with a diverse range of organisations becoming involved, and efforts to form networks and umbrella groups to bring more Barelwi and Salafi oriented voices, and others, to public discussions about the role of Islam and Muslims in public life.

While the MCB's disproportionate share of influence has waned, it remains 'the most enduring and influential of Britain's Muslim representative organisations'.[22] The MCB is a membership network, established in 1997 to coordinate the activities of Muslim groups in the UK. It also advocates for Muslim communities at the political level, including submitting views in response to governmental or parliamentary calls for consultation, or contributing advice for government policy papers. In its early years the MCB worked closely with the government, which sought to mainstream religion in public life, and enjoyed notable successes, such as a concerted advocacy campaign that resulted in a religion question being added to the census since 2001.[23] Amid tensions relating to post-2001 concerns about Islamist-inspired terrorism, the relationship turned somewhat acrimonious early in the 21st century, driven by factors such as the government's reactions to the 2005 London bombings and the MCB's decision not to participate in Holocaust remembrances in 2006.[24]

It is questionable how representative the MCB is of the overall British Muslim community, with its member organisations being predominantly Deobandi or related to Jamaat-i-Islami, with little involvement of Barelwi or Shia communities.[25] The MCB sees this as an overall issue in British Muslim civil society, which is 'historically dominated by South Asian, Sunni male "elders"', and is leading efforts to diversify, with four of the twelve members of its Executive Committee being women; three Shia Muslims; two members with African heritage; and more youthful leadership as second and third generation British Muslims come to the fore.[26] Notwithstanding perceptions of domination by ideological organisations such as Jamaat-i-Islami, 'the current MCB leadership team [are] more likely to self-identify by their profession, or where they grew up in the UK, rather than by school of thought or ideology'.[27]

The attacks of September 2001 in the USA and of July 2005 in London, and the 2003 war in Iraq, reshaped the state's engagement with Islamic communities in the UK.

[22] S. Gilliat-Ray and R. Timol, 'Introduction: Leadership, Authority and Representation in British Muslim Communities' (2020) 11 *Religions*, p. 559, 561 (citations omitted).

[23] K. Braginskaia, 'The Muslim Council of Britain and its engagement with the British political establishment' in: Timothy Peace (ed), *Muslims and Political Participation in Britain* (Routledge, 2015), p. 195, 198-9.

[24] Braginskaia, 'The Muslim Council of Britain and its engagement with the British political establishment', p. 195, 199-201.

[25] Gilliat-Ray, *Muslims in Britain*, p. 109 (citing Pedziwiatr 2007). Jamaat-i-Islami is a political Islamic revivalist movement developed under the leadership of Abu al-A'la al-Mawdudi in the period leading up to and following the independence of India from British rule.

[26] H. Khan, H. Joudi and Z. Ahmed, 'The Muslim Council of Britain: Progressive Interlocutor or Redundant Gatekeeper?' (2020) 11 *Religions*, p. 473, 477 (noting that the Deputy Secretary General elected in 2018 was then 28 years old).

[27] Khan, Joudi and Ahmed, 'The Muslim Council of Britain', p. 473, 479 (citing Pedziwiatr 2007). Note that the contributors to this article included senior leaders of the MCB.

The London bombings in particular proved to be a watershed, with the government initiating a Counter Terrorism Strategy (CONTEST) that includes a Prevent component aimed at identifying potentially violent individuals and groups, to bring them back to mainstream society before they act. As discussed further below, Prevent appeared to focus almost exclusively on Islamic ideologies as potentially leading to terrorism. In the context of engagement with the MCB and other Muslim organisations, this led to a perception that the state sees British Muslim leaders as first of all responsible for policing their communities, and only incidentally as having anything to offer broader British political and social development. The lack of enthusiasm elicited from the MCB by these efforts accelerated its sidelining by the government, but at the same time may have added to its credibility in Muslim communities. However, although the direct interaction of the MCB with governmental actors and programmes has declined, from the early 21st century its political activity has broadened, with particular efforts to encourage voter registration, and to work with non-Muslim groups on areas of common interest such as opposition to UK participation in the war in Iraq.[28] One long term effect appears to be the mainstreaming of Muslim groups into overall UK political activism, a nearer reflection of the experiences and attitudes of younger British Muslims who are not tied as tightly as older generations to their families' South Asian or other international origins. The MCB's coordination efforts have also become more international, with growing cooperation with other Muslim umbrella organisations internationally, particularly in Europe, especially to exchange good practices and outreach ideas.[29]

Since 2005, the UK government has sought to work with newer networks as an interlocutor, not necessarily because they are more representative of British Muslims, but possibly in hope of finding a more pliant partner than the MCB.[30] This coincided with the desire of especially British leaders of the Barelwi movement, historically a more decentralised and less politically engaged movement than the Deobandis, to make their voices heard in public discourse. Pan-UK Barelwi groupings began in 2005 with the British Muslim Forum (BMF), created essentially 'to give a national voice to *Barelwi* Muslims in Britain, who felt "unrepresented" in the Muslim Council of Britain', and having some hundreds of member organisations.[31] The Muslim Association of Britain, an organisation with 11 branches around the UK that is ideologically linked to Salafism and the Muslim Brotherhood, has cooperated with the UK government to counter violent ideologists.[32] However these groups' influence

[28] Khan, Joudi and Ahmed, 'The Muslim Council of Britain', p. 473, 475.

[29] Khan, Joudi and Ahmed, 'The Muslim Council of Britain', p. 473, 479.

[30] Gilliat-Ray, *Muslims in Britain*, p. 110.

[31] Gilliat-Ray, *Muslims in Britain,* p. 97.

[32] Gilliat-Ray, *Muslims in Britain,* p. 77 (for example, in 2005 the MAB agreed to take over operation of the Finsbury Park Mosque, to stymie its extremism).

has not grown as robustly as the MCB's did. Indeed, the status of the BMF, the main Barelwi group, is uncertain since 2019, with a nonfunctional website and its listing removed from the register of charities.[33] It is uncertain why the early success of the MCB in cooperating closely with government initiatives has not been replicated in the efforts in both directions (governments and Muslim organisations) to engage in a much broader dialogue. However, it has been observed that, unlike its Labour and coalition predecessors, since the Conservative party entered power in 2010 ideological neoconservatives close to the Prime Minister's office have tended to be 'dismissive toward Muslim representation' although casual consultations still take place on discrete issues.[34] One recent analysis attributes the MCB's advocacy success in significant part to 'a delicate interplay between national-level representation and local-based community agenda',[35] but cautions that ultimately, 'any prospect of cooperation [with the government] rested on mutually-accepted expectations and personal connections'.[36]

C. **Islamic institutions in the UK legal order**

Within the British legal order, Islamic law can operate on a consensual basis between Muslims. The Muslim Arbitration Tribunal is a registered charity whose decisions, made according to Islamic law, are enforceable in UK courts under the Arbitration Act 1996. When Islamic law arises in British court cases, institutions such as the Islamic Sharia Council or individual scholars might be invited to testify as experts in Islamic law,[37] but the Tribunal is the only Islamic authority whose decisions are actually enforceable. Otherwise, institutions such as mosques, associations or schools interact with the British legal order in mundane ways such as building permits, tax reporting and regulation of social service providers. EU law remains influential in the sense that the laws enacted to transpose EU directives remain in effect until Parlia-

[33] The BMF website appears now to be inaccessible, but an archived copy indicates the organisation was active as late as March 2019. <https://web.archive.org/web/20191027063817/http://www.britishmuslimforum.co.uk/about-bmf/members/>. The BMF was removed from the register of the Charity Commission of England and Wales, apparently after the fiscal year that ended on 31 March 2019.

[34] Khan, Joudi and Ahmed, 'The Muslim Council of Britain', p. 473, 481 (noting that the devolved administrations of Scotland and Wales, led by other political parties, have continued to engage formally with the MCB's regional affiliates).

[35] Braginskaia, 'The Muslim Council of Britain and its engagement with the British political establishment', p. 195, 196.

[36] Braginskaia, 'The Muslim Council of Britain and its engagement with the British political establishment', p. 195, 207.

[37] See eg, A. Al-Astewani, 'Loci of Leadership: The Quasi-Judicial Authority of Shariah Tribunals in the British Muslim Community' (2019) 10 *Religions*, p. 406, 414-5 (a UK court accepted expert testimony regarding Islamic marriage laws, in ruling on the distribution of property following a dissolved Islamic marriage).

ment acts otherwise. The roles of the Tribunal and the Council are discussed further in the next section, as applications of Sharia in the UK.

III. Application of Shari'a

In general, Islamic law has no effect in the British legal system. However, parties may agree among themselves to be bound by Islamic law, resulting in potentially significant de facto effect, especially in family and personal status law. British Muslims may undertake parallel obligations, such as entering into an Islamic marriage contract alongside a civil marriage according to UK law, or they can simply choose to regulate family matters according to religious law. Marriage and divorce is the most active area of Islamic law in the UK in practice, with Islamic marriages that are not civilly registered being a significant, and reportedly increasingly popular option among Muslims in the UK. It is possible for a matter of Islamic law to cross over from Sharia councils or tribunals in the sense that parties could bind themselves to those bodies' decisions by forming a contract to that effect. But few if any such contracts are contested in the UK courts; if they were, British family law would require that they be reviewed, and possibly revised, for fairness.[38] Essentially then, Islamic family and personal status law applies fairly widely between British Muslims, by personal choice. In terms of active application in proceedings, this most often takes the form of procuring divorces for women in Islamic marriages.

Sharia councils formed in the UK in the 1980s. They give advice, hear disputes, and if necessary, issue rulings. The rulings are not effective in UK law, but the parties can elect to abide by them, or could transpose them into instruments such as contracts or wills drafted such that British courts will enforce them; some Sharia councils affiliate with solicitors' firms to facilitate this. Since councils are not formally registered as such (although possibly as registered charities or similar), it is difficult to know how many currently operate in the UK. A government report to Parliament in 2018 estimated there were between 30 and 85.[39] The oldest and most prominent are the Islamic Sharia Council (1982) (ISC), based in Leyton in east London, and the Muslim Law Sharia Council (1986) (MLSC), in Ealing, west London. The Muslim Arbitration Tribunal (2007) (MAT) is the only body that issues decisions based on Islamic law that are enforceable at UK law. The MAT has the same standing in the British system

[38] Bowen, *On British Islam: Religion, Law and Everyday Practice in Shari'a*, p. 181-2.

[39] 'The independent review into the application of sharia law in England and Wales', *Secretary of State for the Home Department,* Feb 2018, p. 10 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/678478/6.4152_HO_CPFG_Report_into_Sharia_Law_in_the_UK_WEB.pdf>. The report defines Sharia councils as 'as a voluntary local association of scholars who see themselves or are seen by their communities as authorised to offer advice to Muslims principally in the field of religious marriage and divorce'.

as any other arbitral body, governed by the Arbitration Act 1996. Its decisions are subject to discretionary High Court review against that Act.

Sharia councils in the UK issue *fatawa*, opinions, and sometimes *akham*, judgments. *Fatawa* can be general guidance to the community, or responses to questions posed by individuals. *Akham* relate to specific parties, and are in principle binding in Islamic law. In practice, the bulk of *akham* are reached by consent, or at least acquiescence of the parties, as the councils lack any means to enforce their judgments. Although initially conceived as a general body for consideration of a range of questions of Islamic law, the ISC quickly came to focus almost exclusively on family law, specifically divorce.[40] This is typical of UK Sharia councils, which mainly work to obtain Islamic divorces for women. These might be desirable for reasons that include indicating to the community that the marriage has ended; securing recognition of the divorce abroad, if for example the family is present in both the UK and Pakistan; or the woman's desire to fulfil her religious beliefs regarding ending a marriage and moving on. The MAT, founded by a Muslim scholar who also practised as a barrister, in Nuneaton in the midlands, seeks to reconcile Islamic law and UK family law, with procedures that resemble English civil procedures, and expert panels that include English law professionals, as well as lawyers simultaneously expert in both UK and Islamic law.[41] The 2018 report to Parliament stated that the main focus of the MAT is on commercial arbitration, with about 10% of its work dealing with family law, mostly divorces ('the overwhelming majority' of those seeking an Islamic divorce go to the Sharia councils, not the MAT).[42]

Islamic law as applied in the UK reflects the institutional prevalence of Barelwi and Deobandi influences. In structure and operation, Sharia tribunals draw on South Asian colonial experiences, where residents 'had been left to manage their private affairs without intervention from the British authorities'.[43] The ISC was formed by scholars from the Deobandi community, with some participation of Salafi scholars, for a broader doctrinal reach. The MLSC takes a broadly similar approach to Islamic law, but with particularities that reflect its Barelwi roots: for example, like the ISC insofar as blending Hanafi jurisprudence with a heightened emphasis on the literal texts, but by connection to South Asian revivalism rather than via the Hanbali school. Despite their differing views of Islamic law in principle, the ISC and MLSC 'work in very similar ways. Indeed, each presumes the other's judgments to be sound'.[44] Islamic

[40] Bowen, *On British Islam: Religion, Law and Everyday Practice in Shari'a,* p. 86.

[41] Al-Astewani, 'Loci of Leadership', p. 406, 412-3.

[42] 'The independent review into the application of sharia law in England and Wales', *Secretary of State for the Home Department*, p. 11.

[43] Al-Astewani, 'Loci of Leadership', p. 406, 410.

[44] Bowen, *On British Islam: Religion, Law and Everyday Practice in Shari'a*, pp. 85-6.

law as applied in the UK predominantly reflects the Hanafi school of jurisprudence, with some extra emphasis on the Quran and *ahadith*. Consequently, the largest part of *fatawa* issued for the British Muslim community are grounded either in the Hanafi school (Deobandi) or built from the Quran and *ahadith* directly (Barelwi), with some Hanbali influence entering via institutional inputs. Continuing practice developed under British law in South Asia, in matters of divorce, it is open to Sharia tribunals to pronounce divorce for a wide range of grounds, drawn from across the Sunni *madhahib*, particularly from Maliki rulings.[45] As fundamentally religious rather than judicial bodies, the councils aim to approach cases holistically, taking their spiritual, pastoral and logistical aspects into consideration, alongside interpretations of law.[46]

The Sharia councils in the UK are controversial. The government's 2018 report raised concerns relating to inconsistencies in procedures and decision making; very few women as panel members; insufficient understanding of and engagement with UK law and society; and consultation and mediation efforts that can potentially become intrusive or traumatic for the women involved.[47] Although the government's report, and most close academic observers of the councils and tribunals, present an overall view of Sharia councils as, on balance, providing useful guidance and community services, this view is not shared across all of British society. Sharia councils have been criticised for acquiescing in the mistreatment of women in the name of Sharia, or even encouraging it via their rulings. There is some anecdotal evidence of councils straying into areas regulated by British civil authorities, such as custody or visitation rights regarding children, but direct evidence of this appears to be difficult to obtain. It is also possible that 'Sharia' is applied abusively within families or other social groups, and that the victims may not be aware and informed about support resources available. There is enough room for oversight to satisfy the needs of the British legal system, but there might still be significant issues in awareness of rights and access to justice.

IV. Anti-Discrimination Law and Employment Discrimination

The overarching anti-discrimination law in the UK is the Equality Act (2010). It replaced the Employment Equality (Religion and Belief) Regulations 2003, among other instruments, which had collectively transposed Directive 2000/78. The Act incorporates the main provisions of the Regulations, and remains compatible with the Directive, even though the Directive itself no longer applies in the UK. The Equality

[45] Al-Astewani, 'Loci of Leadership', p. 406, 410-1.

[46] Al-Astewani, 'Loci of Leadership', p. 406, 415-6 (likening the Sharia councils' approach to that of a tribunal of the Catholic church).

[47] 'The independent review into the application of sharia law in England and Wales', *Secretary of State for the Home Department*, p. 15.

Act, which includes religion as a protected characteristic,[48] has wide scope, covering employment, provision of services, education and associations, among other areas. Courts may order civil remedies against discrimination, whether that discrimination is directly against the claimant or indirect, operating to the disadvantage of a class of persons that includes the claimant. In most areas, a specialised administrative judge hears claims at first instance, appeals go to an administrative tribunal, and courts have discretion to grant leave for further appeals. The Act prohibits harassment related to protected characteristics, as well as discrimination because of them. British employers are not strictly required to accommodate religious practices, although they are advised that they should where possible. The Equality Act 2010 and its associated workplace regulations impose a duty of non-discrimination, and recommend best efforts toward accommodation. According to the UK Human Rights Commission, limiting the right to manifest one's religion or belief in the workplace 'may amount to unlawful discrimination; this would usually amount to indirect discrimination'.[49]

Religious discrimination claims raised to the Employment Appeals Tribunal (EAT) have generally failed, regardless of the religion or belief asserted, when the employer can show a reasonable business provision, custom or practice (PCP) and that they treated the employee no different to similarly situated employees of different religions or beliefs. For example, recent decisions have ruled against a Seventh Day Adventist bus driver assigned to work on the Sabbath,[50] and against another Christian whose employer (a creche) required Sunday work, after two years of not doing so.[51] In the latter case, the EAT stated that the discriminatory impact of a PCP (and thus, the amount of justification an employer needs to show) depends on whether it violates a 'core' religious belief, and on the number of persons affected in that way.[52] Under this precedent, it is unlikely that an employment tribunal would find the Equality Act violated by an employer who declined to allow extra breaks for prayer, or whose premises lacked suitable prayer space. Similarly with religious symbols: employers may not restrict identifiably Islamic attire as such, but may do so under generally applicable PCPs. For example, an employer who restricts the length of *jilbab* (a flowing garment that might extend to the floor) that may be worn while on duty in a creche

[48] Equality Act (2010) chapter 1, section 10. The text of the Act does not otherwise specifically address religion.

[49] Equality and Human Rights Commission, 'Equality Act 2010 Code of Practice: Employment Statutory Code of Practice' (2011), [2.61]. The Code does not have binding legal effect, but as the Commission is a statutory body created by Parliament, the EAT and courts treat its views as potentially persuasive authority.

[50] *Oxford Bus Company v Harvey* [2018] UKEAT/0171/18/JOJ.

[51] *Ms C Mba v London Borough of Merton* [2012] UKEAT/0332/12/SM.

[52] *Ms C Mba v London Borough of Merton* [2012] UKEAT/0332/12/SM, [46].

has presumptively discriminated against Muslim women, but may still demonstrate that this is a proportionate workplace safety measure.[53]

Muslims continue to face apparent discrimination in employment opportunities, across all economic sectors. This includes employment in public services. Despite gains made during the 21st century, it is likely that Muslims are proportionately underrepresented in police forces in the UK. According to government figures, about 3 % of police in the UK are of Asian (excluding Chinese) and 1.3 % of Black ethnicity, reflecting in both cases less than half their prevalence in the general population.[54] Since these ethnic categories encompass the vast majority of British Muslims, it is reasonable to presume that Muslims are proportionately underrepresented among the police forces. The Equality Act 2010 provides strong protection against discriminatory hiring practices, but this is essentially forward looking; outside of the public sector, efforts to actively increase access to professional opportunities are still needed.

V. Exercise of Religious Freedom and Other Cultural Rights

Religious freedom is a core principle of UK law, with no particular restrictions for Muslims. The laws either do not address, or as with slaughtering, they allow derogations for, Islamic rituals. There is no specific legal treatment of mosques. Local councils generally have permitting authority over construction and property use. Halal has become a common designation in UK groceries and restaurants. Islamic ritual slaughter is permitted in slaughterhouses via the derogation in article 4(4) of the EU regulation,[55] in conjunction with the corresponding UK regulation.[56] Muslim schools provide both secular and religious education, subject to the normal rules covering privately provided education in the UK. The largest bars to Muslims' exercise of religious and cultural rights lie probably in discriminatory practice, rather than the law itself. There have been court cases or other controversies over issues such as whether a building permit for a mosque is improperly denied, whether a school can forbid a Muslim girl to wear the *niqab*, and whether an employer can restrict Muslim attire for reasons of workplace safety.

[53] *Ms T Begum v Barley Lane Montessori Day Nursery* [2015] UKEAT/0309/13/RN. In this case the would-be employee also wore a *hijab*, but this was uncontroversial.

[54] 'Ethnicity facts and figures: Police workforce', *UK Government,* updated 29 Jan 2021 <https://www.ethnicity-facts-figures.service.gov.uk/workforce-and-business/workforce-diversity/police-workforce/latest>. The proportion of Asian officers has approximately doubled since 2007; a brief review of population statistics suggests the ethnically Asian general population in the UK has not increased as quickly.

[55] Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing OJ L 303 1-30. The Regulation remains in force in the UK until superseded by a new law.

[56] The Welfare of Animals at the Time of Killing (England) Regulations 2015.

Islamic schools that provide general education must implement the state's core curriculum, and religious schools that instruct children are subject to registration and some regulation. Most children of Muslim families in the UK attend state schools. There are several specifically Islamic schools that provide a general education. In 1998, the Department of Education approved the first two Muslim primary schools for grant-maintained status, which recognises their curriculum as meeting the requirements of an equivalent education provided by British state schools.[57] Schools in the UK are required to provide some religious education, at least as an optional subject, and to facilitate a daily act of worship. In areas where most students are Muslim, a school might choose to provide for Islamic worship.

There is an essentially full range of opportunities for Islamic religious education in the UK. This includes elementary and adult learning schools, both full time and after school or work, as well as higher education, and advanced academies that prepare Islamic scholars to serve as imams or in other leadership roles within the British Muslim community and to contribute as experts to British and international discourse regarding Islam. The main state-imposed restriction is that religious schools (like all schools) must be registered and overseen by child welfare authorities if they serve students under the age of 16. Through 2003, about 25 seminaries had registered with the government, and starting in the 1990s some have linked to British universities to facilitate their students' taking standard A-level exams and study onwards toward advanced degrees.[58] As of 2005, 17 out of the 26 advanced Islamic religious training institutes in the UK were Deobandi.[59]

VI. Challenges posed by Islam in the traditional understanding and application of democracy and rights in Europe

Structurally, the UK political system is open to the participation and influence of Muslims. This, plus the generally laissez-faire posture of British law toward religious communities, means that in most spheres of activity, in principle, Muslims are legally and institutionally well integrated in UK society. The policy questions raised tend more toward working out how to accommodate beliefs and practices, such as religious education, halal standards, or burial. The major exception as far as relations with the state go is security and anti-terrorism policy, which especially since the 2005 London bombings has been criticised as unduly focusing on Muslims, raising civil and human rights concerns. Another significant challenge is a trend toward open Islamophobia, as well as racism and xenophobia (which disproportionately affect Muslims), includ-

[57] Khan, Joudi and Ahmed, 'The Muslim Council of Britain', p. 473, 475-6.
[58] Bowen, *On British Islam: Religion, Law and Everyday Practice in Shari'a*, p. 36.
[59] Gilliat-Ray, *Muslims in Britain*, p. 86-8.

ing a significant rise in harassment and other crimes against Muslims. This has taken place at the same time as the rise of populist politics that contributed to the UK's decision to leave the EU.

Because British Muslim communities tend to be regionally concentrated, their political interests are to an extent voiced through the normal workings of representative democracy. Politicians in regions such as Blackburn or Bradford or Birmingham or northeast London can ill afford to disregard the shared concerns of their Muslim constituents. The Labour Party in particular has won the support of Muslim voters in the UK, more so than the other major parties, and is the party of most Muslim holders of elected office in the UK. Officials elected in regions with large Muslim populations devote the bulk of their attention to ordinary matters relating to social services, such as arise in any urban English constituency. Political issues that affect Muslims as a community distinct from the rest of British society tend to be highly localised, relating to the needs or activities of specific constituencies around schools or mosques, or affected by approaches to policing and other public safety services.

The 2003 invasion of Iraq and the July 2005 London bombings were watershed events that continue to shape public discourse about Islam, radicalisation and security in the UK. One major result is the national Counter Terrorism Strategy (CONTEST). Its 'Prevent[ing Violent Extremism]' component, aimed at '[w]inning hearts and minds and preventing individuals being attracted to violent extremism',[60] has proved particularly controversial. The government promulgated Prevent in 2007, in explicit response to the 2005 bombings. It has been criticised for targeting not violent extremism in general, but rather, specifically that carried out in the name of Islam. The main concern is that while it calls for constructive engagement with Muslim communities and institutions, its implementing activities have been frequently headed on the state's side by officials who approach engagement with an apparent security-first mindset. Its early implementation saw considerable blurring of bureaucratic lines, as the Home Office (responsible for security) and the Ministry of Local Government (responsible for social services) both carried out Prevent activities with differing priorities.[61] Concerns include the potential alienating or even targeting of Muslims via asking educational and other civil society institutions to identify potentially at risk individuals; infusing a security mindset into ordinary services such as housing or health counselling; and perceived attempts of the state to co-opt Muslim community institutions to act as informants, or otherwise to 'take responsibility' for those who might ascribe to violent ideologies. Subsequent reviews of Prevent have removed

[60] Department for Communities and Local Government, 'Preventing violent extremism – Winning hearts and minds', April 2007, [4].

[61] T. O'Toole, N. Meer, D. N. DeHanas, S. H. Jones and T. Modood, 'Governing through Prevent? Regulation and Contested Practice in State-Muslim Engagement' (2016) 67(3) *Sociology*, p. 160.

its explicit focus on Islam (though concerns remain this may not have been fully reflected in implementation yet), and it appears in recent years to be evolving into a more productive, two way engagement, through the individual decisions of local authorities who develop and implement Prevent activities.

The issue of withdrawal from the European Union has defined British politics since 2016. Driven to a considerable extent by anti-immigrant sentiment, the success of the Brexit referendum and subsequent rise to political power of its main proponents has coincided with a significant increase in crimes that specifically target Muslims. While there have been several openly anti-Islamic political parties and movements in the UK, their fortunes have faded and today they are irrelevant. At the same time, in a 2020 submission to the Home Office, the MCB expressed strong concern regarding the increasing and disproportionate numbers of religion-based hate crimes carried out against mosques or other visibly Muslim places or persons.[62] Possibly, to the extent that there is political Islamophobia in the UK, it overlaps significantly with xenophobia. It might be that those who would support anti-Muslim politicians are largely satisfied with the Conservatives, who are seen as the main anti-immigration party, and who are in firm control of the national government.

There may be a nexus connecting terrorist attacks or major political events around Brexit with spikes in anti-Muslim hate crimes. A study of Metropolitan (ie Greater London) Police Service (MPS) reports from 2005-2012 showed 44 'Islamophobic incidents' in the three months preceding the July 2005 London attacks, and 365 in the subsequent three months.[63] The aggregated monthly police reports of England and Wales for 2013-2019 likewise show surges around the murder of Lee Rigby in 2013, and subsequently dramatic increases during and after the 2016 Brexit referendum and in 2017 the attacks at the London and Westminster bridges, the attack targeting worshipers at the Finsbury Park Mosque, and the Manchester Arena bombing.[64] After the MPS began in December 2008 to require that all hate incidents classified as faith based specify the religion, 48.2% of the 3,300 reports from 2008 until 2012 referenced Islam or Muslims (and 35.9% Jewish persons or faith).[65] Faith hate incidents in England and Wales increased by about 40% annually from 2012/13 to 2016/17, then nearly doubled in 2017/18 and did not decrease in 2018/19.[66] Most incidents in 2006-2012 'took place as victims were going about their daily lives',

[62] 'Submission to the Home Office Protecting Places of Worship Consultation', *Muslim Council of Britain*.

[63] V. Kielinger and S. Paterson, 'Hate Crimes against London's Muslim Communities: An analysis of incidents recorded by the Metropolitan Police Service' (Metropolitan Police Service, 2013), p. 15.

[64] Home Office, 'Hate Crime, England and Wales 2018/19', Oct 2019, p. 8.

[65] Kielinger and Paterson, 'Hate Crimes against London's Muslim Communities', p. 14.

[66] Home Office, 'Hate Crime', p. 6.

particularly between 3pm and 6pm.[67] The majority of suspects were not previously known to the victims, male, between 21 and 50 years old, and categorised ethnically as 'White – Northern European'.[68] Nearly half the victims were lone males, predominantly 31-50 years old, and just over a quarter lone females, predominantly 18-30 years old.[69] Several types of crimes are subdivided into ordinary, and racially or religiously aggravated crimes, such as assault, harassment, and criminal damage.[70] Even if the aggravated crime is not charged, factors such as anti-Muslim animus can justify enhanced sentencing.[71]

VII. Conclusions: Co-existence of the secular state and Islam

The UK presents an example of inclusion and integration of Muslims in Europe. As such, it holds lessons for other societies to study, but with a degree of circumspection. Many British citizens, both native born and immigrants, are Muslims. Formally, Muslims are fully welcomed in the UK, with no significant limitations on social or political participation, and relatively few restrictions on religious practices. At the same time, British society is no stranger to racism or xenophobia, both of which disproportionately affect Muslims as a highly visible subgroup in the population. Any comparison of the UK to other countries also needs to take into account the very particular history and political traditions of the UK; Islam in the UK today is the product of generations of social interaction and learning. It is highly dependent on the particularities of UK law and English, and later British, colonial history.

Institutionally, the postwar UK was well prepared to accept Muslim communities. While it is not a fully secular state (the Church of England still has some lawmaking powers, for example), it is today quite tolerant of religious diversity. Non-Christian religious groupings remain in the minority, but in some areas of potential friction, such as diet or dress, pre-existing legal protections based on Jewish observance transferred readily to protect Muslim practices as well. In general, Muslims can rely on strong protections of religious freedom and against discrimination. Significant long term challenges remain in the form of structural discrimination, reducing educational or professional opportunities, and in apparently disparate treatment of ethnic minorities by state authorities in policing or counter-terrorism. In all problematic areas, however, there is scope for progress by virtue of the ongoing integration of Muslim viewpoints into the social fabric of the UK through education, advocacy, and direct participation in politics.

67 Kielinger and Paterson, 'Hate Crimes against London's Muslim Communities', p. 14.
68 *Ibid.*
69 *Ibid.,* p. 16.
70 Home Office, 'Hate Crime', p. 3.
71 See eg, *Michael Patrick O'Leary v Regina* [2015] EWCA Crim 1306.

Probably the most prominent institutional question not yet addressed is the relationship between Sharia councils and the state. Religious freedom rquires that they be lightly regulated, but lack of oversight can lead to rogue councils or errant decisions. Furthermore, overt state efforts to control Sharia councils could lead to alternative councils being set up outside the state's framework. However, what has been lacking to date is not so much a desire on the part of Sharia councils to implement fairness, equality, and human rights in their work, but an overarching coordinating structure for the councils. Since larger, long established British Muslim institutions such as BMC, ISC and MLSC have an interest in ensuring consistency and respect for both human rights and Sharia, they might in principle support a state-designed oversight and certification board composed of leaders of the councils themselves. Rather than the state trying to regulate Sharia councils in detail, it might be more practical for the state to provide the organisational structure that enables religious leaders to exercise oversight of the activities of the councils, without having to address the difficult issue of the non-hiearchical nature of the Sunni schools of jurisprudence.

The British promise, if not yet the reality, of full inclusion of Muslim communities raises the question of what inclusion really means. Concerns are sometimes expressed about the development of parallel societies, with Muslim neighbourhoods, schools, universities, societies and businesses enabling individual Muslims to live almost entirely apart from non-Muslim Britain, with potentially harmful impacts especially on women and children. However, it seems likely the greater danger is the potential long term 'othering' of Muslims, whether based on ethnicity or religion, which could feed into conflation of Muslims with terrorists, whether by individual or state actors, or the development of a long term underprivileged class due to structural discrimination and alienation, for example. These concerns, while deserving of ongoing attention, seem likely to recede over time. It seems more likely that the diversity among British Muslims will continue to increase, and ways will be found to balance the desires of those Muslims who wish to live somewhat apart, and those who prefer to integrate fully into British society yet still retain a distinctly Muslim identity.[72]

[72] All websites last accessed on 22 Sept 2021.

AFTERWORD

Lina Papadopoulou

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