64. Mohammed Arkoun, *Rethinking Islam. Common Questions. Uncommon Answers* (Boulder, CO: Westeview Press, 1994), 17.
65. Ibid., 126.
66. Interview 20, Copenhagen (September 15, 2003).
67. http://www.time.com/time/innovators/spirituality/profile_ramadan2.html.
68. *Nouvelle Observateur* (October 9, 2003); http://www.nouvelobs.com/articles/p2031/a218643.htm.
69. Ramadan, *Western Muslims*, 17–80
70. 'Grundsatzpapier: Muslime in einer pluralistischen Gesellschaft,' SCHURA-Rat der islamischen Gemeinschaften in Hamburg e.V. (no date)
71. Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), 191, 205.
72. The First Amendment states that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' The prohibition on established religions contained in the first part is known as the Establishment Clause. The second part is the Free Exercise Clause, and imposes a duty on government not to hinder religious practices. Conflict arises because the Establishment Clause prohibits the government from favoring any religion while the Free Exercise Clause also imposes a duty to allow religion freely to develop and has been interpreted to recognize implicitly the public nature of religious exercise.
73. Dworkin, op. cit., 190.

6

Sexual Politics and Multiculturalism

The status of the Muslim headscarf—the hijab—has provoked more debate about Islam in Europe than any other issue. This is because it seems to sum up so many of the concerns that trouble Europeans when they consider the Islamic minority in their midst. These range from the status of Muslim women to wider questions of religious freedom and even national identity. And the controversy has created odd bedfellows, feminists and conservatives joining in an unlikely alliance, ostensibly in order to protect women's right to choose.

In 2004 the French government and five German state governments (Baden-Württemberg, Saarland, Hesse, Lower Saxony, and Bavaria) passed legislation to prohibit the wearing of the Muslim headscarf. Berlin passed a ban in February 2005. In Germany, the laws affect teachers in public schools, and sometimes public employees generally, but not students. In France, only the students are affected.

Feminist supporters of the scarf bans argue that it is demeaning to women to have to cover up their hair and bodies. The practice is presented as an emblem of the repression of women in Islam. Women would not subjugate themselves if they were free to choose, they argue, and therefore a ban is needed to protect women's rights.[1] However, it would be unusual for a government to force women to be 'free' by prohibiting them from a specific action, such as wearing a headscarf. Gender equality enforcement was a prominent issue in the debates but was in no case the reason given by legislators to pass the legislation.

The ostensible reason for banning the scarf in both Germany and France was the need to protect fundamental public values, but the endangered values apparently at stake were different, and the prohibitions were differently tailored. France and Germany are the only countries to have taken legislative action to date, but headscarf controversies are everywhere. Banks, cleaning companies, department stores and food chains, day care centers, and hospitals all over Europe have refused to hire women who wear headscarves. New EU employment law prohibits refusals to hire on religious grounds, but the religious status of the headscarf is contested and court challenges are, in any case, time-consuming, and the outcome uncertain.

What do Muslim leaders think of these issues? Are patriarchal men and conservative clerics pitched against moderates and modernizers who support women's equality? What are the views of Muslim women who occupy positions of political leadership? And is the headscarf a symbol of a larger problem inherent to Islam: a disregard for women's rights, even denigration of women, exemplified more painfully in forced marriages and polygamy?

COUNTING HEADSCARVES

The headscarf is now part of the European streetscape. In France, the headscarf is referred to as 'the veil'—'le voile islamique'—and women who wear it are described as being 'veiled.' However, this terminology gives the wrong impression in most cases. The contested piece of clothing may be made of a flimsy chiffon or expensive silk, or it may be a heavy, folded, black scarf made of thick fabric. One of the difficulties with enforcement turns out to be how to determine exactly which types of head coverings are prohibited. How does a principal or an employer distinguish between a headscarf worn for religious reasons and one worn for other reasons? Is a flimsy scarf a missionary statement for Islam? Is a Chanel scarf banned? Is a bandana?

Although the word 'hijab' is used in English simply to refer to the headscarf, properly speaking it refers to the general obligation to dress modestly.[2] A more rigid interpretation of Islamic dress codes involves wearing the headscarf with a tight tube sock or hood pulled over the hair and a jilbab, a floor-length dress coat. However, most women who wear a scarf otherwise dress in conventional western clothes, and for many covering-up is something you do in the mosque and on other special occasions.

I counted headscarves on my trolley rides from the immigrant neighborhood in Oost Amsterdam, where I was staying, to the city center. On average one-fifth of the women, who were mostly young and smartly dressed, wore them. The older women tended to wear more severe versions with long dress coats in dark colors. On occasion, you would come across someone wearing niqab, a piece of thin cloth that is worn to cover the face but leave the eyes uncovered.

Headscarf fashions and conventions vary from country to country in Europe, and in part reflect the varying ethnic origins of Muslims. Pakistani and Indian Muslim women usually wear a thin scarf with the colorful salwar kameez, a tunic with pajama-style pants. Many women color-coordinate their scarf with jeans or smart suits. And women wear the headscarf for many different reasons: tradition, choice, and, yes, sometimes because they are told

to do so by fathers or husbands, imams or sheiks. Young women who wear the scarf generally tend to stress choice and self-discovery as their reason for doing so.[3] They experience the headscarf bans as a penalty on their personal quest for identity, a very Western project.

In Denmark and Sweden, I listened to young Muslim women joke about how people berate them for being 'suppressed' and 'throwing away their freedom.' They find it amusing that in Scandinavia it is OK to be naked but to wear a headscarf is not. At a party in the Stockholm mosque, a group of young women training to become teachers and nurses, and in one case a psychologist—all wearing headscarves—explained to me how they could never get jobs in pediatric wards but the geriatric wards were happy to take them, because Swedes did not want to work there. 'We Muslims,' they said, 'we value the old people and they quickly take to us.'[4] Discrimination rather than coercion seemed to be the primary issue in their case.

It was difficult to believe that Iram, a beautiful and bright law school student I met in the offices of an antidiscrimination watchdog organization in London, who was wearing an expensive scarf pulled over her forehead and tightly knotted under her chin, was coerced. Or whoever could force Sadia, the 'sister' chair of the Young Muslims' Association in the Stockholm mosque, to do anything she did not choose to do? Sadia adjusted her colorful scarf while telling me about how strange Swedes are because they think religion should be invisible. 'But what good is faith,' she said smiling, 'if you cannot see it?' She also confided that she would probably never marry because she was too busy with her education and political activism to think about romance.

Only a few of the women leaders I met wore headscarves, but many of the young activists did. When I asked if their mothers wore the scarf, in most cases I was told that the mothers did not wear a scarf. In contrast, several parliamentarians and prominent women leaders who do not wear the scarf said that their mothers did. It would seem that among the politically active women the headscarf is not worn out of tradition but by choice, and to make a statement about their faith and identity. All thought that women who wear the scarf pay a heavy penalty.

BANNING THE HEADSCARF: FRANCE

The French ban took effect with the start of the 2004–5 school year. The law prohibits students from wearing 'ostentatious' religious symbols. The Jewish kippa (yarmulke) as well as 'oversize' crosses are prohibited together with the Muslim headscarf. The Sikh turban was inadvertently included and France's

6,000 Sikhs tried subsequently but unsuccessfully to negotiate an exemption based upon the claim their turban is 'ethnic' dress rather than a religious symbol. Since the ban primarily affects teenage girls, one problem arising from the ban is how to educate the girls who are staying away or have been sent home from school for violating the ban.

The scarf only gradually became a charged political symbol of the presence of Islam in France. It first became a political issue in October 1989, when a principal of a secondary school in Creil, a Paris suburb, expelled three girls for wearing the scarf. In November that year the Conseil d'Etat, the highest administrative court, issued a ruling that the wearing of headscarves for religious purposes in public schools did not violate the principle of *laïcité* or other French law. In December that year, the socialist prime minister, Lionel Jospin, issued the first of a series of government rules that gave principals the authority to make decisions about the permissibility of the headscarf. Controversy broke out again one month later when teachers went on strike in support of a principal who had expelled girls for wearing the headscarf. Officials, teachers' unions, and various public figures became involved. A second 'circulaire' was issued, once again stressing the principals' rights to decide, but the controversy did not go away. In the Fall of 1994, more girls were expelled from school for refusing to take off the headscarf and further government regulations were issued. In 1999, seventy teachers of a middle school in Normandy went on strike on a Friday during Ramadan, in protest against girls wearing the hijab.

Also in 1999, the Conseil d'Etat ruled that school principals had the authority to set dress codes 'compatible with the proper functioning of the class, notably in gymnastics and science.' This decision undid a decision by a lower court from 1996 that held in favor of a girl who had been expelled from school for wearing the hijab. The lower court had given priority to freedom of expression and freedom of religious belief, but the court held that neither prevented school principals from setting dress rules. It was nevertheless a balanced decision, because the court also held that the school had not provided sufficient evidence that the headscarf was a danger to the girl and prevented her from participating in gym and science classes. From 1989, when the high court first ruled on the headscarf, until the 2004 legislation, the legal status of the headscarf remained the same: the scarf did not pose a problem for French principles of secularism, but principals could set dress codes which disallowed wearing the scarf during certain activities if well-founded and specific reasons were given.

As a result of the decision, the then socialist government headed by Lionel Jospin hired a 'scarf-mediator,' whose task it was to mediate between girls and the schools when conflicts arose. In effect, principals were free to set their own rules and the mediator, Hanifa Chérifi, the government official in charge of mediating headscarf conflicts, was only moderately busy.

Controversy erupted again with the start of the school year in 2003, when two girls, Alma and Lila Lévy, were thrown out of school for wearing the headscarf. The girls had a Jewish father and a mother who, albeit Muslim, did not wear the scarf. Alma and Lila quickly became celebrities, appearing in tabloids and women's magazines explaining how they color-coordinated their headscarf with their outfits, while their father threatened a lawsuit. This time, the president, Jacques Chirac, a conservative, declared that the headscarf breached the separation of church and state. and was a source of social disorder.

French newspapers regularly reported that fundamentalist clerics force young women to wear the headscarf and prominent feminists criticized Islam and Muslims, and headscarf wearing, as demeaning and repressive of women. In April 2003, Nicolas Sarkozy, who had been negotiating with various Muslim associations to create the CFCM, the French Muslim council (see Chapter 1), surprised his audience at a meeting of all the main associations by reverting to a 'tough on Muslims' stance and announced that henceforth all women would be required to remove their headscarf for picture-taking for ID cards and drivers' licenses.[5]

In July, Chirac created a presidential commission to 'update' the French law of 1905 on the separation of church and state, which is regarded as establishing the principles associated with 'laïcité.' Reexamination was needed, he argued, in view of the multireligious nature of contemporary French society and with particular reference to the question of 'the veil.' Members of the commission subsequently denied that it had been charged with the task of 'reexamining' secularist principles and the law of 1905, yet the title of the commission and the official announcement of its creation mentioned both and suggested that this was precisely their task.[6] The committee members rewrote the committee's change in the course of their work.

In December 2003, a group of French feminists, actors, designers, and intellectuals took out an advertisement for a petition in the fashion magazine, *Elle*, which was also published in *Le Monde*, which argued that Muslim women are suppressed by the headscarf and in need of the legal protection provided by a law that would forbid them to wear it.[7] The Chirac government agreed. Hitherto unknown for his support for feminist issues, Chirac expressed his concern in terms of the rights of women. At an early stage of the commission's deliberations, the commission president, Bernard Stasi, also expressed the view that the Muslim headscarf is 'objectively' a sign of the suppression of women. Young girls wore it only because they were forced to do so by parents, grandparents, older brothers, or religious groups.[8] Hanifa Chérifi, the headscarf 'mediator,' testified to the French National Assembly that since a majority of Muslims do not wear the headscarf, it is the symbol of

Islamic fundamentalism.[9] When asked if girls might freely choose to wear the headscarf, she responded that choice is meaningless among fundamentalists.

The Stasi commission issued its report on December 11, 2003, and recommended banning all clothing or jewelry displaying 'ostentatious' religious symbols.[10] But now the rights of women had dropped out as a primary concern. Presenting the new law to the National Assembly, the prime minister, Jean-Pierre Raffarin, stressed the importance of protecting the French way of life. 'Integration is a process that presupposes a mutual wish [to integrate], a shift towards certain values, a choice of a way of life, a commitment to a certain view of the world proper for France.'[11]

On February 10, 2004, the National Assembly voted 494 to 36 in favor of the legislation.[12] The dissenting votes came from members of the center-right UDF and the Communist Party. Edouard Balladur, a former prime minister from the RPR, now part of the UMP, Chirac's coalition, voiced concerns about the constitutionality of the bill. In his view, Article 10 of the Declaration of the Rights of Man and Article 9(1) of the European Convention on Human Rights allowed for restriction of religious freedom only if this is justified by the need to protect social and legal order.[13]

The Stasi commission had anticipated such concerns, and probably shared them. Article 9 of European Convention on Human Rights grants everyone 'the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.' Yet the convention also leaves the door wide open for governments to legislate on religious matters. Article 9(2) allows governments to limit 'manifestations' of religion or belief, albeit 'only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.' 'The headscarf bans exploit this exemption, Patrick Weil, a political science professor and one of the members of Stasi commission, subsequently explained, 'the Convention authorizes the limitation of the expression of religious faith in the case of problems of public order or attacks on the freedom of conscience of others.'[14]

Weil and his colleagues had expert advice on how to devise a headscarf ban that could withstand the court's scrutiny. Jean-Paul Costa, one of the vice presidents of the Human Rights Court, went before the Stasi Commission, in secret session, to advise the Commission on the court's views of what were acceptable exemptions under Article 9.[15] Judges do not usually advise governments on how to design a bill to pass the scrutiny of their own court, and Costa's appearance before the Commission was controversial among his colleagues on the court.

BANNING THE HEADSCARF: GERMANY

The headscarf is seen in a different light in Germany. The German bans were a matter of state law, and what exactly is prohibited varies from state to state. In Berlin, the legislation included all civil servants and all signs of faith, encompassing crucifixes and yarmulkes together with the Muslim headscarf. In other states, only the headscarf is affected. And in Bavaria, a ban on headscarves was accompanied by a law that required the placing of crucifixes in public schools. The problem, it is argued, is that women who wear the scarf are acting as missionaries for their faith, and proselytize in the classroom for values that are incompatible with fundamental German values.

The controversy began in July 1998 when the Stuttgart school system refused to hire a German-Afghani woman, Feresthta Ludin, as a teacher, because she wore the headscarf. She had come to Germany as a political refugee from the Taliban, and had started wearing the headscarf later. She took her case to court and, in September 2003, the German Constitutional Court reached an ambiguously worded decision that held that her rights had been violated and yet gave local governments the authority to legislate against the headscarf. Ms Ludin's rights were violated, the court said, because no law existed that prohibited teachers from wearing the headscarf.[16] The decision thus set off the rush to pass state laws banning the headscarf.

The court did not reach its decision, as one might have expected, on the grounds that religious freedom is guaranteed by Article 4 of the German Constitution. The refusal to hire Ms Ludin was unlawful simply because no prior law existed in the state of Baden-Württemberg (where Stuttgart is the state capital) saying that teachers could not wear a headscarf. The Stuttgart school system had argued that the schools were obliged by the Basic Law's Articles 6 and 7 to remain neutral in religious questions, and that the headscarf constituted proselytizing. The Court did not directly address the neutrality argument but declared that competence to regulate the meaning of neutrality rested not with the federal government but with the states (which in what follows will be referred to by the German term, 'Länder,' in order to avoid confusion.)

The decision, together with a 1995 ruling in which the Constitutional Court struck down a Bavarian law school mandating the placement of a crucifix in every classroom, can be seen as the beginning of a muddled dialogue between the Länder governments and the Court on the meaning of the constitution's provisions with respect to religion.[17] The Bavarian legislature reacted to the 1995 decision by passing a new law that once more mandated the placing of crucifixes in classrooms, and referred to Christianity

as the Bavarian cultural inheritance. The new law bypassed the court's objections to the previous law by creating a procedure for complaints. Students (or parents) may demand that the crucifix be removed from the classroom, if they can demonstrate 'serious and consequential reasons' ('ernsthaften und nachvollziehbaren Gründen') for removing it. School principals are charged with the responsibility of reviewing complaints and must, in doing so, also be sensitive to the concerns of the religious majority of the community.

Following the Ludin decision, on April 1, 2004, Baden-Württemberg passed a law prohibiting teachers from wearing the headscarf in the classroom. The prohibition of religious symbolism was justified on the argument that the headscarf is a threat to core 'Western' norms and constitutes a challenge to the fundamental values of the state. The crucifix was not banned from the classroom, however, on the argument that universal human rights and democracy derive from Christian norms. The legislators accepted that the state must be neutral in religious matters, but they denied that this means it should be neutral with respect to fundamental values. On the contrary, public schools are charged with the task of educating children in the values on which the republic is based. The Christian Democratic culture minister, Annette Schavan, who pushed the bill through with great speed, gave as the reason for the apparent inequity in the treatment of Christianity and Islam that Christianity is an essential part of the value systems of the 'occident.' It is therefore a matter of public ethics to keep Christianity in the classroom. 'We cannot allow a spiritual vacuum to emerge that would leave our society without guidance,' the Minister warned. 'We must stand by our cultural and religious traditions as they are expressed in our Constitution.'[18] The constitution in question is that of the state of Baden-Württemberg, but it should be noted that the Länder are also obliged to observe the values and rights expressed in the federal constitution as well as the international conventions on human rights to which Germany is a signatory.

Cultural policy is subject to devolution to the Länder. Religious freedom is a federal matter. After the Ludin decision, the Constitutional Court was criticized for bucking its obligations by defining the headscarf as a cultural matter rather than an issue of religious freedom. One of those critics was Johannes Rau, the departing Federal President, who pointed out that if Germans wanted to ban the Muslim headscarf in schools, they would also have to ban Catholic nuns' wimples or priests' habits.[19] The states count on the Constitutional Court's reluctance to assert federal power over the Länder. But the argument that the crucifix is 'value-neutral' and the Muslim headscarf is 'religious proselytizing' because the former is part of the value heritage of occidental nations and the latter not clearly engages the constitution's definition of religion, and will likely wind its way back to the Constitutional Court.

A member of the German Bundestag told me that, in her view, when the history of how Muslims changed Europe will be written, the conclusion will be that they promoted secularism and the separation of church and state. 'Because of this decision by the constitutianal court (the Ludin decision), we are having a discussion about secularism,' she remarked. 'I do not say that things will change in two months, but we are looking for a new parity of state and secularism and religion in Germany. It is very interesting that Islam has brought a new dimension to the discussion in this country. It is a very big difference, and when you look in five years, in ten years, things will have changed as a result of this decision.'[20]

In the Ludin decision, the Constitutional Court dodged engagement with two articles in the German Constitution, Article 3, which stipulates that 'All persons shall be equal before the law' (section 1) and that 'No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions...' (section 3), and Article 4, which says that 'Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable' (section 1). It does not seem possible any longer to postpone a legal interpretation of the application of these articles for German Muslims.

EUROPEAN HUMAN RIGHTS LAW

Headscarf controversies have ended up in courts across Europe, and the bans have mostly been deemed legally acceptable. Human rights enforcement is now entrusted to two European courts, the European Human Rights Court, which was created under the European Convention of Human Rights (ECHR), and the ECJ, which interprets EU law. Confusion arises because the courts have different jurisdictions—different countries are signatories to the treaties enforced by the two courts—and the ECJ has so far ruled only on employment law and EU citizenship issues. In the recent treaty expansion, parts of the ECHR have been incorporated into EU law and the ECJ will in the future be able to apply some of the same rights paragraphs that in the past have only applied under the Convention. It typically takes ten years for a case to wind its way through the court to a decision, which means we will have to wait a while to see what role the court will play.

The Consolidated EC Treaty (Amsterdam plus Nice) restates the prohibition in Article 13(5) to include discrimination based on sex, racial or ethnic origin, religion or belief, disability, and age or sexual orientation, and empowers the commission to 'take action.' This means that the Commission can

take the initiative and issue directives.[21] The difference is that antidiscrimination rules have now moved from the realm of international law to directly applicable community law. It is probable that in the medium-term the Commission may assume the more important role as arbitrator of the diffusion of convention norms into domestic law and policymaking.

The human rights court has been cautious in its interpretations of the Convention on matters of religious rights, and has mostly held with governments. It has had several opportunities to define the limits of the exemption under Article 9(2). A recent case decided by the human rights court, *Sahin v. Turkey*, is relevant to the French and German headscarf bans. It concerned a fifth year medical student, Leyla Sahin, who was refused admission to training in various medical specialties at the University of Istanbul in 1998 after the university passed a dress code. She subsequently enrolled at the University of Vienna. Sahin's lawyers argued that the university's headscarf ban forced students to choose between education and religion, and therefore discriminated between believers and nonbelievers. They further argued that the headscarf does not pose a threat to public order, and is therefore permissible under Article 9(2). The Turkish government responded that the ban was justified under section 2, because the 'Islamic-style headscarf is a symbol against the principles of the Republic. Such a situation can lead to chaos in the country. It also contradicts with [*sic*] the principle of secular education.'[22] The court held with the Turkish government.

In an earlier and similar case, involving a nursery school teacher, the court held with the Swiss government that the obligation not to proselytize in public schools could be used to justify a headscarf ban.[23] Likewise, the court upheld a requirement by the Turkish government that women remove their headscarves for ID card pictures.[24] The cases show that the court is inclined to grant governments a great deal of freedom to exploit the exemption in Article 9(2). The test for permissible bans on religious expression—as in the case of the headscarf bans—is that restrictions otherwise covered by the freedom of religion clause contained in Article 9(1) must be based on evidence that public order is threatened by the behavior that is to be restricted. A second requirement is that restrictions on religious expression can be imposed only by legislation—they must be 'democratic'—and not simply derived from administrative rules. A third requirement is that the legislation must be 'proportionate' and 'necessary', and must regard religious exercise that constitutes a manifest threat to public order.

If the French government takes heart from the Sahin decision, the German 'Länder' governments expect that the decision regarding the Swiss nursery school teacher will provide support for their argument that protecting the integrity of public education requires the removal of the headscarf from

teachers' heads. Neither decision, of course, can be interpreted as supporting the permissibility of crucifixes in the classroom, and the end result of the Länder's haste to prohibit the headscarf may still have unanticipated consequences for the place for Christianity in public schools.

In Britain, the courts have taken a very different view of Article 9, as became clear in the Shabina Begum case, which I will discuss in detail below. The British government intervened 'by proxy,' in the sense that a well-known QC, Cherie Booth, Tony Blair's wife, acted as counsel for Shabina when the case went to the Appeals Court. It is, as far as I know, the first time the right to wear religious dress has been upheld by a high court in Europe and with implicit support from the government.

The US Justice Department intervened in the trial regarding an eleven-year-old girl, Nashala Hearn, who was sent home from school twice for wearing a headscarf. The Muskogee Public School District in Oklahoma argued that the girl's headscarf violated school dress codes. The Department of Justice took the girl's side, arguing that the dress code violated her constitutional rights, specifically Title IX of the Civil Rights Act of 1964. Outgunned, the school district entered a consent agreement on May 19, 2004, in the US District Court, allowing the girl to wear the scarf and agreed to revise school dress codes.[25]

Interestingly, the consent agreement established quite cumbersome procedures for obtaining a religious exemption from dress codes. The agreement allowed the school district to forbid headgear, 'Head coverings of any sort whatsoever will not be worn by students to class or within school buildings.' But it also established that, 'Any student who requests permission to wear any head covering for religious reasons will submit a written application on the form provided by the School District for such purpose,' and enumerated a multistep procedure for granting the exemption. Even in the USA, you need certification to receive an exemption from rules that stipulate allowable dress styles before you can claim a right to break such rules.

The US government appealed to the right to religious expression, well-established in the USA but still not entrenched in most European legal systems. Nonetheless, in practice the difference between European and US rules are smaller than first principles suggest. There is no right in Europe to wear the headscarf, but outside the French and German bans—which may yet be modified further—governments and courts have applied a reasonableness test and set limits for dress codes, for instance by allowing employers to make assistants in perfume departments wear fashionable clothes, or to ban headscarves in occupations where uniforms are worn. On the other hand, courts have generally disallowed headscarf bans for clerical workers in back offices, and for janitorial staff. The unanticipated consequence of European

legal reasoning is to banish headscarves to low-skilled jobs and close off access to professional occupations for Muslim women who wear the headscarf.

BANNING THE JILBAB: WHERE IS THE LIMIT?

Within certain boundaries, the collective and individual levels of tolerance prevailing in society are subject to constant negotiation and adjustment. The headscarf issue is an interesting example of the negotiation of boundaries. Most European Muslim leaders think that women should be free to choose to wear the headscarf or not, but they also draw the line at the niqab and the burqha, the tent-like head to toe cover that the Taliban and other radical Islamic groups require women to wear. It is regarded as an ethnic custom that is debilitating for routine social intercourse and detrimental to pluralist coexistence.

The headscarf bans, in contrast, are seen as an invasion of the freedom to choose, and an attempt to legislate religious expression that is demeaning to Muslims as a group and contrary to Western values. My informants often remarked that it is just as unacceptable to prevent a woman from wearing a headscarf as it is to force her to wear one. One Danish city councilor, who spoke laughingly of a relative who had decided to 'become religious' and now looks like 'Bin Laden's wife,' still thought that it was 'her choice' and not something a democratic government should get involved with.[26]

Most Western European countries have gone through one or more episodes of public controversy and legal challenges on the issue of the right of Muslim women to wear the headscarf at work or in public settings. In the Netherlands and Britain, the headscarf is widely tolerated by private and public employers, although the Amsterdam police chief was forced to withdraw a proposal to allow policewomen and meter maids to wear headscarves with their uniforms. In Britain, policewomen and parking officers have been issued uniforms with headscarves, if they request them. British doctors and nurses can freely wear the headscarf, as do many other professional women and students.

In other countries headscarf conflicts led to lower-level arbitration and have not been a matter of national lawmaking. In some instances, laws have been proposed and failed. Adjudication of employment law issues in Europe typically goes to tribunals or administrative agencies rather than proper courts. The reasons for firing women wearing the headscarf have ranged from 'occupational hazard' grounds to uniform requirements and other dress codes. A Danish case from the early 1990s concerned a Muslim doctor

who was barred from working at a hospital because she insisted on wearing a headscarf. The hospital management argued that the headscarf was disallowed for 'practical and hygienic' reasons but also that, 'neither patients nor other employees can accept that doctors wear headscarves because they diverge from the hospital's normal standards for attire.' Upon appeal, the case went to three different ministries and all three upheld the hospital's decision.[27]

Supermarkets have been involved in many cases across Europe. In 1999, a Danish supermarket chain fired a cashier for wearing a scarf to work on the argument that it might get stuck in the cash register. The court held with the chain, and rejected the defense's argument that if baseball caps and Santa Claus hats—'nissehuer'—were permissible at work, the Muslim headscarf should be too. A large Swiss supermarket chain issued a prohibition on headscarves in November 2004, but rescinded it a few weeks later in response to criticism. In Sweden, cashiers and stockers are allowed to wear the scarf.

Dress codes that prohibit the more restrictive styles of Islamic dress have been less controversial, in part because they affect few women and in part because the majority view among Muslims is that no religious grounds can be invoked in their defense. Many Muslims therefore consider dress codes that disallow burqas or jilbabs in schools or at work acceptable. In Britain, the Court of Appeals, on March 2, 2005, held with a sixteen-year-old girl, Shabina Begum, against a principal, who in September 2002 sent the then thirteen-year-old student home for wearing a jilbab. She had been admitted to the school in 2000 and had not previously protested the dress code.

Shabina says that she had reached the conclusion through her own religious studies, that the Koran requires an observant Muslim woman to completely cover her body, with the exception of her face and hands. The lower court held with the school, and argued that the school had the right to set dress codes providing proper accommodation was made for religious students, which the court found the school had done. The school allowed Muslim students to wear the shalwar kameez, baggy pants and a long tunic. Local Muslim leaders and imams had approved and supported the school's rules. Muslim parents and students at the school, Denbigh High School in Luton, told the press that they supported the dress code and the principal's decision. Eighty percent of the students and the principal are Muslim.

The case acquired celebrity status when a well-known QC, Cherie Booth, decided to represent the girl in the Court of Appeal.[28] The Muslim Council of Britain at first refused involvement with the case, but then changed its mind and issued a statement in her support. Shabina became an orphan during the trial, when her mother died. When she first turned up in a jilbab her

brother, Sherwas Rahman, and another unidentified man accompanied her. Throughout the case, the brother spoke on her behalf in dealings with the school and as her 'litigation friend' in court. Rahman is a supporter of the extremist Islamist group, Hizb-ut-Tahrir (HT). This became publicly known after the trial ended, when HT took credit for having 'advised' Shabina. The principal and the school's lawyer pointed out the connection to extremists in the argument before the lower court, but the issue did not receive much attention. The principal stated, 'there is a number of girls in the school which [*sic*] relies on us to help them resist the pressures from the more extreme groups. I fear that if the school uniform were to be replaced to include the jilbab.... These girls would be deprived of proper protection and would feel abandoned by those upon whom they were relying on to preserve their freedom to follow their own part of the Islamic tradition.... [S]ince this case has been given publicity, the school has been picketed by groups of mainly young men who would appear to be from the more extreme Muslim traditions.'[29]

Would the Muslim Council of Britain have stuck to its original reluctance to support Shabina Begum's lawsuit against her Luton High School for refusing to allow her to wear a jilbab to school, if it was widely known that her brother was an extremist? Would Cherie Booth have decided to represent Shabina? The political and factual aspects of the case largely confirm the French sentiment that girls are being manipulated by men and political extremists, and that it is only extremists who demand Islamic dress. The Shabina Begum case, it should be noted, was not about the headscarf—which was tolerated at Luton High—but about the more restrictive dress.

Why did the Court of Appeals reach the conclusion that the school could not prevent Shabina from wearing her jilbab? Interestingly, the justices decided for Shabina based upon their understanding of Article 9 in the European Court of Human Rights, the same Article under which the French government justifies banning the headscarf. (The European Convention on Human Rights was made directly applicable in British courts by the 1998 Human Rights Act.) The British justices argued that Shabina's right to wear religious dress was covered by Article 9(1), and the school had failed to demonstrate that it was justified in insisting on the application of its dress code as required by Article 9(2), which allows restrictions on religious rights under specific circumstances related to safety and social order.[30] The curious outcome is that, in Britain, the European Convention of Human Rights is interpreted to prohibit schools from having dress codes that disallow the jilab but allows other forms of religious dress including the headscarf, such as the one in effect at Denbigh High, whereas in France it is seen as allowing a blanket prohibition on the headscarf, the turban, and the yarmulke.

Irrespective of the discord on the legality of headscarf bans, the politicization of the headscarf has had difficult consequences for many Muslim women. A young Swedish Social Democrat said to me, 'My mother wears the headscarf; just a pretty small scarf. She is the strongest woman in the world, yet they have now made her into a victim and they do no see her for what she is.'[31] The irony is that twenty years earlier her mother had been welcomed to Sweden as a celebrated political refugee and was much admired for her courage. She wore the headscarf then, too, but once Swedes decided that the headscarf was not a quaint foreign custom one had to respect but prima facie evidence of female suppression, the woman was transformed from a freedom fighter to a victim.

Invariably, politicization works also to make the scarf a symbol of resistance. Pola Manzila Uddin, a Labour peer, described in a letter to the *Guardian* her own path to an assertive and politicized Muslim political persona.[32] She wrote to express her dismay over the lower court's decision in the Shabina Begum case, and explained how as a Muslim she had joined Labour because only the left held out the promise of social improvement for Muslims. Now, with Labour failing to deliver on its promise to help Muslims improve their status, she was disappointed. Muslims who want to keep their faith were afforded few choices about where to put their energies and votes. Baroness Uddin explained how, when she recently had occasion to put a headscarf on, it felt 'right' to keep it on for the time being. She was shocked, she wrote, that friends and colleagues interpreted her choice as a political statement. (Which, of course, she had just said it was.)

Baroness Uddin's embrace of a contested symbol as a personal statement of identity—and, one has to conclude from her own explanation, also a political statement—does not fit with any of the assumptions normally made about why women wear the scarf. It is evidently a political statement—she did not use to wear one previously and now she does because she is protesting about certain political developments. But Baroness Uddin is not a fundamentalist, and she is not repressed. She wears the headscarf by choice to show her allegiance to her faith, and for political reasons. But she does not wear it all the time, so it is not an obligation. It seems to me that to prohibit Baroness Uddin from wearing the scarf as she carries out her duties as a member of the House of Lords—which would be the case if she were a member of the French Senate—would be to violate *both* her political and her religious rights.

Muslim women who wear the headscarf argue that they are victims of discriminatory homogenization. A Stockholm city councilor, a Social Democrat, wears a headscarf. In official Sweden, she said, discrimination is not allowed but there are many problems for immigrants, and particularly for Muslims. Headscarves are a very important problem, she said, adding,

'Islamophobia is real.'[33] It is assumed, she says, that a woman who wears a headscarf is an Islamic 'fundamentalist' and that she will be trouble, and therefore should be avoided.

Headscarf bans have become a litmus test for European feminists. On one side are feminists who argue that backsliding cannot be allowed, and the force of law must be used to defend women's gains. And on the other side are feminists who say that consciousness changes slowly and that the most successful changes are voluntary.

The frequently made argument that women must cover up to prove themselves 'chaste' and 'pure' illustrates that it *is* intended as a restriction on women's sexual freedom. If women's bodies must be hidden because they are distracting to men or offensive, it *does* connote female inferiority. The misogynistic justifications for the 'veiling' requirement expressed by some imams and religious scholars are all too familiar reminders of a not so distant era when women were deemed responsible for their own victimization. Yet even if you agree that to regard women as responsible for their own purity is an inherently misogynist position, it does not follow that governments should prohibit women from covering up. It is easy to see why Muslim women regard government dictates in this matter as yet another interference with their freedom and another obstacle to their social integration.

The headscarf controversies have had perverse effects. Muslim scholars and theologians are increasingly reluctant to say that the headscarf is a matter of choice for reasons that have more to do with a desire to protect women's rights than with a wish to suppress women. The view that the headscarf is 'optional' is seen as lending credibility to the argument that the headscarf is 'political,' and therefore not covered by the European Convention of Human Rights' Article 9. The courts have stipulated that for something to be covered as a matter of religious freedom, it must be seen as unambiguous religious obligation. One unfortunate consequence is that the prohibitions may have a chilling effect on liberal interpretations of Islam's religious obligations.

A British imam explained to me, 'I used to say that there is no doctrinal basis in the Koran for the hijab, but I will not say that anymore.'[34] To say that the hijab is optional would, he continued, lend credence to the argument used in favor of headscarf bans that women 'do not have to wear' the scarf and the bans therefore do not violate any principles regarding toleration of religious expression.

Nevertheless, Muslims disagree on how to interpret the Koran's instructions. Religious scholars and feminists argue that the hijab requirement is the same for men and women. Amina Wadud, in *Qur'an and Women: Rereading the Sacred Texts from a Woman's Perspective*, argues that the Koran's prohibitions against 'wanton display' (verses 33: 33 and 24: 60) clearly applies to

both men and women and that nothing specific is said about what dress to wear.[35] And then there are all those who think it does not matter what the Koran says or does not say about dress, because sleeve length and head coverings are unimportant aspects of what it means to be a Muslim.

WOMEN AND ISLAM

There are problems with the subjection of women in Islam—and among Muslims, which is a different thing. It is hardly a problem peculiar to Islam, but this is not the place for a comparative evaluation of how different faiths treat women. Women's legal equality is a more recent phenomenon in Europe than we often care to think about. In Germany, the legal subordination of wives to husbands remained a matter of law until the reform of the Civil Code in 1956, when legal patriarchy was abolished.[36] The political influence of Catholic thinking had a great deal to do with the lateness of the reform. Fifty years have passed, and it is in part the gains that European feminists have made that cause them to take a hard line on Islam. They sometimes overlook the fact that misogynist clerics do not speak for all Muslims.

'Because women are not deemed as important as men in most Muslim majority or minority communities,' writes Amina Wadud, 'Muslim women do not enjoy a status equal to men.'[37] Like many other Muslim feminists, she has chosen to address the problem by rereading the Koran. She insists that women belong in the mosque, and may even lead a congregation in prayer and preach the khutbah. A group of Canadian feminists, the Canadian Council of Muslim Women in Ontario, entered into a heated debate with local religious leaders on the question of women's imamate after a woman gave a sermon in a local mosque. 'There is no reliable hadith that prohibits women from leading men in prayers,' the Council declared in a letter to local religious leaders, and rejected the authenticity of a particular hadith which is usually regarded as an unequivocal scriptural prohibition on female prayer leaders in the mosque.[38]

Muslim politicians and activists, and many religious leaders, often point out that Islam—and Muslims—must revisit religious teachings on the position of women. Khalida Khan, a British Muslim activist, complains that things are getting worse as a new—male—Muslim political elite is emerging in Europe. 'There is an unhealthy trend towards an alliance of men in building structures of power, excluding and marginalizing the role of women.'[39]

A common complaint among Turkish-origin politicians about the Turkish communities in Europe is that they have held on to conservative values and

expectations, particularly about women's roles, that are outdated in Turkey itself.[40] Forced or arranged marriages are another frequently cited example of patriarchal conservatism. Arranged marriages are not a religious but an ethnic custom, widespread both among Turks from rural areas and among British Asians. Restrictive immigration laws have had the unintended consequence of providing economic and legal incentives for the continuation of the practice. In many cases, a 'cousin marriage' is a way of helping relatives to send a young woman or man to Europe. South Asian families—Muslim and Hindu—often view marriages as a way to strengthen family networks. Bhikhu Parekh has defended consensual arranged marriages, arguing that, 'the wider society is right to ban imposed marriages or those contracted under duress as defined in a culturally sensitive manner, but to go further is to be guilty of moral dogmatism and unjustified cultural interference.'[41]

For many feminists, myself included, the difference between an arranged and a forced marriage is murky, and any defense of parental interference with sexual freedom suspect. This is not a 'feminists versus Muslims' argument. Several of the imams I interviewed advocated changing public policy so that religious marriages are made legally binding. The measure would, among other things, make polygamous marriages impossible, because the imams would be required to ascertain that the parties were legally able to agree to marriage. It might at first glance seem a simple change, but it raises complex questions about the legal status of imams who currently have neither the legal rights nor the legal obligations afforded to other clergy.

Without the right to issue legally binding marriage documents, imams cannot prevent anyone who is not freely entering into the marriage from marrying in religious ceremonies. The problem has many permutations ranging from forced marriages, under-aged marriages, and polygamous marriages. As long as religious ceremonies are not legally binding, marriage law does not apply to the union, and nor does divorce law. Women who marry in religious ceremonies have no legal claims on their husbands. The more common problem regards men who remarry after legally divorcing their first wives in civil procedures but do not seek religious divorces. The consequences for the women are at times severe. Women who have obtained civil divorces cannot remarry another Muslim, if the husband refuses a religious divorce. Moreover, some men marry different women in religious and civil ceremonies, and in effect commit polygamy.

Naser Khader, a Danish member of parliament, has called for legislation that would compel conformity between religious and secular law in this connection. The British Shariah Council issued a report on October 22, 2004, in which it estimated that as many as 4,000 men skirt the ban on polygamy by marrying second wives in religious ceremonies. 'We are concerned for the women—the second wife or subsequent wives usually find they have no rights if the relationship breaks down,' a spokesman for the council said.[42]

ISLAMIC DIVORCES AND LEGAL DUALISM

Another controversy related to the position of Muslim women and of Islam in European law and public policy has arisen over the shariah, the expressed desire on the part of some Muslims to apply Islamic religious law in Europe. Generally, Muslim leaders agree that it would be a serious mistake to grant statutory status to Islamic religious law, and admit that this would be particularly bad for women. The common accusation that Muslims want to make religious law binding for everybody is absurd. For one thing, Muslims are a minority and cannot impose any law on Western democracies. Nor would they want to. Most Muslims do not follow shariah. Many Muslims say, as did one parliamentarian, 'shariah! What nonsense.'[43] It is only fringe groups like Hizb-ut-Tahrir that argue for the generalized imposition of Islamic religious law on everybody.

Religious people may argue that Muslims are obliged to follow shariah in their personal life, but that this is a matter of personal choice, and that they are constrained by secular law. The argument goes that the Koran may be read to mandate stoning as a punishment for certain crime, for instance, but that stoning is illegal everywhere in Europe. Therefore no European Muslim can endorse stoning. This is a pragmatic way for Muslims who are disinclined to engage in theology to neutralize parts of Islam with which they do not agree and still keep the faith. However, it does not satisfy religious people who take a literal approach to the interpretation of religious law. It also leaves believers who want to follow the shariah but do not know how to do so in a vacuum. And if no reliable authorities exist capable of interpreting religious law and no courts are willing to apply it, the void will be filled one way or another. Self-help is readily available on the Internet. A large number of online advice columnists dispense advise about how to follow the righteous path in the land of disbelief.

Technically speaking, the shariah is a code of law derived from the Koran and from the teachings and example of Mohammed. It is the task of Islamic religious scholars, organized in shariah councils, to arbitrate disputes where interpretations of religious law are involved. Fatwas are not declarations of war, as many Europeans think, but pronouncements of the application of shariah to particular moral or public issues, where interpretations of religious law are involved.

In contrast to the Muslim states in Asia, the Middle East, and now even Africa, there are no state-mandated shariah councils and no shariah courts upholding religious law in Europe, and here Muslims are free to make their own decisions about which law they will follow. However, for those who care about observing shariah, there may already be too many experts. Multiple Islamic law bodies are uneasily competing to develop authoritative statements of Islamic law for European Muslims. One is the Dublin-based European Council for Fatwa and Research discussed earlier. One highly regarded French imam and rector pointed out that this too was a consequence of freedom. 'They [the fatwa council] take advantage of the freedom in Europe to do what they couldn't do at home.'[44]

The imams I interviewed generally regarded the fatwa council and al-Qaradawi unfavorably. Outside Britain, I found little support for the ideas that shariah councils were needed. As a young Danish woman put it, 'the imams have already lost their power.'[45] In Britain, however, the Muslim Law (Shariah) Council associated with the Muslim College in Ealing, London, takes a very different view of its role and a different approach to the elaboration of religious law. The Council oversees a network of regional shariah councils. The purpose is to provide expert opinion in family disputes and to advise civil courts on Islamic law issues involved in court cases. A number of civilly educated lawyers associated with the Council have specialized in the application of religious law in secular courts. As one person associated with the council explained to me, 'you can find many different opinions about the meaning of shariah, and our task is to find the basis for helping British Muslims get on with their lives here.' He stressed that the council was particularly concerned about helping women, and finding legal interpretations that protected women's status.[46]

Abduljalil Sajid is a British Islamic religious leader of Pakistani descent. He is imam of the Brighton Islamic Mission and a Muslim chaplain for the National Health Service. He is engaged in interfaith organizations and was for five years chair of the MCB's social policy subcommittee. He is also a Muslim judge in the Muslim Family Court in Brighton. Imam Sajid writes and talks widely on Islam and preaches integration and coexistence. He is also a conservative Muslim, whose views articulate the reformist neo-orthodox position of many establishment Muslims in Britain. His views on the role of shariah in Britain are suggestive of how conservatives bridge the gap between liberalism and secularism on the one hand, and religious neo-orthodoxy on the other.

Shariah is not a divine law, he says, but a human interpretation of the sacred text made by religious scholars since the days of the Prophet. Muslims living in Britain must first observe British law and then Islamic religious law. Islam contains rules for human conduct in all aspects of life, but since it is man-made law people have the right to make objections against some of its provisions and to change the law, Imam Sajid says. The Koran is revealed divine truth but truth is subject to context and interpretation is important. He points out that his view of shariah as man-made and historically contingent sets Muslims like himself off from the literalists (or fundamentalists) who reject such relativism. He supports reforms that will allow the codification of Islamic religious law and its application in secular courts for Muslims. His views of the Koran allow for a generous interpretation on the question of the treatment of women. 'Qur'anic revelation raised the status of women in marriage, divorce and inheritance,' he says and cites in support a passage in the Koran: 'Men and women are equal in the eyes of God; man and woman were created to be equal parts of a pair (51:49).'[47]

Imam Sajid's moderate conservatism does not have many supporters among European Muslim leaders outside Britain. I asked the leaders who completed the survey that I used in all six countries if they supported the application of Islamic religious law in civil law and what special legal exemptions were needed to accommodate the application of Islamic religious law in Europe. The majority responded that no laws had to be changed to accommodate Islam, and that Islamic religious law should remain a private matter.

One question elicited strikingly different responses from Muslim leaders in the different countries. The question was, 'Should secular civil law respect religious law and allow imams and Islamic legal scholars to decide on legally binding decisions for Muslims living in country X?' This question was specifically designed to test the support for allowing Islamic religious law to become legally binding for European Muslims. In my phrasing of the question, I allowed for 'choice,' that is, the question suggested that Muslims themselves could choose between getting a divorce, for example, under religious personal law or secular civil law. The question mentioned divorce, which is one of the most controversial issues because it involves women's rights under Islamic law, but Islamic personal law covers a range of issues, of which divorce is only one of the more contentious matters. Table 6.1 shows the distribution of support for the application of Islamic religious law as binding law—by choice or for all Muslims—in each of the countries in the study.

Four out of five of the British participants in the study supported the proposition that the state should allow the application of shariah law in some cases. In Scandinavia, respondents were emphatically opposed. The majority of the Dutch Muslims rejected the possibility that religious law should have legal status but allowed that perhaps some choice in the matter should be permitted. The ambiguity about choice may reflect some lingering affinity for earlier (but now discontinued) Dutch experiments with

Table 6.1. Question: Should secular civil law respect religious law and allow imams and Islamic legal scholars to decide on legally binding decisions for Muslims living in country X?

	Denmark (%)	Sweden (%)	France (%)	Germany (%)	Netherlands (%)	UK (%)	Total (%)
No	81.3	85.7	83.3	74.4	60.9	20.0	65.6
Maybe	9.4	0.0	8.3	15.4	26.1	10.0	12.1
Yes	9.4	14.3	8.3	10.3	13.0	70.0	22.3
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0

$n = 157$

'multiculturalism,' which involved the recognition of an independent 'Muslim pillar.'

One out of ten Dutch Muslim leaders was in favor, and three out ten were inclined to support the proposal with reservations. The lack of support for traditionalist measures reflected in part value judgments and in part a realistic assessment of the Dutch political context.

The reasons for the difference between British Muslims and Muslims elsewhere in Western Europe are almost certainly related to ethnic origin, but that may not be the whole story. In personal conversations, British Muslim leaders alluded to 'the Indian solution' as a possible template for how British law could be changed. The reference here is to the Indian constitution's support for partial devolution of legal power on cultural questions to religious and ethnic authorities in a system of legal pluralism or, as it is sometimes termed, legal federalism. The difficulties of making such provisions in European legal systems may not be well understood. It should be noted also that British Muslim parliamentarians, from both the House of Commons and the Lords, had little sympathy for allowing legal dualism.

Religious law is well entrenched, in different ways, it should be noted, in Pakistan and India but has not been accepted in Turkey since the Kemalist revolution in 1923. The different legacy of the usage of Islamic religious law in these countries may to some extent explain the cross-national difference observed here. British Muslims come primarily from South Asia. Muslims elsewhere in Europe are primarily of North African or Turkish background, and draw on a different history.

The different recruitment patterns for political elites in the six countries may also play a role. Generally speaking, parliamentarians and, in some cases, city councilors were more supportive of integrationist and secular values and policy choices than the leaders who were associated with national and regional Muslim associations. The political parties act as filters, and we

therefore tend to find that individuals who subscribe to the neo-orthodox and more conservative views of Islam are excluded from the political elite. This is not the case in Great Britain, however. Recruitment to the House of Commons is highly centralized but local governance structures are highly decentralized, which helps explain, in part, why we find higher rates of support for the integration of shariah in Britain than in other countries.

British Muslims are also consistently more inclined towards a conservative theology. Ethnic origin and the different approaches to religious exercise associated with various ethnic and national histories are part of the explanation. None of this should be taken to mean that Pakistani-origin Muslims are conservative and Turkish-origin Muslims are not. That would be a gross simplification. The differences reflect patterns of demographic variation and theological propensities as well as elite recruitment that require more sophisticated analysis than is possible in the context of this study.

BALANCING RELIGIOUS AND CIVIL LAW

Giving Muslims a choice between which personal law they want to rely on poses many practical problems, but it would in effect allow people who are pious to rely on religious law to regulate family affairs. Orthodox Jews have been able to do this for some time. New York state amended the 1980 Domestic Relations Act in 1992 to allow civil courts to fine husbands who use the refusal of a religious divorce—a *get*—to extract concessions from their wives in divorce proceedings or otherwise to punish their former wives. The amendment was a reaction to what was seen as a growing problem with Orthodox Jewish women trapped in 'Agunah,' the so-called 'chained women,' who are unable to remarry in religious ceremonies because their husbands refuse them religious divorces after divorce has been obtained in civil courts. The issue arises because, within Orthodox Judaism, rabbinic courts grant divorces only upon the husband's request. Rabbis have complained that the 1992 amendment unfairly coerces husbands, who feel compelled to grant a *get* for financial reasons.

The 'choice' option implied in my question may appear to provide an attractive way of balancing secular and religious law, but it does not. The New York controversy illustrates how difficult it is to achieve such a balance without sacrificing either religious freedom or civil rights. It also illustrates some of the problems that Muslim women experience. Orthodox Jewish women have the option of ignoring the rabbinic courts and remarrying in civil ceremonies, but they may face opposition from their families, suffer loss

of status, and be obliged to marry a partner who does not share their faith. Children from that union would be regarded as illegitimate.

Implementation raises complicated questions about the circumstances in which individuals should be allowed to choose not to exercise their rights under secular law—and again, this is an issue mostly for women. It is arguable that 'choice' in this matter violates principles about the equal application of the law. If religious law is incorporated into civil law, secular courts, lawyers, and solicitors will have to familiarize themselves with religious law. A practical solution discussed in Britain is to have a special corps of Muslim lawyers available to adjudicate such cases.

Any attempt to institutionalize shariah in Great Britain will probably produce a split between traditionalist and modernist Muslim leaders. In Canada, controversy has erupted over the efforts of a Muslim group—the Islamic Institute for Civil Justice—to create a shariah court for family law and inheritance disputes under Ontario's 1991 Arbitration Act. The Arbitration Act created a legal basis for a 'multicultural' approach to family law. The Ontario government recently commissioned a report to defuse 'the confusion' over the proposal to create the shariah court. (It supports the initiative.) The report, written by Marion Boyd, who was responsible in 1991 for the passage of the Arbitration Act, states that 'Canada is a multicultural society and the fundamental tension that must be addressed is between respect for the minority group and protection of a person's individual rights within that minority.' Submitting to religious arbitration is a voluntary act, the report noted.[48]

The Canadian Council of Muslim Women attacked the report, as did other Muslim groups in the province. The Council accused Boyd of being 'naive' and demanded that Muslim women and children be given the same legal safeguards that others enjoy. Demonstrating once again the infinite elasticity of the human rights rhetoric, the Council cited the Canadian Charter of Rights and Freedoms in their support, the very same act that, according to Boyd, imposes an obligation on Canadians to respect the rights of religious groups, and so requires Canada to embrace legal multiculturalism.[49]

GENDER AND SUPPORT FOR SHARIAH

The women in my study were notably less supportive of legal pluralism and multicultural devolution of authority to Islamic scholars and imams than were the male leaders. They overwhelmingly supported freedom of choice to embrace religious law—but without the possibility of legal sanctions in

matters of behavior—or secular circumscription of the institutions of faith. Gender differences were particular salient in matters of personal law, with women generally disinclined to accept religious exemptions (Table 6.2).

Only one woman participant in the study agreed that secular law should be changed to devolve authority to imams in divorce cases and other personal law matters. Half of the men in the study outright rejected the idea but three-quarters of the women did. As for the opposite proposition that imams should be bound by law to grant religious divorces in cases where civil divorces had been obtained—an issue that has some importance because of the women's inability to remarry in the absence of a religious divorce—three-quarters of the women agreed but only three in five men did.

Overall, although there are women leaders who support the traditionalist perspective on the institutionalization of Islam, most female leaders are generally more inclined than their male counterparts to support the more secular or integrationist models. Even women who otherwise expressed traditionalist views prefer to see an accommodation between Islam and European legal norms that protect women's rights. These views were consistent also with women's strong support for the right to wear the headscarf, which Muslim female civic and political leaders generally regard as a women's rights issue.

A young British lawyer objected strenuously when I retold the 'Shariah! What nonsense!' remark: 'I love the shariah!' she exclaimed. I told her that as far as my research suggested, most women did not share her view on this question. I explained that I had found next to no support, even among women who described themselves as 'very religious,' for allowing imams and shariah councils to issue binding decisions following religious law on issues related to marriage and divorce. 'But oh no,' she said, 'they are right. You cannot trust these matters to imams. That would be terrible for women. We must have professionals make those decisions.'[50] I finally understood that for her shariah meant a codified body of law, developed and managed by professional lawyers like herself. It is not clear, however, that this is practical. A Canadian law scholar, Natasha Bakht, who has studied the operation of the Canadian Arbitration Act, concludes that decisions taken by Arbitration tribunals cannot stand up on appeal to the courts because there is no standard

Table 6.2. Support for application of Islamic law by gender.

	No (%)	Maybe (%)	Yes (%)	Total (%)
Female	76.7	6.7	16.7	100.0
Male	62.0	13.2	24.8	100.0
Total	64.9	11.9	23.2	100.0

interpretation of religious law.[51] From a legal perspective, this poses big problems, as there is no guarantee of equal application of the law.

MULTICULTURALISM AND THE SHARIAH

Multiculturalists argue that Western states must grant self-governance to minority groups in certain areas of law and policy directly related to cultural differences. The application of different culturally contingent laws—for example, the shariah—to minority population groups is a core feature of the multicultural program. Typically, family practices and language are among the first on the list for legal pluralism. Critics argue that these arrangements violate Western societies' cultural preferences for cohesive national communities based on entrenched—and often hard-fought for—value systems and value-affirmative policies.

Critics who belong to the affected minorities point out that the more serious issue is that members of minority groups are deprived of their right to equal protection under the law and that, while self-government may appear to give the group special privileges, individuals who belong to the group are potentially deprived of certain rights. Women's rights are the most contested. In one view, legal pluralism is inherently conservative because it empowers unelected traditional elites and, in the case of gender relations, disadvantages women.[52]

One of the difficulties with multiculturalism is how to decide whose rights come first, a question that also plagues the Ontario debate over religious rights versus women's rights. Sikhs and other minorities subjected to Francophile assimilation in Quebec have complained that their minority protection is more extensive in Anglophone Canada. Jewish women, who oppose the orthodox rabbis' control over Israeli family law, object that their rights have been sacrificed to those of the Orthodox Jews.[53]

Will Kymlicka, a proponent of multiculturalism, acknowledged 'the possibility of tragic conflict, the possibility that no conception of justice may prove adequate even in principle to eliminate the experience of imposition and injustice in social life,' but he did not suggest how the conflict might be resolved.[54] French Canadian claims for cultural and political self-government have inspired much of the multicultural theorizing in Canada but, paradoxically, as the conflicts between non-French minorities and the province of Quebec have shown, primacy for one exposed culture—in this case the Quebecois versus Anglo-Canadians—inevitably means less tolerance for other differences. One of the difficulties of the multiculturalist project has

been to come up with institutional solutions that provide fair solutions to the problem of how to balance the need for solidarity—for example, an equal right to social protection—against the need for self-government and cultural and political autonomy for communities that claim to have distinct identities which set them apart from the majority.

Multiculturalists argue that uniform legal codes may be unjust in societies characterized by cultural pluralism because they invariably assert a particular set of values at the expense of others. They recognize that uniform codes may be appropriate in certain contexts, defense or taxation, for example, but not in matters related to core cultural or religious values.[55] Family law and educational policy are typical examples of areas where some measure of legal pluralism and devolution are in place from this perspective.

Examples of institutional arrangements of this sort include the Dutch 'pillared' system and the so-called 'Indian model.' Both types of arrangements are also sometimes referred to as 'internal' federalism. Not only is it right, it also works, says Will Kymlicka, a proponent of such arrangements, who evaluated the institutions of minority self-government used by French-speaking Quebec and Swiss and Dutch ethno-linguistic groups. He concluded they have 'worked well' and are 'a cause for optimism.'[56]

The Indian constitution devolves legal authority on certain issues to substate actors. Article 29 guarantees religious groups the right to maintain different cultures, and Article 30 bars the state from interfering with the ability of religious communities to establish separate educational institutions with public funding and prohibits discrimination.[57] This arrangement is also sometimes called 'internal federalism,' because self-government is devolved to nonterritorial groups defined by social, religious, or ethno-linguistic characteristics. In India, Hindus and Muslims were allowed culturally specific personal law traditions that accommodate religious laws and practices. European precedents for devolution of circumscribed legal authority to nonterritorial groups defined by religion or language are found in the Netherlands, Belgium, and Switzerland.

Some multiculturalists push the boundaries of minority rights further to include affirmative action and broad delegation of rights to self-government on many areas of policymaking. Iris Marion Young thinks that self-government is insufficient; minorities are entitled to preferential treatment because they are disadvantaged simply because they are a numerical minority.[58] The separatist implications of such arrangements worry critics. Bhikhu Parekh proposed instead that legal exemptions given to particular minority groups have to be negotiated in reiterated rounds of democratic conversations between minorities and majorities. Special rights must be subjected to

democratic scrutiny rather than exempt from it, as suggested by Young and Kymlicka.

The institutional arrangements proposed by multiculturalists suffer from inherent tensions between collective and individual rights. The entitlement of a religious or ethnic minority group to use legal sanctions to protect their traditions often clash with individual wishes for mobility and equal protection under the law. Critics of the Indian system point out, for example, that political tension over how to balance uniformity of rights within the state has deteriorated into competition for 'special privileges' between groups and become a cause of separatist nationalist mobilization. In judicial terms, legal pluralism is often exceedingly difficult to manage, and appears invariably to lead to a codification of minority cultural practices that is detrimental to the objectives of enhanced pluralism and flexible adjustment.[59]

Dutch multiculturalism collapsed for similar reasons. It is not possible to maintain group-based self-government in societies with a high degree of social and geographic mobility. While immigrant groups—exemplified by Pakistanis and Bangladeshis in England—may at this point in time exhibit sufficient internal cohesion to make religious or cultural self-government reasonably workable, it is unlikely that future generations will feel comfortable with such arrangements.

The Dutch system of political and social organization based upon religious 'pillars' emerged as a uniquely Dutch version of national liberalism between 1870 and 1920, and served as a vehicle for the emancipation of the lower middle classes. The system bridged religious and linguistic cleavages by allowing each group—Protestants and Catholics, liberals and socialists, farmers and workers—to develop separate but parallel social and political institutions.[60]

'Generally speaking,' write Ruben Gowricharn and Pim Mungra describing the system, 'each "pillar" had its own schools, shops, youth organizations, recreation facilities, churches, radio and television broadcasting corporations, newspapers, literature, trade unions, employer organizations, political parties, even universities.'[61] The norm was that nobody mixed and everybody respected each other. Government funding was evenly allocated between the pillars, and the rules of coordination within national organization allowed each group a right to self-determination in appointments and political representation. Dutch 'pillarization' began to break down in the 1960s in response to increased geographical and social mobility that gave people incentives to defect from their assigned pillars. A brief attempt to revive the pillared system for immigrants was made in the 1980s, but today Dutch political leaders are disenchanted with the attempts to promote Muslim integration by means of separate but equal institutions. Muslims are disenchanted, too, and often note that the institutions were only separate and never equal.

HUMAN RIGHTS AND EUROPE'S MUSLIMS

The gender issues are indicative of the disagreements concerning the limits for Islamic autonomy in Europe. In general, European Muslim leaders want parity and respect for Islam, but they want to edit which aspects of Islam they choose to put into practice. And they want the full protection of the law that is afforded other faiths and other citizens. They want equal rights, not different rights. This is the reason why there is so little support for multiculturalist solutions outside Britain. Multiculturalism has been tried and failed, say Dutch and German Muslims. Swedish and Danish Muslims insist first and foremost upon equal treatment. Only British Muslims—and not all—support limited derogation (and with opt-out options in place) from civil law to empower religious law with statutory status on occasional issues.

The power of appeals to human rights rests primarily upon the ability of groups and individuals to point to national violations and to base appeals for change on moral grounds or on apparent instances of conflict between international norms and national policies. A recent study of the socialization of international human rights norms into national politics, edited by Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, concluded that 'lesson number one' is that transnational networks and human rights advocacy groups are essential for the dissemination of human rights into domestic politics.[62] Unfortunately, there are no significant 'external actors'—no think tanks, no Ford foundation researchers, and no UN support groups—who have made the difficulties that religious Muslims experience in secular and Christian Europe their particular concern. The exception is some of Europe's Green parties, which have increasingly asserted a new European liberalism based upon a human rights discourse sensitized to cultural and religious pluralism.

The development of European Islam will, for most Muslims, proceed within a conception of rights that stresses individual freedom and choice. The collective identity as Muslims derives from personal affinity with a faith, spirituality, and has little to do with the traditionalist collectivism of immobile societies or the coerced Islamization of the Islamic countries. It implies a radically new approach to Islam and Islamic religious laws, which are likely to be seen as 'suggestions' or, in the case of the neo-orthodox, self-imposed obligations.