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# THE *SHARIA*, FREEDOM OF RELIGION AND EUROPEAN HUMAN-RIGHTS LAW\*

Javaid Rehman

*Advocate, Professor of Law and Head of School, Brunel Law School, Brunel University, London*

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## ABSTRACT

Freedom of religion and the rights of religious communities are subjects that, throughout human history, have been sources of profound disagreement and conflict.<sup>1</sup> While the legal and constitutional debates continue to be faced at a global level, religious freedom within Europe and the place of Islam within Europe are of particular contemporary interest. Amidst the wider debate of the ‘war on terror’, and the so-called ‘clash of civilisations’ the position of Muslims and compatibility of *Sharia* with European human-rights values has been a debate that is intense and extremely controversial. The present paper, as its title indicates, examines the complicated affair of the role and influence of Islam within Europe, and in so doing challenges many of the stereotypical arguments and myths about the Muslim faith. The first section of this paper provides an overview of the developmental norms relating to freedom of religion in the European context. The second section examines the role and contributions of Islam and Muslims to freedom of religion in Europe. The third section, while assessing the jurisprudence of European human-rights institutions, highlights the rather insular and inward-looking approach adopted by the European Court of Human Rights towards Islam. In order to provide an essential focus for the paper, it was considered appropriate to have a case-study from the United Kingdom, a country with a historic yet highly complex relationship with Islam and Muslim minorities. This is presented in section four. The final section of the paper offers a number of concluding reflections.

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<sup>1</sup>See Arcot Krishnaswami, *Study of discrimination in the matter of religious rights and practices* (Geneva, 1960); E.O. Benito, *Elimination of all forms of intolerance and discrimination based on religion or belief* (Geneva, 1989); Stephen Neff, ‘An evolving international legal norm of religious freedom: problems and prospects’, *California Western International Law Journal* 11 (1973), 543–86.

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Author’s e-mail: Javaid.Rehman@brunel.ac.uk

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## INTRODUCTION

European historical prognosis confirms the overpowering and domineering nature of religion. Religion has been used as an instrument for developing humanitarian principles and human-rights law. In the evolution of European human-rights law, freedom of religion and the treatment of religious minorities has featured prominently.<sup>2</sup> There were discernible international efforts in protecting religious minorities against persecution as early as the thirteenth century.<sup>3</sup> During the seventeenth and eighteenth centuries, a number of treaties embodying clauses relating to religious minorities were concluded between various European countries. These treaties included the Treaty of Vienna signed in 1607 by the King of Hungary and Prince of Transylvania, which accorded to the Protestant minority in Transylvania the free exercise of their religion.<sup>4</sup> The Peace of Westphalia 1648, between France and the Holy Roman Empire and their respective allies—a critical event of European and international law—also marked the end of the Thirty Years War that had witnessed unprecedented suffering and pain.<sup>5</sup> The protection of Christian minorities was also an issue that spurred the Western European powers to form alliances and intervene militarily. The nineteenth century conceived a number of military interventions, ostensibly for the protection of minorities in the Ottoman territories. In reality, however, there are substantial misgivings about the ulterior motives with which such interventions were conducted.<sup>6</sup>

Notwithstanding its humanitarian appeal, religion has been used as a weapon for generating intolerance, and as an instrument for the persecution and ultimate destruction of religious minorities. As exemplified in various contexts, texts of religious scriptures were interpreted to sanction wars of the Medieval and Middle Ages, as well as the Crusades. The resulting religious wars caused an incalculable loss of human life and resulted in suffering and genocide.<sup>7</sup>

In its more modern manifestations, freedom of religion and the rights of religious minorities have also remained problematic areas. At the end of the First World War, significant efforts were made by President Woodrow Wilson of the United States to incorporate into the founding covenant of the League of Nations provisions relating to the protection of religious minorities. Wilson's third draft Covenant for the League contained the following provision:

Recognising religious persecution and intolerance as fertile sources of war, the powers signatory hereto agree, and the League of Nations shall exact from all new states and states seeking admission to it the promise, that they will make no law prohibiting or interfering with the free exercise of religion, and that they will in no way discriminate, either in law or in fact, against those who practice any particular creed, religion or belief whose practices are not inconsistent with public order or public morals.<sup>8</sup>

<sup>2</sup>Tore Modeen, *The international protection of minorities in Europe* (Abo, 1969), 35.

<sup>3</sup>Inis Claude Jr, *National minorities: an international problem* (Cambridge, Mass., 1955), 6.

<sup>4</sup>Wolfgang Heinz, *Indigenous populations, ethnic minorities and human rights* (Berlin, 1988), 22.

<sup>5</sup>Antonio Cassese, *International Law in a divided world* (Oxford, 1986), 34; S.J. Anaya, *Indigenous peoples in International Law* (New York, 1996), 13.

<sup>6</sup>See Thomas Franck and Nigel Rodley, 'After Bangladesh: the law of humanitarian intervention by military force', *American Journal of International Law* (67) (1973), 275–305.

<sup>7</sup>Leo Kuper, *International action against genocide* (London, 1984), 1; Leo Kuper, *Genocide: its political use in the twentieth century* (New Haven and London, 1981), 12–14.

<sup>8</sup>D.H. Miller, *The drafting of the Covenant* (New York, 1928), vol. ii, 105.

Despite these efforts, the Covenant in its final form failed to make reference either to freedom of religion or to the rights of religious minorities.<sup>9</sup> Minority-rights scholars derive some consolation, however, from the European bilateral treaties that were put into operation under the auspices of the League.<sup>10</sup>

These treaties did contain specific provisions relating to freedom of religion and accorded certain rights to religious minorities. However, being restrictive and discriminatory, the treaty system (much like the League itself) failed to survive the political stresses of the era. Religion and the treatment of religious minorities was a crucial, though highly complex and controversial, issue during the Second World War. It was the wholesale extermination of a religious community—the Jews of Europe—and indeed other groups that provoked resentment and condemnation, spurring international opposition against the Nazis.<sup>11</sup> Freedom of religion was one of the four essential freedoms identified by United States President Franklin D. Roosevelt, and upon which the Allied powers were claiming to establish a world order after the war.<sup>12</sup> In the United Nations era, which commenced at the end of the Second World War, the international community of states has made tremendous strides in formulating standards regarding the promotion of individual human rights. It is recognised that freedom of religion and the rights of religious minorities represent essential concerns for modern human-rights law. Discrimination on the grounds of religion or belief is condemned and forms a necessary feature of the United Nations human-rights regime.<sup>13</sup> The *Universal Declaration of Human Rights* (1948)<sup>14</sup> and the *International covenant on civil and political rights* (1966)<sup>15</sup> contain specific provisions relating to freedom of religion. The *United Nations declaration on the elimination of all forms of intolerance and discrimination* (1981) is dedicated entirely to the issue of religious freedom.<sup>16</sup> The foundations of the modern principles of religious freedom can be ascertained from Article 18 of the *Universal Declaration of Human Rights*, which provides that:

<sup>9</sup>For the text of the Covenant of the League, see Malcolm Evans, *Blackstones International Law documents* (London, 1991), 1.

<sup>10</sup>For a list of measures see United Nations, ‘Special protective measure of an international character for ethnic, religious or linguistic minorities, UN Doc/cn.4/Sub.2/214/rev 1; UN Doc E/CN.4.Sub.2/221/Rev 1; UN Sales No 67.XIV3; for text until 1927, see, *Protection of linguistic, racial and religious minorities by the League of Nations: provisions contained in the various international instruments at present in force* (Geneva, 1927).

<sup>11</sup>See Raphael Lemkin, *Axis rule in occupied Europe* (Washington, 1944).

<sup>12</sup>See *Documents of American History* no. II, Doc. 537, (9th edn, New York, 1973), 449; also see M.G. Johnson, ‘The contribution of Eleanor and Franklin Roosevelt to the development of international protection of human rights’, *Human Rights Quarterly* 9 (1987), 19–27.

<sup>13</sup>See United Nations, ‘Charter of the United Nations’ (San Francisco, 1945), articles 1(3) and 13, available at: <http://www.un.org/en/documents/charter/index.shtml>; *Universal Declaration of Human Rights*, adopted on 10 December 1948, GA Resolution 217, UN Doc A/810 (Geneva, 1948), articles 1, 2, 18, available at: <http://www.un.org/en/documents/udhr/index.shtml#ap> (5 September 2011); *Convention on the prevention and punishment of the crime of genocide* (Geneva, 1948), article 2, available at: <http://www.un.org/millennium/law/iv-1.htm> (5 September 2011); *International covenant on civil and political rights* (New York, 1966), articles 2, 18, 26 and 27, available at: <http://www2.ohchr.org/english/law/ccpr.htm> (5 September 2011); *International covenant on economic, social and cultural rights* (New York, 1966), article 2, available at: <http://www2.ohchr.org/english/law/cescr.htm> (5 September 2011); and *UN Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities* (Geneva, 1992), available at: <http://www2.ohchr.org/english/law/minorities.htm> (5 September 2011).

<sup>14</sup>*Universal Declaration of Human Rights*, UN Doc A/810, 71.

<sup>15</sup>UN General Assembly (hereafter cited as GA), Res. 2200 (XXI), GA Official Records (hereafter cited as GAOR), 21st Session, Supp 16 United Kingdom Treaty Series (Geneva, 1977).

<sup>16</sup>UN GA, Res. 36/55, 36; UN GAOR, Supp (no. 4), at 171, UN Doc A/36/51 1981.

Everyone has the 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 teaching, worship and observance.<sup>17</sup>

The internationally binding treaty provisions of the *International covenant on civil and political rights* have also considered the position of religious freedom and the rights of religious minorities.<sup>18</sup> Article 18 of this covenant provides as follows:

- (1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private to manifest his religion or belief in worship, observances, practice and teaching.
- (2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
- (3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
- (4) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.<sup>19</sup>

Article 27 of the the same covenant provides, as an important provision:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

In the European context, religious freedom—at least in terms of the establishment of legal, supra-national and constitutional mechanisms—has been readily developed. The leading European organisations, the Council of Europe and the European Union, have both dedicated provisions to the prohibition of discrimination on the basis of religion. The Council of Europe, an inter-governmental organisation established in 1949, developed a coherent human-rights treaty prior to the United Nations—the *European Convention on Human Rights* (ECHR) in 1950. This Convention which came into force in 1953 contains as a major provision, article 9, according to which:

- (1) Everyone has 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, and

<sup>17</sup>*Universal Declaration of Human Rights*, UN Doc A/810, article 18.

<sup>18</sup>Freedom of religion is also recognised by regional human-rights instruments. In addition to article 9 of the *European Convention on Human Rights* (Rome, 1950), which shall be discussed below, see also article 12 of *American Convention on Human Rights* (San José, 1969) and article 8 of the *African Charter on Human and People's Rights* (Banjul, 1981).

<sup>19</sup>United Nations, *International covenant on civil and political rights*, article 18; the full text of this covenant is available at: <http://www2.ohchr.org/english/law/ccpr.htm> (5 September 2011).

to manifest his religion or belief, in worship, teaching, practice and observance.

- (2) Freedom to manifest one's religion or beliefs shall be subject 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 for the protection of the rights and freedoms of others.<sup>20</sup>

Similarly, the corner-stone of European integration through the European Union is protection from all forms of discrimination, including discrimination on the basis of religion or belief. At a constitutional level, European states also exhibit legislative norms affirming freedom of religion and non-discrimination on the basis of religious beliefs and ideologies. However, it is the administrative practice and the application of legislative norms that have proven to be highly problematic in respect of full compliance with the right to freedom of religion.

#### ISLAM, EUROPE AND FREEDOM OF RELIGION

The recent debate on Islam in Europe—often mistakenly and naively—tends to overlook the historic relationship of Islam with the European human-rights movement, as well as Islam's enormous contribution to the advancement of freedom of religion. Amidst the largely Christian-oriented considerations that have been instrumental in formulating principles of European and international law, the rise and spread of Islam has provided a major exception.<sup>21</sup> The emergence of Islam in Arabia in the seventh century and its growth at a phenomenal pace at one point threatened to overtake all other contemporary civilisations. Hazrat Muhammad (Peace be Upon Him), the Prophet and founder of Islam, died in AD 632. Within a century, Muslim Arabs conquered and became rulers of an area stretching from the borders of India and China to the Atlantic Ocean.<sup>22</sup> His Excellency Judge Christopher Gregory Weeramantry makes the point eloquently when he notes '[t]he call of the muezzin from the minaret—"There is no god except God and Muhammad is the Apostle of God"—was, within a century of the Prophet's death, re-echoing in territories as far afield as Spain and China'.<sup>23</sup> The Muslim Empire was thus a huge empire, which included much of North Africa, the Near East and Spain: 'a collection of peoples under one banner greater than any before and a domain more extensive than the Roman Empire at its height'.<sup>24</sup>

This was a remarkable achievement, unparalleled in human history. In the words of one historian:

This astonishing expansion had been achieved by a people who, if they were known at all to the great world beyond the Arabian peninsula, had been dismissed as ignorant nomads. They had overrun something above four-and-a-half million square miles of territory and changed the course of history, subordinating Christianity to Islam in its homelands in the Near East and in

<sup>20</sup>Council of Europe, *European convention on human rights* (Rome, 1950), article 9; the complete text of this convention, and its five protocols, is available at: <http://www.hri.org/docs/ECHR50.html> (5 September 2011).

<sup>21</sup>See Majid Khadduri, 'Islam and the modern law of nations', *American Journal of International Law* 50 (1) (1956), 358–72; and Sobhi Mahmassani, 'The principles of international law in the light of Islamic doctrine', *Recueil des Cours* (The Hague, 1968), vol.117, 205–323.

<sup>22</sup>G.C. Weeramantry, *Islamic jurisprudence: an international perspective* (London, 1988), 9.

<sup>23</sup>Weeramantry, *Islamic jurisprudence*, 9.

<sup>24</sup>Rom Landau, *Islam and the Arabs* (London, 1958), 46.

North Africa and Spain, forcing the Roman Empire of Byzantium onto the defensive and converting the Empire of the Persians into a bulwark of Islam. Human history tells of no other achievement comparable to this. Alexander had dazzled the ancient world by his conquests, but he left behind him only legends and a few inscriptions. Where the Arabs passed they created a civilization and a whole pattern of thought and of living which endured and still endures, and they decisively determined the future history of Europe, barring the way to the rich lands of the East and thereby provoking—many centuries later—the voyages of exploration to the West and to the South which were to nurture European power.<sup>25</sup>

Contrary to commonly held views, the successes of Muslim rulers during this initial phase, as well as in subsequent centuries, were based on a culmination of factors; of particular importance were the promise of religious tolerance and a more egalitarian and fairer society. In strict doctrinal terms there was a particular dearth of tolerance for pagan minorities: their choices were limited, either to embrace Islam or to perish. In practice, however, the show of tolerance towards the *ahal al-kitab* ('peoples of the Book') was frequently extended to the pagans. This was particularly the case when the Muslims began to interact with other ancient traditions such as Hinduism or Buddhism. It is also the case that the treatment that non-Muslim minorities received varied depending on the ruler in question, the strength of the empire and its geography. Some regimes were more repressive and intolerant than other. That said, and judged as a whole, by the standards of the time the Islamic system was hugely impressive; it promised a much greater measure of tolerance than was being practised by the Christian West. According to one leading European scholar,

[a]lthough, like Christianity, Islam was an aggressively universalist religion, it also displayed far more tolerance to followers of other faiths, and particularly Jews and Christians who, like followers of Islam were considered to be 'Peoples of the Book'. Jewish and Christian Communities were, therefore, permitted a large degree of freedom in both religious and civil affairs...<sup>26</sup>

It also remains the case that the practices of the Prophet Muhammad (Peace be Upon Him), and subsequently those of the Muslim rulers, which now form part of the wider code of Islamic law, seriously defy the 'Western images of Muslim conquerors presenting the conquered peoples with the choice of conversion to Islam or the sword'.<sup>27</sup> On the contrary, 'conquered Christians and Jews were allowed to persist in their beliefs because Islamic law opposes compelled conversions'.<sup>28</sup> Commenting on the facts as they prevailed during the expansion of Islam, Eaton makes the remark that:

[t]he rapidity with which Islam spread across the known world of the seventh centuries was strange enough, but stranger still is the fact that no rivers flowed with blood, no fields were enriched with the corpses of the vanquished. As warriors the Arabs might have been no better than others of their kind who had ravaged and slaughtered across the peopled lands but, unlike these others, they were on a leash. There were no massacres, no rapes, no cities burned. These men feared God to a degree scarcely imaginable in

<sup>25</sup>C.G. Eaton, *Islam and the destiny of man* (Cambridge, 1994), 29.

<sup>26</sup>M.D. Evans, *Religious liberty and international law in Europe* (Cambridge, 1997), 59.

<sup>27</sup>E.A. Mayer, *Islam and human rights: traditions and politics* (Boulder, CO, 1995), 126.

<sup>28</sup>Mayer, *Islam and human rights*, 126–7.

our time and were in awe of His all-seeking presence, aware of it in the wind and the trees, behind every rock and in every valley. Even in these strange lands there was no place in which they could hide from this presence, and while vast distances beckoned them ever onwards they trod softly on the earth, as they had been commanded to do. There had never been a conquest like this.<sup>29</sup>

In view of these considerations, it would be convincing to argue that the religious minorities (certainly the *ahal al-kitab*) in fact enjoyed a better status under the jurisdiction of Islam in comparison with religious minorities within a Christian state.<sup>30</sup> It is also ironic that for vast periods of European history, persecuted religious minorities would flee to Muslim lands with the hope and assurance of safety and *Aman*. In the present context, the concept of *Aman*—devised and developed under *Sharia* principles—deserves elaboration. The pledge of *Aman* allowed non-Muslims safety of their person and property whilst resident within the territory of Islam, the *Dar-ul-Islam*. The rights under *Aman* were extensive in nature, including the right to life and security of person and property, with these rights remaining enforceable by the heirs and legal guardians of non-Muslim residents. This pledge of *Aman* was certainly extended to the Christian and Jewish minorities during the peak of rule by the Ottomans in Eastern and Central Europe, who for several centuries retained a vast empire with adherents of various religions.<sup>31</sup>

While religious minorities were not always treated with complete tolerance, the Ottomans did experiment with a special mechanism for the granting of autonomy through the *Millet* system—a system that allowed various religious minorities to enjoy a generous measure of autonomy, in social, civil and religious affairs.<sup>32</sup> Professor Van Dyke makes a valid comment when, analysing the *Millet* system, he notes ‘it was an application of the right of Self-Determination in advance of Woodrow Wilson’.<sup>33</sup> The Ottomans also carried on the Islamic practice of granting capitulations to Christians and other Westerners under Muslim rule. The capitulations provided a degree of autonomy and self-government, including an exercise of civil and criminal jurisdiction over other co-nationals.<sup>34</sup> The application of the *Millet* system and the induction of capitulations also provide striking examples of innovation in religious tolerance at a time when the rest of Europe, and indeed the entire world, was wrestling with such horrific acts as the slave-trade and colonialism.

<sup>29</sup>Eaton, *Islam and the destiny of man*, 29–30.

<sup>30</sup>Despite incidents of discrimination and mistreatment of non-Muslims, it is fair to say that the Muslim World, when judged by the standards of the day, generally showed far greater tolerance and humanity in its treatment of religious minorities than did the Christian West. In particular, the treatment of the Jewish minority in Muslim societies stands out as fair and enlightened when compared with the dismal record of Christian European persecution of Jews over the centuries’, see Mayer, *Islam and human rights*, 27–128 (footnotes omitted).

<sup>31</sup>Halil Inalcik, *The Ottoman Empire: the classical age 1300–1600* (London and Phoenix, 1994); Peter Mansfield, *The Ottoman Empire and its successor* (London, 1973); Justin McCarthy, *The Ottoman peoples and the end of empire* (London, 2000).

<sup>32</sup>J.A. Laponce, *The protection of minorities* (Berkeley and Los Angeles, 1960), 84–5.

<sup>33</sup>V.V. Dyke, *Human rights, ethnicity and discrimination* (Westport, Conn. and London, 1985), 74; see also, John Packer, ‘[w]hile the [Millet] system was hardly based on any recognition of “human rights”, its application is most compatible with the philosophy of human rights’, ‘On the definition of minorities’, in John Packer and Kristian Myntti (eds), *The protection of ethnic and linguistic minorities in Europe* (Turku and Åbo, 1993), 23–65: 42.

<sup>34</sup>Evans, *Religious liberty and international law in Europe*, 60.

## ISLAM, MUSLIMS AND CONTEMPORARY EUROPE

Having regard to the generally humanitarian values brought by Islam into Europe, and by and large the peaceful existence of Muslims in Europe, it is rather surprising (and indeed alarming) to notice the increasingly hostile attitude adopted by European human-rights institutions and European states towards Islam. We are familiar with such distasteful actions as the banning of Minarets in Switzerland,<sup>35</sup> and the banning of *burqas* in France and Belgium.<sup>36</sup> Less well known, though probably more disturbing, has been the role and pronouncements of the European human-rights institutions: these include the European Court of Human Rights, the premier human rights court for Europe. The Court, in the *Refah Partisi* (Turkish Welfare Party) case, held *Sharia* to be incompatible with human-rights law.<sup>37</sup> In accepting that the dissolution by the Turkish constitutional court of the *Refah Partisi*—a party that had advocated the replacement of secularism with the *Sharia*—was not a violation of freedom of expression or association, as provided for in articles 10 and 11 of the ECHR, the Court made the following observations:

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 precepts... *In the Court's views, a political party whose actions seems to be aimed at introducing the 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.*<sup>38</sup>

Such a predetermined and rigid position adopted by the European Court of Human Rights on *Sharia's* compatibility with European human-rights law can only be regarded as unhelpful, misdirected and courting hostility. In another case, *Dahlab v. Switzerland*, it was held that prohibiting a primary school teacher from wearing a headscarf was permitted in the circumstances, despite

<sup>35</sup>See, for example, Nick Cumming-Bruce and Steven Erlanger, 'Swiss ban building of minarets of Mosques', *New York Times*, Geneva, 29 November 2009, available at: <http://www.nytimes.com/2009/11/30/world/europe/30swiss.html> (15 August 2011); or 'Swiss votes back ban on minarets', *BBC News Online*, 29 November 2009, available at: <http://news.bbc.co.uk/1/hi/8385069.stm> (15 August 2011).

<sup>36</sup>'French Senate approves "Burka ban"', *Telegraph*, 14 September 2010, available at: <http://www.telegraph.co.uk/news/worldnews/europe/france/8002914/French-Senate-approves-Burka-ban.html> (15 August 2011); Leo Cendrowicz, 'Belgium moves closer to Europe's first burqa ban', *Time*, Brussels, 3 April 2010, available at: <http://www.time.com/time/world/article/0,8599,1977350,00.html> (15 August 2011).

<sup>37</sup>European Court of Human Rights, *Case of Refah Partisi (the Welfare Party) and others v. Turkey*, Judgement of 13 February 2003, App. nos. 41340/98, 41342/98, 41343/98 and 41344/98.

<sup>38</sup>*Case of Refah Partisi and others v. Turkey*, paragraphs 73 and 123.

the fact that the teacher had taught in the same school for three years without action being taken and without complaints being made. In this case, the European Court of Human Rights ‘further noted that the impugned measure had left the applicant with a difficult choice, but considered that State school teachers had to tolerate proportionate restrictions on their freedom of religion’.<sup>39</sup> More recently, the neutrality of the state education system was held to be a legitimate aim when restricting freedom of religion. This sentiment was echoed in the case of *Leyla Şahin v. Turkey*,<sup>40</sup> in which a decision was taken that the banning of headscarves by a university was justified and proportionate to the aim. In *Leyla Şahin*, the applicant Ms Şahin complained that a rule established by Istanbul University prohibiting the wearing of the Islamic headscarf during classes and exams violated her article 9 rights under the ECHR.<sup>41</sup> Ms Şahin regarded wearing the headscarf as a religious obligation, and insisted that wearing the headscarf was a matter of personal choice and that such a personal decision was not incompatible with the principles of secularism as guaranteed within the Turkish constitution.<sup>42</sup> The Turkish government contested the applicant’s position and argued that the idea of secularism was vital to the Turkish state remaining a liberal democracy, and that the headscarf represented an association with extreme ‘religious fundamentalist movements’ presenting a threat to Turkey’s value of secularism.<sup>43</sup>

The Grand Chamber of the European Court of Human Rights, by a majority of sixteen votes to one, decided that the ban on the headscarf was justified under article 9(2). The Court noted that the restriction on wearing the headscarf was ‘necessary in a democratic society’, and went on to make the following points of endorsement of the Turkish state’s argument. The Court noted that:

[a]s the Chamber rightly stated...the Court considers the notion of secularism to be consistent with the values underpinning the Convention. It finds that upholding that principle, which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey.<sup>44</sup>

The Court’s position is open to criticism, not only for endorsing an oppressive state restriction on article 9, but also for its insensitivity towards freedom of religion and the personal autonomy of women in relation to the manifestation and practice of religion.<sup>45</sup> Critics, such as myself, view the *Leyla Şahin v. Turkey* and *Dahlab v. Switzerland* cases as additional examples of an anti-Islamic bias on the part of the European human-rights institutions. Notwithstanding these criticisms of bias on the part of such institutions, the Commission and the European Court of Human Rights have continued to adopt a narrow and rigid approach towards

<sup>39</sup>European Court of Human Rights, *Dahlab v. Switzerland*, Judgement of 15 February 2001, app. no. 42393/98, para. 12.

<sup>40</sup>European Court of Human Rights, *Leyla Şahin v. Turkey*, Judgement of 10 November 2005, app. no. 44774/98. See also *Refah Partisi and others v. Turkey*, paragraph 123.

<sup>41</sup>*Leyla Şahin v. Turkey*, paragraphs 85–101.

<sup>42</sup>*Leyla Şahin v. Turkey*, paragraph 85.

<sup>43</sup>*Leyla Şahin v. Turkey*, paragraphs 90–3.

<sup>44</sup>*Leyla Şahin v. Turkey*, paragraph 114.

<sup>45</sup>*Leyla Şahin v. Turkey*, Dissenting opinion of Judge Tulkens, paragraph 12; see also, Carolyn Evans, ‘The Islamic scarf in the European Court of Human Rights’, *Melbourne Journal of International Law* 7 (1) (2006), 52–73: 52; Anastasia Vakulenko, ‘“Islamic headscarves” and the European Convention on Human Rights: an intersectional perspective’, *Social and Legal Studies* 16 (2007), 183–99: 190.

freedom of religion, especially involving Islam and Muslims. Such an approach does not augur well for either granting appropriate rights to Muslim minorities or establishing an appropriate role for Islam in European politics and society.

POSITIONING ISLAM IN THE WIDER DEBATE ON FREEDOM OF RELIGION AND MULTI-CULTURALISM: A CASE-STUDY OF THE UK

Amidst the constitutional dilemmas of multi-culturalism, integration and assimilation, the position of British Muslims is highly intriguing and challenging, and in many senses is symptomatic of the concerns portrayed by their co-religionist across Europe.<sup>46</sup> From the early part of the nineteenth century up until the end of the Second World War there were very limited, often uncoordinated waves of Muslim settlements in the United Kingdom. In the aftermath of the Second World War, increasing demands for labour prompted a significant, large-scale influx of workers to Europe and the United Kingdom.<sup>47</sup> For the United Kingdom, this class of economic migrants hailed principally from the Commonwealth countries of India and Pakistan. They were unskilled workers who either lacked any or had very low levels of education. Upon arrival, these Muslim migrants faced issues of joblessness, and more significantly faced alarmingly high levels of racism and social exclusion. A sense of community, as Sebastian Poulter has pointed out, was inadvertently formed as a consequence of the personal insecurities and vulnerabilities of these individuals, and due to the racial prejudices from the wider white majority population.<sup>48</sup> Prejudice and discrimination was also evident in certain governmental practices—immigration laws that were brought into force provided a litmus test for other racially-motivated legislation.<sup>49</sup>

Statistical and factual analysis of the contemporary position of Muslim communities provides a sobering moment for reflection and may also highlight some arguments for resentment of and disenchantment with British society. For the Muslim youth, the pervading social, sociological and political environment in Britain has resulted in disillusionment, despondency and crises of identity. Amidst an occasional, rare 'success story', Muslim communities on the whole remain immersed in deprivation, poverty, high unemployment and low educational achievements. An influential 2002 report notes the continuation of disproportionate levels of 'unemployment, poor working conditions, poverty, poor and overcrowded housing, poor health, and low educational qualifications'.<sup>50</sup> Muslims remain disadvantaged in higher education and the United Kingdom labour market.<sup>51</sup> Muslim men are the least likely to obtain managerial

<sup>46</sup>See Javaid Rehman, 'International terrorism and Muslim minorities in Europe: Islamophobia after 9/11', *European Yearbook of Minority Issues* 3 (2003/2004), 217–35; Patrick Thornberry, 'Rights of minorities', in David J. Harris and Sarah Joseph (eds), *The international covenant on civil and political rights* (Oxford, 1995), 597–627; Sebastian M. Poulter, 'The rights of ethnic, religious and linguistic minorities', *European Human Rights Law Review* 3 (1997), 254–64.

<sup>47</sup>This was a pattern followed in the larger economies of Western Europe. See Samantha Knights, 'Religious symbols in the school: freedom of religion, minorities and education', *European Human Rights Law Review* 5 (2005), 499–516: 501.

<sup>48</sup>Sebastian M. Poulter, 'The claim to a separate Islamic personal law for British Muslims', in Chibli Mallat and Jane Connors (eds), *Islamic family law* (London, 1990), 147–66: 150.

<sup>49</sup>A.W. Bradley and K.D. Ewing, *Constitutional and administrative law* (13th edn, London, 2003), 433; David Feldman, *Civil liberties and human rights in England and Wales* (2nd edn, Oxford, 2002), 479.

<sup>50</sup>Humayan Ansari, *Muslims in Britain* (London, 2002), 9; The Runnymede Trust, *Islamophobia: its features and dangers. A consultation paper* (London, 1997), 16.

<sup>51</sup>Open Society Institute, *Muslims in the UK: policies for engaged citizens* (Budapest, 2005), 101–249.

and professional jobs and are over-represented in low-skilled vocations. The current unemployment rate for Muslim men is nearing 40 percent, with economic inactivity as high as 50 percent.<sup>52</sup> Amongst young people aged 16–24, Muslims have the highest unemployment rate of all faith groups, 17.5 percent as compared to 7.9 percent for Christians and 7.4 percent for Hindus. The overall unemployment rate for Muslims is, alarmingly, three times that of the population as a whole.<sup>53</sup> Nearly half of the Muslim households in Britain remain on income support, and these households tend to be based on rented accommodation, with poor heating, ventilation and sanitation.<sup>54</sup> Muslim children risk significant levels of poverty; over one-third live in households where none of the adults is in employment. Around 50 percent of these children live in overcrowded accommodation, with a home environment characterised by low-morale, poor educational achievements, narrow social circles and generally depressive attitudes.<sup>55</sup> This tremendous sense of ostracisation, neglect and alienation from the mainstream, when combined with repressive parental attitudes and restive community approaches towards established legal and social norms, provides a recipe for rebellion or radicalisation.<sup>56</sup>

If equality encapsulates eradication of arbitrary distinctions as well as the substantiation of an environment for minorities in preserving their religions and traditions, British Muslims have a sizable catalogue of grievances. For British Muslims a matter causing substantial disquiet is the failure of the established institutions to protect individuals from discrimination based on religious grounds.<sup>57</sup> Discrimination can take a range of forms, and in the present context Muslim complaints range from religious jokes, negative media portrayal, disproportionate arrests, targeted policing and heavy-handed policing strategies. There are disproportionate levels of stop and search policies targeted at Muslims: statistics establish that between 2001–02 and 2002–03, the number of white people stopped and searched under the Terrorism Act (2000) increased by 118 percent, while the corresponding increase for black people was 230 percent and for Asians 302 percent.<sup>58</sup> The right to identity in a multi-cultural society, although highly controversial, nevertheless remains one of the fundamental rights of minorities.<sup>59</sup> Muslim identities and the level of recognition accorded to these identities in British society form a contentious element in the debate on multi-culturalism. Muslim communities increasingly maintain a specific dress code, have particular dietary requirements and engage in distinct religious ceremonies and celebrations. An open and public exhibition of these identities represents the core of the right to identity insofar as British Muslims are

<sup>52</sup>Commission on British Muslims and Islamophobia: *Issues, challenges and action* (Stoke, 2004), 30.

<sup>53</sup>See Office of National Statistics, *Focus on religion*, (London, 2004), 5; available at: <http://www.ons.gov.uk/ons/rel/ethnicity/focus-on-region/2004-edition/index.html> (22 September 2011).

<sup>54</sup>Open Society Institute, *Muslims in the UK*, 65.

<sup>55</sup>Commission on British Muslims and Islamophobia, *Issues, challenges and action*, 30.

<sup>56</sup>See the comments made by former Pakistani prime minister, the late Benazir Bhutto, 'The price of dictatorship', *Guardian*, 23 August 2006, 29.

<sup>57</sup>See Thornberry, 'Rights of minorities', 620.

<sup>58</sup>Home Office, *Statistics on race and the criminal justice system—2004* (London, 2004), 2; cited in Open Society Institute, *Muslims in the UK*, 261.

<sup>59</sup>See Patrick Thornberry, *International law and the rights of minorities* (Oxford, 1991), 141–256; Javid Rehman, *The weaknesses in the international protection of minority rights* (The Hague, 2000), 165–223; Javid Rehman, 'Autonomy and the rights of minorities in Europe', in Steven Wheatley and Peter Cumper, (eds), *Minority rights in the New Europe* (The Hague, 1999), 217–31.

concerned. In the words of Tariq Modood, what Muslim minorities are claiming:

is that they should not be marginal, subordinate or excluded; that they too—their values, norms and voices—should be part of the structuring of the public space. Why, they ask, should we have our identities privatised, while the dominant group has its identity universalised in the public space? The issue, then, is about the public/private distinction and what is ‘normal’ in a society, and to lessen any group feeling abnormal or different.<sup>60</sup>

British Muslim women frequently query the need to feel apologetic about what they consider as their fundamental right to an Islamic identity through the wearing of the *hijab* and traditional *Shalwar Kameez* (a loose fitting tunic and trousers). There is strength in the argument that those who choose not to follow the malaise and religious decadence prevalent in many parts of the West should not be pre-judged on the basis of the prevalent parochial, narrowly-constructed, stereotypical image of religiosity in general, and particularly regarding the Islamic faith. There is frustration that young Muslim men are frequently associated with violence, extremism and terrorism. These men are, in the words of Archer, conceptualised in British society not only as ‘dangerous individuals’ having the capability of violence and terrorism, but also as ‘culturally dangerous’, working religiously to undermine ‘the British way of life/civilization’.<sup>61</sup> Visualised in terms of a question of identity and the need for an inclusive public space, it is understandable why many liberal-minded Muslims were offended at the publication of the cartoons of Prophet Muhammad—the offence and anguish were caused not so much by images of the Prophet, but by establishing an impression that his followers are terrorists.

As in the European Court of Human Rights, at the United Kingdom domestic level, the wearing of headscarves continues to remain a hugely divisive issue. While the toleration levels for women choosing to wear the *hijab* have possibly increased, its widespread usage in educational institutions and at workplaces is a matter not readily acceptable for mainstream British society. The authorisation of the *hijab* is as far as the limits of tolerance can be stretched. A further claim for the use of enhanced covering (in the form of *Jilbab*) to be permitted at a high school, as the then existent appellate committee of the House of Lords proclaimed, was neither a right recognised under article 9 of the ECHR, nor a pre-requisite for establishing an Islamic right to identity.<sup>62</sup> The whole tenure of their lordships’ judgement is upon placing the responsibility and accountability on the individual member of the minority community—in this case Shabana Begum. The deprivation of her religious feelings was of her own making; or as Lord Hoffman puts it, ‘people sometimes have to suffer some inconvenience for their beliefs’,<sup>63</sup> meaning that there was nothing to prevent her from going to a school where her religion did

<sup>60</sup>Tariq Modood, ‘Remaking multiculturalism after 7/7’, *OpenDemocracy*, 28 September 2005, available at: [http://www.opendemocracy.net/conflict-terrorism/multiculturalism\\_2879.jsp](http://www.opendemocracy.net/conflict-terrorism/multiculturalism_2879.jsp) (11 August 2011).

<sup>61</sup>Louise Archer, *Race and schooling: Muslim boys and education* (Maidenhead, 2003), 157.

<sup>62</sup>*R. (on the application of Begum (by her litigation friend, Rahman) (Respondent) v. Headteacher and Governors of Denbigh High School (Appellants)* [2006] UKHL 15; *R. (on the application of Begum (Shabana) v. Headteacher and Governors of Denbigh High School* [2005] EWCA Civ 199; [2005] 1 FCR 530; C. Gill, ‘Schools have the right to decide uniforms, say Judges, as girl loses her fight over Muslim dress’, *Daily Mail*, London, 23 March 2006, 20; see also Ann Blair, ‘Case commentary: *R (SB) v Headteacher and Governors of Denbigh High School*: Human rights and religious dress in schools’, *Child and Family Law Quarterly* 17 (2004), 399–413.

<sup>63</sup>[2006] UKHL 15, 50.

not require her to wear a *Jilbab* or to a school where she was allowed to wear one. In Lord Bingham's assessment, the respondent's claims for being allowed to continue her education at Denbigh High School was unacceptable, for reasons such as the undesirable differentiation between Muslim girls and other girls, and for jeopardising the principle of social cohesion.<sup>64</sup> Such reasoning appears unconvincing, however, particularly in the light of the limited qualifications placed by article 9(2) in relation to the enjoyment of this right to identity. The judgement is also disappointing for its failure to recognise the rights of individuals within minority groups—a significant element of the right to identity. It is contended that in the absence of strong public policy reasons, the right to identity requires a support for all shades of opinion and outlook. Amidst the enormous diversity of approaches towards Islam in Europe, some Muslim communities are more conservative than others—it is championing their demands which presents the most challenging feature of the right to identity.

Muslim minority communities have issues *inter alia* with family and personal laws, employment law and the system of education in Britain, which arguably is not in consonance with their religious and moral values. There is also the concern of the state's reluctance to provide culturally and religiously inclusive education both at primary and higher educational level. In historic terms, legal challenges based on the arguable violation of rights of Muslims have proven unsuccessful,<sup>65</sup> and it seems doubtful as to whether new provisions within the European Union framework or the incorporation of the ECHR by the Union would make a substantial difference to the recognition of these claims at the domestic level.

More damaging to the Muslim right to identity have been the perceptions developed since the commencement of the 'war on terror'. The tragic events of 11 September 2001 and 7 July 2005 have placed a heavy burden on British Muslims; in the approaches adopted both in the media and often in political rhetoric, Muslims find their loyalties tested and are made to renounce violence and terrorism more than any other minority group.<sup>66</sup> There were also frequent irresponsible statements, such as the one made by former British prime minister Margaret Thatcher, in which she accused 'Muslim priests' of not condemning the events of 11 September enough; or the observations made by Italian prime minister Silvio Berlusconi about the superiority of Western civilisation vis-à-vis the Islamic world.<sup>67</sup> After the bombings of July 2005, the former Conservative

<sup>64</sup>[2006] UKHL 15, 18.

<sup>65</sup>See *Rabia Bibi v. UK* Application no. 19628/92 and *Khan v. UK* (violation of Article 12 ECHR) (1986) 48 D&R, 253. See also *Ahmad v. Inner London Education Authority* [1978] QB 36, [1977] 3 WLR 396, [1978] 1 All ER 574 (Court of Appeal); and the Home Office Report, *Religious discrimination in England and Wales* (London, 2001). Cf. *Yassin v. Northwest Home Care Ltd*, CRE Rep 1993, p.21 Ind. Trib. (which awarded compensation to a Muslim for having been dropped from a sales representative training programme because of the need to have half an-hour off for Friday prayers); and *Ahmad v. UK* (1982) 4 EHRR 126.

<sup>66</sup>Ansari, *Muslims in Britain*, 24–5.

<sup>67</sup>Italian prime minister, Silvio Berlusconi, 'We must be aware of the superiority of our civilization, a system that has guaranteed well-being, respect for human rights—and in contrast with Islamic countries—respect for religious and political rights. Islamic civilization is stuck where it was fourteen hundred years ago', comments made in Berlin, 26 September 2001. These comments have been cited extensively: see, for example, Alasdair Palmer, 'Is the West really best', *Sunday Telegraph*, London, 30 September 2001, 14; Andrew Osburn, 'On the brink of war: reaction—scorn poured on Berlusconi views—European and Muslim leaders express disgust', *The Guardian*, London, 28 September 2001, 4.

party chairman Norman Tebbit made the claim that the bombings could have been prevented had his infamous 'cricket test' been applied; the 'cricket test' was invigorated with calls for a re-assertion of 'Britishness'.<sup>68</sup> Home Office minister Hazel Blears suggested double-barrelled nationality, such as British-Asian, while the then Shadow Home Secretary, David Davis, suggested that multi-culturalism is 'outdated'.<sup>69</sup>

Many of these tensions, for the Muslim minority communities in Britain, were enhanced by the foreign policy fiasco of the decision fully and wholeheartedly to support the US led 'war on terror', and the subsequent decision to support the invasion of Iraq. British Muslims protested against violations of rights, including the Iraq war, the Guantanamo Bay detentions and the extraordinary rendition of suspects to the US; while the British government imposed increasingly draconian legislation in the form of internment, preventative detention and control orders at home and abroad. Further concerns have been generated through the allied policies of extra-judicial killings through Drone attacks in Pakistan and Afghanistan. Drone attacks have accounted for the deaths of several thousand people in recent years. These killings are disproportionate, resulting in deaths of many civilians. For British Muslims, this issue is particularly disturbing as many of them originally hail from northern or tribal areas of Pakistan and Afghanistan, which have been targeted during these attacks. British support for the extra-judicial killing of Osama Bin Laden in May 2011 has also raised anger and resentment, as British Muslims have demanded a right to fair trial for all, including those who are suspected of serious crimes against humanity. They also find it highly disappointing that British foreign policy is subjected to and exclusively subservient to the dictates of the United States. These perceptions have, unfortunately, considerably radicalised a beleaguered Muslim community, which is searching for a sense of community and belonging within the United Kingdom. The shifting loyalties of many members of this community, who have been champions of compassion, tolerance and pluralism, is a sad consequence of the politicisation of religious identities in this dramatic fashion.

#### CONCLUDING REFLECTIONS

This present paper has highlighted the continued significance of religion in European society, politics and legal systems. The article has also amplified that, with its strategic importance based both on its historical foundations and contemporary presence, Islam will continue to contribute to the debate on freedom of religion and the rights of religious communities within Europe. The increasing politicisation of religion and the meaningless insular approaches towards Islam adopted by European human-rights institutions or by individual states within Europe is disturbing; it will not help establish an appropriate

<sup>68</sup>The media and other political analysts also presented substantial prejudicial attacks both on the concept of multi-culturalism and on Muslim minorities. According to Pfaff, those responsible for the July 2005 bomb attacks in Britain 'are a consequence of a misguided and catastrophic pursuit of multiculturalism', see William Pfaff, 'A monster of our own making', *The Observer*, London, 21 August 2005. Furthermore, Kepel makes the point that the bombers 'were the children of Britain's own multicultural society', see Gilles Kepel, 'Europe's answer to Londonistan', *OpenDemocracy*, 23 August 2005, available at: [http://www.opendemocracy.net/conflict-terrorism/londonistan\\_2775.jsp](http://www.opendemocracy.net/conflict-terrorism/londonistan_2775.jsp) (11 August 2011).

<sup>69</sup>Davis attacks UK multiculturalism', *BBC News Online*, 3 August 2005, available at: [http://news.bbc.co.uk/1/hi/uk\\_politics/4740633.stm](http://news.bbc.co.uk/1/hi/uk_politics/4740633.stm) (19 August 2011).

forum of dialogue for nurturing common values of mutual understanding and harmonious and peaceful co-existence.

This work therefore concludes with a plea that policy-makers, politicians and statesmen need to appreciate the common good inherent in the value of freedom of religion. There is also a need for an absolute commitment that all religious communities within Europe, including the Muslims of Europe, are recognised as full and equal partners within society. Muslim identities deserve an affirmed and celebrated position within the matrix of modern European society. The future of the British Muslims raises serious and substantial complexities. As they are engaged in a complex relationship with the state, the Muslim minority communities do not feel that the long-term grievances of Muslims have been addressed adequately. A particularly sensitive issue has been British foreign policy. It is undoubtedly the case that British Muslims feel part of the Muslim *Ummah*, as their sentiments, loyalties and commitments remain attached to their global co-religionists. While the Palestinian and Kashmir issues have led to Islamic militancy, British Muslims have felt anger and disappointment at the political approaches adopted by successive British governments in the Middle East, Afghanistan and Pakistan. Further anger and resentment is being generated through the continuing support for Drone attacks in Afghanistan and Pakistan. As this paper has confirmed, notions of equality, pluralism and multiculturalism are not simply about acceptance or toleration of Muslim values, but entail active participation and celebration of these values and characteristics. Such an attitudinal response will also ensure that a dynamic, vibrant European and British identity is not antithetical to an Islamic identity.