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LEGAL PLURALISM AND ISLAM IN THE SCALES OF THE EUROPEAN COURT OF HUMAN RIGHTS: THE LIMITS OF CATEGORICAL BALANCING.

Karen Meerschaut and Serge Gutwirth[1]

> *"(S)i la République a encore le goût de l'avenir, alors elle ne peut définir une fois pour toutes le prix à payer pour lui appartenir. Si elle veut reprendre son mouvement séculaire, elle doit plutôt se mettre à la recherche de l'universel nécessaire à la cohabitation. Nul n'a le droit d'interrompre cette enquête collective, surtout pas ceux qui, depuis des années, sous le manteau de 'la neutralité scolaire', acceptent sans broncher les marques de l'inégalité sociale, raciale et culturelle. Ceux que le foulard islamique terrorise aujourd'hui se sont-ils souciés de la menace que faisait courir à la France le port du foulard Hermès?"*[2]

Abstract: starting from the Refah v. Turkey case we dig deeper in the issue of conflicting rights in pluralist legal systems, comparing the Strasbourg Court's case law with solutions devised in the Malaysian legal system. Legal pluralism generally includes a set of tensions between the minorities' rights to live following their own norms and rules (article 27 ICCPR and article 8 ECHR), the religious freedom (article 9 ECHR) and, the equality and non-discrimination principles. The idea of the separation of state and church and the principle of secularism are also often brought up as an argument against legal pluralism. How to deal with these tensions?

1.1 Introduction

The European Court on Human Rights (ECHR) does not make use of a steady or explicit method to solve conflicts among fundamental rights. The question at the core of this book relates to the necessity to devise a method to answer such conflicts of rights. Brems has expressed a preference for solutions that would tend to a maximal protection of all the rights at stake: in this sense she pleads for 'practical

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[2] B. Latour, La République dans un Foulard, *Le Monde*, 17-18 January 2004.

concordance'.[3] This is certainly the ideal solution but in most cases such a 'win-win' solution, or even a compromise, cannot be found or built and choices will have to be made. Also, it will be much easier for the legislator to politically formulate a compromise in general terms, than for a judge to decide in a concrete conflict. Things might thus be much more complicated than 'a method' could cope with.

In this contribution we will firstly discuss the ECHR *Refah v. Turkey* case in which the topic of the compatibility of legal pluralism with modern democracy and human rights was brought on the agenda of the Court, at the occasion of the prohibition of one of Turkey's leading political parties, the *Refah*. Secondly we will shift to alternative paths to deal with the issue of legal pluralism not only in theory, but also in the Malaysian legal system. By referring to the latter, we hope to be able to show that sometimes the legislator is effectively in a better position to devise a compromise solution. The legislator, for instance drafting Islamic family law legislation, can elaborate a fairly sophisticated system in which conflicting rights – in this case religious freedom/cultural rights and gender equality – are both protected as much as possible[4]. The important reforms of the Malaysian Islamic family law in the eighties and early nineties do show, both at a substantial and a procedural level, that the understanding and substantiation of Islamic law is contextual and that it can deal with contents and forms very similar to Western law. In Malaysia an interesting compromise has been found, we believe, in the weighing of religious freedom and the principle of equality in gender matters. Eventually, we will focus on the weaknesses of both approaches of legal pluralism. With regards to Malaysia, we will demonstrate that the lack of an efficient culture of judicial review entails that the legal developments in the field of Islamic law depend too much on political compromises that can take too many different forms and directions. As a matter of fact, in the past decade we see in Malaysia that conservative legislative amendments and initiatives in the field of Islamic law have been adopted in Malaysia. Also there is recent case law of the secular superior courts about the conversion out of Islam, which refuses to pose minimal constitutional limits to the functioning of the Malaysian system of strong legal pluralism, namely by the guaranteeing of the right to leave your religion and thus to refuse the application of Islamic law. [5] This has as a negative and regrettable consequence that Malaysia is switching to the other pole of the dichotomy between the secular democracy and the religious Islamic theocracy. Many western liberals see Malaysian critically as a communitarian society or a millet-multiculturalism.[6] Although this is not totally unjustified, it is nevertheless important to focus upon the

[3] E. Brems, Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the protection of Human Rights and Fundamental Freedoms, 27(1) *Human Rights Quarterly*, 294-326 (2005).

[4] See also E. Brems, *supra* note 3, 302.

[5] Positive developments with regard to religious freedom in Malaysia depend very much on the political will of the government. The lack of a clear affirmative position of the government and the courts about the right to leave one's religion is due to the politicizing of the Islam and the fear for protests from the Malay-Muslim electorate. The case of Malaysia shows that the politicizing along communal or religious lines of legal issues may destabilise the system and the capability of the state to safeguard individual rights.

[6] The term "millet-multiculturalism" is used by Appiah, to refer to a "millet" laissez-faire policy where each religious community lives by their own rules: K.A. Appiah, *The Ethics of identity*, 74-75 en 78-79 (Princeton, Princeton University Press, 2004, 384 p.). The term millet refers initially to a confessional community ruled by their own religious courts and personal law rules in the Ottoman Empire. In the 19th century, with the *Tanzimat* reforms, the Ottoman term started to refer to legally protected religious minority groups, other than the ruling Sunni-Muslims. *Millet* comes from the Arabic word *milla*: see www.wikipedia.com (last consulted 20 June 2007).

fact that Malaysia has shaped a very valuable opportunity to let the western world see that "third" paths are possible between the extremes of modern secularism and Islamic theocracy. More diplomatic perspectives are sensitive to both interreligious domination and intra-religious domination, as well as to a more complex understanding of equality.

1.2 Legal Pluralism as a conflict of human rights

The legal(-institutional) and policy debate about the rights and wrongs of legal pluralism is complex and has so far not extensively been covered by legal scholars from a human rights perspective.[7] Within the ongoing multiculturalism debate or the debate about minority rights the issue of legal pluralism, and more specifically the pluralism of different legal systems or rules within one state, is one of the discussed items. In fact, the category of claims of recognition or enforcement of religious and customary law of cultural minorities – mostly in the sphere of family, penal and land law – is seen as one of the strongest claims in this debate. The accommodation by the state of religious law and religious courts to govern marriage and divorce affairs of certain religious groups, concerns a 'hard case' of the 'paradox of the multicultural vulnerability'. This delegation of legal authority may namely expose certain vulnerable insiders such as women, children and other 'minorities within minorities' to intra-group violations of their basic rights.[8] In the 'multiculturalism' debate, especially in the field of legal pluralism, the dominant position affirms that the accommodation of cultural claims, involves a choice for 'culture' rather than for 'rights'.

Legal pluralism entails a problem of conflicting human rights, which demands a serious and contextual examination, which is not always carried out. The conflict can be described as one between on the one hand the accommodation of religious freedom claims (in the case of religious legal rules: article 9 ECHR and article 18 ICCPR), minority rights claims or the right of members of minority groups to live according to their own traditions (article 8 ECHR and article 27 ICCPR) and on the other hand the fundamental rights of others, such as the right to be treated equally or the right of cultural or religious freedom of dissident minorities and individuals. The idea of the separation of state and church and the principle of secularism are also often brought up as an argument against legal pluralism. Legal pluralism thus involves the balancing or articulation of these contrasted rights, freedoms and principles. The main question therefore is how to both ensure recognition of the rights of cultural or religious communities and individual liberties, fundamental rights and equality. Moving beyond the limits of binary thinking or the too abstract and general *rights versus culture*-position, we contend that such balancing cannot occur in the abstract, but that it has to be contextualised. Also, the freedoms and principles concerned contain undetermined concepts and expressions which need to be further explored through philosophical and theoretical reflection on the one side and interpretation in a specific context on the other side.

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[7] However, since the seventies, legal pluralism is a favourite subject in the legal anthropology and sociology.

[8] A. Shachar, Group Identity and Women's Rights in Family Law: The perils of Multicultural Accommodation, 6(3) *The Journal of Political Philosophy*, 285-305 (1998); A. Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001, 208 p.).

With Bader, we plead for a 'practical' or 'contextualised reason'[9], involving an empirical, historical and comparative attention for context, institutions and practices. Moral principles demand further explicitation in specific contexts and cases. Abstract and contextual elements are interdependent and constantly in interaction. Consequently, no *a priori* and context-independent hierarchy can be proposed between different moral principles or human rights. In the case of legal pluralism, associative freedoms, such as religious or cultural freedoms, are demanding to be weighed with individual freedoms and human rights:

"How does one achieve a more sensible balance between protection of vulnerable individuals and groups (minorities within religious minorities) and outside protection of vulnerable religious minorities?"[10]

The purpose of this article is to examine how the ECHR approaches this issue and to contrast it with the Malaysian approach. The contrast is stark because the Malaysian version of legal pluralism (at the level of personal and family law), is precisely the strong version which was radically rebutted by the Strasbourg Court in the Refah case. The Malaysian approach nevertheless shows that legal pluralism does not per se defeats and annihilates the democratic constitutional state, although the actual constitutional protection of the religious freedom and gender equality provisions by the Malaysian courts is highly problematic.

1.3 The Refah-case: Strasbourg's categorical rejection of legal pluralism

i. The framework of article 11 of the ECHR

In its judgement of 31 July 2001 in the *Refah Partisi (Prosperity Party) and Others v. Turkey*-case, the ECHR decided that the dissolution of this political party did not violate the European Convention on Human Rights (ECHR). On request of the applicants, the case was referred to the Grand Chamber of the Court which confirmed the previous judgment on 13 February 2003. In the first judgment there were three dissenting opinions (arguing that the Turkish measures were disproportionate), while the unanimous judgment of the Grand Chamber contained no dissenting but two concurring opinions.

The examination of the merits of the case did not occur in reference to the religious freedom (article 9 of the ECHR) or the right of members of minority groups to live according to their own traditions (article 8 of the ECHR), but within in the framework of the freedom of assembly and association (guaranteed by article 11 of the ECHR). In its Grand Chamber judgement of 13 February 2003 the Court found that there was no violation of the applicants' freedom of association: that is to say there was certainly an interference with the freedom of association (dissolution of a political party), but the dissolution was found legitimate according to the second paragraph of article 11 because it was judged to be 'prescribed by law' and 'necessary in a democratic society' for the pursuit of 'legitimate aims'. The Court decided that *"taking into account the importance of the principle of secularism for the democratic*

[9] See also V. Bader and S. Saharso, Introduction: Contextualized Morality and Ethno-Religious Diversity', *Ethical Theory and Moral Practice*, vol. 7, 2(2004) 108-109, 111.

[10] V.M. Bader, Associative Democracy and Minorities within Minorities, in: A. Eisenberg and J. Spinner-Halev, *Minorities within Minorities. Equality, Rights and Diversity*, 319-340 (Cambridge: Cambridge University Press, 2005).

system in Turkey", the dissolution pursued several of the following legitimate aims: *"protection of national security and public safety, prevention of disorder or crime and protections of the rights and freedoms of others*".[11]

The reasoning that the dissolution was 'necessary in a democratic society' is particularly relevant, because the Court held that the Refah party's plans to introduce legal pluralism and the sharia are contradictory with the 'fundamental democratic principles'. In this contribution we concentrate upon the argumentation concerning the publicly announced intention of Refah to introduce legal pluralism, implying a legal system wherein the adherents of different religious communities could abide by their own religious rules, rather than to be submitted to the Turkish secular law. This consequently included the allowing of Islamic rules of private law and the Islamic headscarves in public schools and universities.

ii. Legal pluralism and sharia as contrary to secularism, equality and democracy

The Court based its findings on the following statements of the leader of the party who had publicly declared the following:

"There must be several legal systems. The citizens must be able to choose for himself which legal system is most appropriate for him, within a framework of general principles…Why then, should I be obliged to live according to another's rules? (…) The right to choose one's own legal system is an integral part of the freedom of religion."

and

"(…) we shall guarantee all human rights. We shall guarantee to everyone the right to live as he sees fit and to choose the legal system he prefers (…) when we are in power a Muslim will be able to get married before the Mufti, if he wishes, and a Christian will be able to marry in church, if he prefers".[12]

On the basis of this and other statements the ECHR decided that Refah wished to establish legal pluralism, including the introduction of the sharia.[13] The Court found such prospects especially at odds with three important principles, namely secularism, equality and democracy. Firstly, the plans of the Refah were interpreted as being contrary to the principle of secularism, which is solidly enshrined in the Turkish Constitution, and explicitly imposes respect for secularism on the different organs of the political power, affirming the impartial role of the state in religious matters.[14]

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11 ECHR 13 February 2003, *Refah Partisi (the Welfare Party) and Others v. Turkey*, para. 67.

12 *Refah v. Turkey, supra* note 11, par. 28-29.

13 However, Refah had made neither programmed commitments to nor legislation proposals for setting up a legal pluralistic system.

14 Article 2 of the Turkish constitution states that: *"The republic of Turkey is a democratic, secular state (…)"* and article 24, par. 4: *"No one may exploit or abuse religion, religious feelings or things held sacred by religion in any manner whatsoever with a view to causing the social, economic, political or legal order of the State to be based on religious precepts, even if only in part, or for the purpose of securing political or personal interest or influence thereby."* Furthermore, according to article 68, par. 4 of the Turkish Constitution: *"(...) activities of political parties shall not be incompatible with (...) the principles of a democratic, secular republic"*. Next to this, numerous provisions of domestic legislation require from political parties to conform to the principle of secularism in a number of fields of social and political life (Law no. 2820 on the regulation of political parties and Criminal Code). *Refah v. Turkey*, *supra* note 11,

Secondly, the Court identified a tension between legal pluralism and the principle of equality, because it found that legal pluralism amounts to an unjustifiable discrimination between individuals regarding the enjoyment of their public freedoms:

"A difference in treatment between individuals in all fields of public and private law according to their religion or belief manifestly cannot be justified under the Convention (...)".[15]

The reverse argument of the applicants that prohibiting a plurality of private law-systems amounted to a discrimination against Muslims, who wished to live their private lives in accordance with the precepts of their religion, was rejected.[16] Thirdly, the Court's Grand Chamber (quoting the Chamber judgment) unambiguously stated that

"sharia is incompatible with the fundamental principles of democracy as set forth in the ECHR (...) It's 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 (...)."[17] [18]

According to the applicants, such a statement could lead to

"a distinction between 'Christian-democrats' and 'Muslim-democrats' and constitute discrimination against the 150 million Muslims in a total European population of 800 million."[19]

But the Court did not explicitly deal with this argument. Instead it asserted that the introduction of the sharia would contribute to the forming of an Islamic theocratic regime comparable to the former Turkish regime under Ottoman law. For the Court, such a regime is incompatible with the Turkish option for a secular republic, which confines Islam and other religions to the sphere of private religious practice.

iii. A problematic precedent for legal pluralism, Muslims and Islam. Discussion of the arguments.

We fear that the Refah-judgment is a difficult precedent for future cases regarding legal pluralism, Muslims and Islam, the more that today we face important tendencies to reduce and simplify the complexity and diversity of the Islamic religion and Islamic legal practice. Muslims are the object of essentialist discourses, labels, generalizations and stereotypes that are not only prominent in public opinion, but also amongst the political elite, social scientists and quality media. For instance, the June

par. 45-48.

15 *Refah v. Turkey, supra* note 11, par. 119.

16 *Refah v. Turkey*, *supra* note 11, par. 128. The Court mentions also that it is not disputed that in Turkey everyone can observe in his private life the precepts of his religion. But it adds that on the other hand contracting parties may legitimately prevent the application of religious private law-rules prejudicial to public order and the values of democracy. It refers to examples such as rules permitting polygamy and privileges for the male sex in matters of divorce and succession.

17 *Refah v. Turkey, supra* note 11, par.123.

18 In the *Dahlab* case the Court held a similar reasoning as regards the wearing of the Islamic headscarf: "It (…) appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and above all, equality and non-discrimination (…)" ECHR 15 February 2001, *Dahlab v. Switzerland*, 13, par. 111 (decision of inadmissibility)

19 *Refah v. Turkey, supra* note 11, par. 75.

2005 annual Report of the European Commission against Racism and Intolerance ECRI expresses a concern related to the climate of hostility against Muslims and considers that the situation requires attention and action in the future.[20] In its advice of 11 april 2006 the Dutch Council for Government policy (Nederlandse Raad voor het Regeringsbeleid) declared that the Dutch political and public debate about Islam and democracy is demonstrating a serious lack of knowledge about Islam and the different Islamic political currents and movements.[21] In the same vein, we believe that the categorical view of the Court on legal pluralism, namely the 'complete plurality versus complete non-plurality' dichotomy, is erroneous and should be challenged.[22]

In fact, The *Refah* judgment implies a radical denial of any legal pluralism that pursues the accommodation of Islamic law and human rights: it leaves no space for 'compatibilisation' of different legal traditions.[23] It is regretful that the court, although it observes that it is not required "*to express an opinion in the abstract about the advantages and disadvantages of a plurality of legal systems"*, nevertheless utters very abstract rulings about *Refah*'s statements to apply Islamic private law rules to Muslims in Turkey in the framework of a plurality of legal systems. By very generally putting that *"sharia is incompatible with the fundamental principles of democracy"* the Court implies that sharia as such is contrary to the principles of secularism/impartiality and equality (the two grounds mentioned above). Indeed, we can also refer to the court's very abstract observation that this amounts to the substitution of a theocratic regime for the republic and that it is prejudicial for public order and the values of democracy enshrined in the convention.[24]

The judgment minimizes or even negates the conflict between the different human rights, which are involved in the issue of legal pluralism. Nowhere in the judgment, there is any reference to the strong Convention-based arguments in defence of the accommodation of legal pluralism on the ground of religious freedom, the principle of equality and the right of minorities to live according to their own traditions (article 8 ECHR). The applicants did however invoke that the right to choose one's own legal system is an integral part of the freedom of religion. Nevertheless, the Court denies this argument and states that the introduction of sharia private law-rules for Muslims goes far beyond the individual freedom of religion to observe the precepts of their

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20 This Annual Report can be downloaded via http://www.coe.int/t/e/human_rights/ecri/ (last consulted 6 December 2006). The Judge Tulkens referred to these observations of the annual report of the ECRI in paragraph 20 of her dissenting opinion in ECHR Grand Chamber 10 November 2005, *Leyla Şahin v. Turkey*.

21 WRR Rapport aan de Regering 11 maart 2006, *Dynamiek in islamitisch activisme. Aanknopingspunten voor democratisering en mensenrechten*. This document (only in Dutch available) can be downloaded via http://www.wrr.nl (last consulted 7 December 2006).

22 See too C. Moe, Refah Revisisted: Strasbourg's Construction of Islam, http://www.strasbourgconference.org/papers/Refah%20Revisited%20Strasbourg's%20-Construction (last consulted 7 December 2006); see also J. Gadirov, Plurality of Legal Systems and Religious Freedom, http://www.strasbourgconference.org/papers/Plurality%20of%20Legal%-20Systems%20and%20, 1 (last consulted 7 December 2006). This last author argues in his paper that a simple no-plurality approach is overly simplistic and that freedom of religion and conscience provides strong liberal arguments in favour of accommodating different normative legal orders into the legal framework of the state: see p. 4 en 6. We shall defend here the same position.

23 The notion of 'compatibilisation' has been proposed by A.C.'t Hart, *De meerwaarde van het strafrecht*, 318 p. (Den Haag: Sdu, 1997) and A.C.'t Hart, *Hier gelden wetten! Over strafrecht, Openbaar Ministerie en multiculturalisme*, 270 p. (Arnhem: Gouda Quint, 2001).

24 *Refah v. Turkey, supra* note 11, par. 127, 128.

religion and the private sphere to which Turkish law confines religion. The Court reiterates that the freedom of religion, including the freedom to manifest one's religion by worship and observance, is primarily a matter of individual conscience and stresses that this is quite different from the field of private law, which concerns the organization and functioning of society as a whole. Henceforth, according to the court, the call for application of religious private law-rules is not part of the claims protected by the religious freedom-disposition of the convention.[25] There is no reference to former cases, for instance wherein the Court decided that article 8 ECHR includes the right of minorities to live according to their own lifestyle.[26]

The argument that a plurality of legal systems would do away with the role of the state as guarantor of individual rights and of its impartiality towards the various beliefs and religions, is not convincing. Even in a legal pluralistic system, the state can act as a warrant of individual rights entrenched in its constitution and in international and regional human rights instruments. The legislator and higher courts could for instance, respectively by legislative initiatives and judicial review, moderate the discriminatory effects of limited-scope legal pluralism on Muslim women. Of course, for the judicial review is possible, the parallel applicable religious rules and the parallel religious courts, cannot be all-inclusive and superior to the other legislation and jurisdiction, especially the constitution and its bill of rights. These rights have to be protected via judicial review by its superior courts, especially the constitutional court, as long as these rights apply to the members of all religious communities. A subsystem of religious law can apply at lower or parallel level, but always under review of the constitutional court. Such protection would then, of course, only take place at higher levels of the state machinery and on appeal. Consequently the protection will be less immediate and effective, but not impossible.[27]

iv. Secularism and neutrality: no clear meaning

Secularism and neutrality are "dirty words" today. At least, they are vigourously attacked in public and academic debate. The dominant way of conceiving the relationship between religion, politics, law and public life in the Western world is through the lens of secularism or the separation of religion and state. On the one side, secularism refers to this separation in terms of institutional arrangements and individual reasons (the separation of church and state or more broadly to the public sphere as distinct from the private sphere including religion and faith). On the other side, in a normative sense, secularism refers to a liberal political doctrine giving priority to principles of toleration, impartiality and neutrality aiming at universality on the basis of conceptions of secular or public reason.[28]

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25 *Ibid.*

26 See the case law concerning gypsies where the Court explicitly stated that article 8 imposes a positive duty on the government to facilitate the different lifestyle of minorities: 'special consideration had to be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases', e.g. ECHR 22 January 2004, *Connors vs. the United Kingdom*; see also the ECHR cases *Chapman*, *Coster, Beard, Lee and Smith v. United Kingdom* all of 18 January 2001.

27 See also C. Moe, *supra* note 22, 9-10.

28 See the introductory note to the international conference, Secularism and Beyond - Comparative Perspectives**,** May 29th to June 1st 2007, University of Copenhagen: http://www.ku.dk/satsning/religion/sekularism_and_beyond/index.asp. (Last consulted 22 June 2007). The aim of this conference is to address from a comparative and interdisciplinary

In current normative legal theory, many authors are however challenging the assumption of the liberal state as a morally, culturally and religiously neutral or impartial agent, capable of producing a neutral moral agenda for the whole of the community.[29] Some authors are consequently pleading for a reconceptualisation of the concepts of secularism, neutrality and impartiality[30], defending a pragmatic case by case approach of dealing with (religious) controversies and conflicts, instead of an ideological approach, drawing a "line in the sand". For Bader the main issue is not secularism or separation of church and state (he rejects this concepts as not very useful), but the compatibility of institutional/legal options with a minimal or "relational" democratic-constitutional morality. To him a strict separationist or secular interpretation of a constitutional-democratic state is not defendable, because 1) the state has often historically prejudiced specific religions, directly or indirectly; 2) 'neutral' rules and decisions are hiding a structural majority preference: a "hands-off" approach is preferential for cultural majorities, because history and quantities are overlooked and seen as arbitrary; 3) the state consequently cannot be culturally or religiously neutral: proponents of accommodation[31] are arguing that public institutions which are pretending to be neutral, are in fact implicitly biased to the needs, interests and identities of the majority group and this has as a consequence the creation of barriers, stigmatization and exclusion (e.g. the law in France which forbids the wearing of ostentative religious symbols).[32]

perspective, the question whether secularism as political doctrine provides an adequate perspective for approaching the contemporary challenges of religion in politics, law and public life.

29 J.H. Carens, *Culture, Citizenship and Community. A Contextual Exploration of Justice as Evenhandedness,* 10-13 (Oxford: Oxford University Press, 2000); D. Ingram, Between Political Liberalism and Postnational Cosmopolitanism, 31(3) *Political Theory*, 359-391 (2003); A. Gutmann, *Identity in Democracy*, 43 (Princeton (N.J.): University Press, 2003); V.M. Bader, Democratic Institutional Pluralism and Cultural Diversity in: D. Juteau and C. Harzig (eds), *The Social Construction of Diversity*, 131-167 (Oxford/New York: Bergahn, 2003); V. Bader, Religious Diversity and Democratic Institutional Pluralism, 31(2) *Political Theory,* 265-294 (2003).

30 Bader argues in favour of dropping the language of secularism in political philosophy and institutions; instead he pleads for a reconceptualisation of neutrality and impartiality as relational neutrality and embedded impartiality. For Bader, relational neutrality or embedded impartiality mean that the Constitution, the judge, the legislator, the government and other legal actors have to deal on an even-handed manner with all the different cultures and religions which are compatible with the minimal moral core of a democratic constitutional state. A relational neutral state gives all cultural styles of life an equal political and public voice and sometimes room for participation (which does not imply that anything goes). V. Bader, *supra* note 29; V.M. Bader, Defending Differentiated Politics of Multiculturalism, forthcoming in: N. Perez Monteiro (ed.); *Ideas and Policies for Our Times.* See also T. Modood, "Anti-essentialism, Multiculturalism & Religious Groups", *The Journal of Political Philosophy*, 1998, vol.6, nr.4, 378-399. Modood pleads for a moderate secularism and states that the accommodation of Muslim identities and claims is not inconsistent with secularism in practice. Karen Meerschaut followed Bader's position in her doctoral dissertation (in Dutch) about Diversity and Law. A research of the contextuality of the law, with special reference to the Malaysian case, defended at the VUB on 24 february 2006. K. Meerschaut, *Diversiteit en Recht. Een onderzoek naar de contextualiteit van het recht, met bijzondere aandacht voor de Maleisische casus*, 293-297 (Brussel: VUB, 2006).

31 V. Bader, *supra* note 29 and J.H. Carens, *supra* note 29. See also B. Parekh, *Rethinking Multiculturalism. Cultural diversity and political theory* (Houndmills: Palgrave, 2000) and W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995).

32 In her article on 'Indoctrination, Secularism, Religious Liberty, and the ECHR', Langlaude argues that if the school gives no appropriate place to religion, this may lead to the perception that the school is a bearer of majority values under the banner of impartiality. She also wonders if such

In the *Refah* case the Strasbourg Court does not even examine the particular Turkish strict conception of secularism and the nature of its relation with democracy and the Convention. Conceptions of secularism and separation of church and state have no univocal meaning, vary widely and are conditioned by historical, political and cultural factors, reflected in the diversity of national approaches. There are multiple forms of secular states and multiple theoretical formulations of secularism.[33] For example, the "Italian *laicità* is not the same as the German *neutralität*, the French *laïcité* is different from the British *secular state*, the Spanish *laicidad* is not equivalent to the Swedisch *disestablishment"*.[34] Hence, following to the doctrine of the margin of appreciation, the member states to the ECHR are accorded ample room for policy. Convinced of the need to respect local/national diversity, we certainly defend a contextual position. Nevertheless, there are limits. The Strasbourg Court has to seriously investigate if the particular conceptions of secularism are compatible with democracy and a minimalist interpretation of rights and freedoms protected by the Convention. In this regards, the margin of appreciation has to be accompanied by European supervision: the State-Religion relations, certainly in the light of the freedom of religious liberty, are not merely a local issue, but one of importance to all states. European supervision can consequently not totally be escaped by invoking the margin of appreciation.[35] With Ventura, we note that "the continental convergence on the European integration standards makes the once only domestic issue of secularism something pertaining to Europe as a whole". Also, "the different countries and political and legal framework are linked and cannot avoid confrontation, interaction and mutual influence".[36]

Consequently, the compatibility of the outspoken and strict brand of Turkish Kemalist secularism[37] with the Convention, can, contrary to the opinion of the Grand Chamber, be seriously challenged when it prevents the expression of religious symbols and practices in the public sphere in a very radical way, which is objectionable in the light of the freedom of religion of article 9 of the ECHR. For example, some of the laws and practices instituted in accordance with the Turkish principle of secularism, are difficult to reconcile with the conventional freedoms of religion and expression: 'dress and hat laws' forbidding certain religious garments to be worn, the prohibition

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situation violates the principle of neutrality in the direction of the 'a-religious' or the 'anti-religious'. Many authors contend that what is taught at the public 'neutral' school is the imposition of Christian values under the appearance of neutrality. S. Langlaude, Indoctrination, Secularism, Religious Liberty and the ECHR, 55 *International and Comparative Law Quarterly*, 929, 933 (2006).

33 See also K. Meerschaut and Paul De Hert (eds.), *Scheiding van kerk en staat of actief pluralisme?*, 1 (Antwerpen/Oxford: Intersentia, 2007). See also the different papers presented at the international conference, Secularism and Beyond - Comparative Perspectives**,** *supra* note 27).

34 M. Ventura, Domestic secularism vs. European secularism. A legal perspective, abstract for *the international conference, Secularism and Beyond - Comparative Perspectives,* May 29th to June 1st 2007. http://www.ku.dk/satsning/religion/sekularism_and_beyond/index.asp. (Last consulted 22 June 2007).

35 See also the dissenting opinion of Judge Tulkens, ECHR Grand Chamber 10 November 2005, *Leyla Şahin v. Turkey*, para 3.

36 M. Ventura, *supra* note 34. In this sense the ECHR can play a remarkable role in building up a European doctrine of secularism.

37 Seen as 'the final phase of philosophical and organizational evolution of societies' and wherein a secular state is defined as a state where sacred religious beliefs should never be mixed with politics, civil affairs and legal regulations which shall be formulated according to the needs of individuals and the whole society by using *scientific* data', *Turkish Constitutional Court Decision* 16 january 1998, 21-23.

of (religious) political parties often regarded as pursuing an objective in disregard of secularism, while it could be also understood as pleading for an alternative version of secularism; the trials for expression of opinions on the role of Islam...[38] In this regard, it is interesting to note that the ECHR held that there was a violation of the freedom of expression in a Turkish case wherein a Muslim religious leader had been convicted for violently criticising the secular regime in Turkey, calling for the introduction of sharia.[39]

The principles of secularism and separation of church and state are not specified moral principles, nor legal human rights, but contested meta-narratives. As Van der Burg underlines, their violation rarely amounts to an encroachment upon democracy and human rights. Nevertheless, in the actual debates regarding the foundations of a democratic constitutional state, they obviously have acquired a too broad and universalistic meaning. In the early history of western societies linked to Christianity, secularism was primarily an argument to combat a too strong intertwining of state and religion (i.e. the church). In this sense, the principle is sensitive to intra-religious domination but not to interreligious domination. We now see that secularism is predominantly used as a weapon against one religious group, the Muslims. However, as many authors are arguing nowadays, in regard of many questions, it is not yet an adequate and balanced conceptual framework. It needs more conceptual elaboration.[40] If the *laicité*, neutrality or secularism is often seen as components of the freedom of religion, they are not the only ones. They exist next to the right to the free exercise of one's religion. These different elements of the freedom of religion can contradict each other and must be balanced by the court.[41]

The European Court does not define what it means by 'neutrality', 'secularism' or 'the separation of church and state'. Do we have to interpret secularism as the non-establishment of religion? In its most radical version, such as in Turkey, the state prefers non-religion ('science', 'rationality', 'professionalism') to religion and non-believers or private believers to public believers. But how then can 'a liberal state minimize and limit its imposition of any metaphysical notions'? A principled 'no religion'-interpretation of the above mentioned concepts is thus inconsistent with the other components of the freedom of religion, namely the right to free and public exercise and the internal autonomy in church or religious affairs. Gadirov argues that the religious freedom taken together with non-discrimination between believers and non-believers is a liberal argument in favour of legal pluralism as a part and parcel of the fundamental right of freedom of religion and conscience. To him this issue demands a more comprehensive research before any guidelines could be put forward. He also refuses the categorical rejection of any kind of legal pluralism because it is over-simplistic: certain degrees of legal pluralism can be compatible with a democratic constitutional state.[42] We can also refer to Plesner, who is arguing that the argumentation of the Refah-case does not only conflict with the liberal tradition concerning individual manifestations of religious practice in the public sphere, but also with the liberal practice of respecting a certain legal autonomy for religious

38 C. Moe, *supra* note 22, 23-24.

39 ECHR 4 December 2003, *Gündüz v. Turkey*.

40 W. van der Burg, Gelijke zorg en respect voor de gelovige burger – een inclusief-vrijzinnige schets, in K. Meerschaut en Paul De Hert (eds.), *supra* note 33, 187-203.

41 Tulkens argues that it is necessary to seek to harmonise the principles of secularism, equality and liberty, not to weigh one against the other: Dissenting Opinion of judge Tulkens in *Leyla Şahin vs Turkey*, *supra* note 35, para. 4.

42 J. Gadirov, *supra* note 22, 12-13, 14.

groups. She gives the examples of Catholic, Protestant and Jewish traditions regarding marriage and divorce or employment policies of religious communities. She states that in other cases, the Court has even supported a certain legal autonomy for religious communities.[43]

v. Strasbourg's two strands of case-law concerning the freedom of religion

Following Moe, we contend that in the Refah-case the Court missed an opportunity for revisiting the leeway of the Turkish authorities when limiting the freedoms of articles 9, 10 and 11 in the name of secularism.[44] The court's mere endorsement of the Turkish conception of secularism is present in its rulings on headscarves in Turkey as well, namely in the cases *Karaduman* (1993) and *Leyla Şahin* (2005).[45] In these headscarf-cases, the Court's backing of the Turkish measures is even more problematic, since the impact of the wearing of headscarves is less radical than the introduction of legal pluralism and Islamic law: the impact of possible discriminatory private law-rules is much more serious. After all, one can raise the question if the prohibition to wear a headscarf does contribute to a more equal treatment and the emancipation of the girls concerned.[46]

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43 I.T. Plesner, "The European Court on Human Rights between fundamentalist and liberal secularism", Paper for the seminar on The Islamic head scarf Controversy and the Future of Freedom of Religion or Belief, Strasbourg, France 28-30 July 2005, www.humanrights.uio.no/omenheten/seminar/forum/plesne.., referred to by S. Langlaude, *supra* note 32, 942.

44 C. Moe, *supra* note 22, 25. A distinction can be made between a formal/procedural and a substantial conception of the *laïcité*. A formal conception starts from the freedom of religion and the individualizing of religious practice. An extensive substantial conception is followed by Turkey: Z. Anseur, Le couple laïcité-liberté religieuse: de l'union à la rupture? Réflexions à partir de l'affaire Ait Ahmad, *Revue trimestrielle des droits de l'homme* 77, 78 (2001).

45 European Commission for Human Rights, 3 May 1993, *Karaduman v. Turkey*; *Leyla Şahin v. Turkey*, *supra* note 35. Another headscarf-case was about an Islamic teacher with headscarf in Switzerland: *Dahlab v. Switzerland*, *supra* note 15. In these cases the violation of article 8, 9, 10 and 14 ECHR and article 2 Protocol 1 ECHR were invoked.

46 In the *Şahin* case, the Belgian judge Françoise Tulkens formulated a strong dissenting opinion. She questioned the general and abstract appeal to secularism and equality and doubted that the ban was proportionate. Also Sylvie Langlaude in her article 'Indoctrination, Secularism, Religious Liberty and the ECHR', points out that on the issue of proportionality the Court never really analyzed the issue, whether there would have been less restrictive alternatives possible, which would have a less drastic effect on the right to education and the religious freedom of the applicant. Tulkens also is of the opinion that although the principle of secularism is important, the Court still has the responsibility to analyze the appropriateness, necessity and the proportionality of the ban. Simply wearing the headscarf is not sufficient to support the finding of a contravention of the principle of secularism: only indisputable facts, reasons and concrete examples have to be demonstrated, not mere worries, fears or mere affirmations. She also points out that the Court did not address the argument that the applicant did not dispute the principle of secularism; that the Court didn't make a distinction between school pupils and students and that it also did not show that the applicant wore the headscarf in order to provoke a reaction or to proselytize; there is nothing that could have suggested fundamentalist views on the part of Miss Şahin and that it did not prove that the ban promoted sexual equality. According to Tulkens, sexual equality cannot justify prohibiting a woman from following a freely adopted practice: 'Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them. 'Paternalism' of this sort runs counter to the case-law of the court, which has developed a real right to personal autonomy on the basis of article 8 (…)', Dissenting Opinion of judge Tulkens in *Leyla Şahin vs Turkey*, *supra* note 35, para. 2, 5, 7, 8, 10, 11 and 12; S. Langlaude, *supra* note 32, 936.

These headscarf judgments and the *Refah*-case do raise the following questions: is the Court following its own case-law? Has the Court taken a similar line of reasoning in cases concerning other countries? In fact, the Court limited the application of the margin of appreciation in other cases about the dissolution of political parties and also some cases concerning religious freedom, while in *Leyla Şahin* and *Refah* it gave the doctrine of the margin of interpretation its full wings.[47] We get the impression that tensions exist between these judgments and other cases, giving rise, in the Turkish cases, to a sharp conflict between the margin of appreciation doctrine and the freedom to manifest his religious convictions. Following other case law of the court, however, the freedom of religion is defined as

"One of the foundations of a 'democratic society' and the 'pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it".[48]

Brems shows convincingly that in the European headscarf-cases, the European Court of human rights leaves ample room for state discrimination, while the Committee on the Rights of the child and the Human Rights Committee has adopted a more critical attitude towards headscarf bans.[49] The Court supports a vision of religious freedom that relegates religion to the private sphere of the individual to the detriment of other conceptions of religious freedom. Hence, some authors suggest that the Court has

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47 In the dissenting opinion in the Şahin-case, Tulkens mentions that the Court has not always shown the same judicial restraint to give the margin of appreciation of the state such a wide meaning with references to ECHR 14 December 1999, *Serif v. Greece* and the case ECHR 13 December 2001 *Metropolitan Church of Bessarabia and others v. Moldava*. See also the case about the conviction for proselytism of a Jehovah's witness, because he had "engaged in discussion" the wife of the cantor of the local Orthodox Church: ECHR 25 May 1993, *Kokkinakis v. Greece*.

48 *Metropolitan Church of Bessarabia and others v. Moldava, supra* note 47, para. 114. Sylvie Langlaude argues that there are two strands of case-law when the Court examines freedom of religion cases. On the one hand, there is the case-law concerning the manifestation of religion in public or in community. In these cases, the Court emphasizes the prevention of indoctrination, neutrality, secularism and *laïcité*. On the other hand, there are cases concerning state interference in the leadership of religious communities, the issue of legal recognition, property-related issues and the persecution of religious communities. Here the Court shows a much more community-oriented approach to religious freedom. Langlaude points out that in this strand of case-law, the Court does not leave a great margin of appreciation to the State, but sets the limits itself. Langlaude is of the opinion that there is a dichotomy in the Court's approach: 'it recognizes the principle of non-intervention of the State in the internal procedures of religious communities while at the same time restricting the legitimacy of certain religious practices (…) what's the point in recognizing some form of 'external' freedom of religion if the Court does not allow religious communities to engage in a number of religious practices or to hold their own 'ethical and religious precepts', simply because they are not held to be in accordance with neutrality and secularism?'. S. Langlaude, *supra* note 32, 938-943.

49 E. Brems, Above Children's Heads. The Headscarf Controversy in European Schools from the perspective of Children's Rights, 14 *The International Journal of Children's Rights*, 119, 126 (2006). The European headscarf-cases can be contrasted to the *Raikon Hudoyberganova v. Uzbekistan*-case before the Human Rights Committee: Communication 931/2000 (2005). The committee considered that the freedom to manifest one's religion encompasses the right to wear religious clothes or attire in public. The State party did not according to the committee invoke any specific ground for which the ban would be necessary. In the absence of any justification and taken into account the specifics of the context, the committee came to the conclusion that there had been a violation of both the freedom of manifestation (article 18, 1) and the freedom from coercion (article 18, 2).

shifted from a liberal (which does not prohibit religious manifestations in the public) to a fundamentalist form of secularism.[50]

The Strasbourg Court endorses the position of the Turkish constitutional court that secularism constitutes an essential condition of democracy and a guarantee for religious freedom and equality, particularly in the light of the historical experience and the place of Islam in Turkey. This principle is defended on the grounds that it prevents the state to show a preference for a specific religion or conviction. The principles of equality and of secularism were consequently invoked as the main grounds to interfere with the freedom to manifest one's religion.[51] In sum, the Court is very loyal to the margin of appreciation-doctrine in the Turkish cases, but it has forsaken the right to investigate the particular Turkish conception of the principle of secularism and its compatibility with the Convention and other international human rights instruments. The margin of appreciation cannot jeopardise the standards set by international and regional human rights and, would this be at hand, the Court has to intervene: 'Secularism cannot be intolerant'. Or as judge Tulkens has courageously written down in her dissenting opinion: "Bans and exclusions echo that very fundamentalism these measures are intended to combat".[52]

vi. Legal pluralism and gender equality

The Court also argues that a plurality of legal systems would be discriminatory. But we contend that this is also avoidable, at least in theory, because the hypothetical concurring or parallel systems of law have to be compatible with human rights and the principle of gender equality. In practice, this can amount to a situation wherein the parallel legal systems are very similar or will become very similar.[53] Certainly, the most minimal condition for legal pluralism to be compatible with human rights is the guaranteeing and protection of the exit option: individuals have to be free at any time to opt out of their religious community and to choose another community *and*, if relevant, another system of law linked to the new position. We will see that the fulfilment of this minimal condition is a serious problem in Malaysia, where it is subject to many social and legal barriers (state apostasy bans) when it comes to conversion out of Islam. Overall, however, legal pluralism cannot abstractly be coined incompatible with the Convention or as inherently discriminatory, as the Court seems to assume. It depends on the scope of legal pluralism as well as on the form and content of the parallel religious or customary law to be practiced. Furthermore, the *mere discussion* of such issue, as was the case in *Refah*, is certainly not a sufficient reason to dissolve a political party.[54]

Shachar is one of the authors in the field of legal theory who has explicitly dealt with the issue of legal pluralism on an institutional/legal level: she is digging into the question how law and institutional design can improve the legal situation of

50 S. Langlaude, *supra* note 32, 937.

51 See also S. Langlaude, *supra* note 32, 929. She is of the opinion that the Court, by emphasizing values such as neutrality, secularism and laïcité, tries to promote and enforce a normative order of secularism, which has unfortunate consequences for religious freedom.

52 Dissenting Opinion of judge Tulkens in *Leyla Şahin vs Turkey*, supra note 35, para. 19.

53 *Cf.* In Malaysia the Islamic family law after the reforms resembles very much the common family law; D.L. Horowitz, The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change, 42(2) *American Journal of Comparative Law*, 233-293 (part 1) and 543-580 (part 2) (1994).

54 C. Moe, *supra* note 22, 11-12.

vulnerable minorities within a group such as women. Shachar defends a 'joint governance' or a 'transformational accommodation' approach to resolve the conflict between commitments to cultural diversity and gender equality. She grounds her plea for overlapping or shared jurisdictions on three principles: 1) '**division of authority'** (f.ex. matters of marriage could be handled in accordance with religious requirements while property or alimony matters would fall under the common or secular family law; 2) '**the no-monopoly rule'**: nor the religious community nor the state would have an exclusive control, which implies, as we already stated, that the religious rules and/or courts may not be comprehensive or superior: there has to be a hybrid of sources of law (national and religious), also the legal system has to ensure legal representation and register consent; and 3) the '**establishment of clearly delineated reversal points'** which permit parties to address the civil/secular Court at any time. Shachar's legal and institutional proposals are based on the aim to provoke change for more gender equality from within the group.[55] At least the institutional choices are not limited to the dichotomy between at the one side a strict or complete (constitutional, legal, administrative, political and cultural) separation between state and organized religions, and on the other side theocratic forms of religious government.[56]

vii. An essentialising discourse on Islamic law

Finally, the Strasbourg Court's generalizing construction of Islamic law is very problematic in itself: according to the Court "*sharia faithfully reflects the dogmas and divine rules"*, *"is stable and invariable"* and *"pluralism in the political sphere or the constant evolution of public freedoms have no place in it"*[57]. In our opinion, it is impossible to state in abstracto that Islamic law is incompatible with the Convention: the Court assumes wrongly that 'the sharia' is static and invariable and that it is always incompatible with the convention concerning penal law and the status of women. Moreover, such assumption implies a categorical rejection of the possibility of any conciliation between Islamic law and human rights. This is not a very prudential or precautious position of the Court. Moreover, such a position reaches far beyond the competence of the court: it should not make such a general abstract conclusion. It is not the Court's role to assign a general meaning to a religion or a religious practice.[58]

Further, the Court shows quite some ignorance about the theory and practice of Islamic law. The judges seem uninformed about current applicable Islamic laws and scholarly research and debate about Islam, political Islam, Islam and human rights, Islam and women's rights and so on. Prominent Muslim intellectuals such as Abou El Fadl and An-Naim are both underlining that the sources of Islam, the Quran and Sunna, have no meaning and relevancy except through human agency, human understanding and behaviour. A sharp distinction between the secular and the

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55 A. Shachar, Religion, State, and The Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies 50 *McGill Law Journal* 49 (2005) and A. Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights, supra* note 8, 14, 118-121, 142, 148 and 150. Shachar is referring to Malaysia as an example of her joint-governance, but we can also refer to institutional and legal changes in Egypt, Morocco and South-Africa.

56 See also V.M. Bader, *Secularism or Democracy? Associational Governance of Religious Diversity* (Amsterdam: Amsterdam University Press, 2007) 386 p.

57 *Refah* Case, para. 123.

58 See also C. Moe, *supra* note 22, 13 and Tulkens, *supra* note 35, para. 12.

religious is therefore misleading, writes An-Naim.[59] Islamic law is plural and diverse both in theory (different historical schools of interpretation; different legal opinions) and in practice. In most countries where it is applied, it is largely limited in scope to personal status and family law. Moreover, it has been enacted in national or state legislation and often this legislative process has involved drastic legal reforms in comparison to its classical medieval formulations. This has certainly been the case in Malaysia, as we will see in the second part of this article. Against this background, the Court appears to have not only a static and essentialist view, but also a "total and interventionist" conception of Islamic law (especially when it says that *"the sharia intervenes in all spheres of public and private law (...)"*[60]. Although the sharia represents the divine will which is relevant for every aspect of Muslim life and relates to morals, actual Islamic law, as applied by states, is often a set of codified substantive and procedural rules that can be easily identified and compared. In the vast majority of Islamic countries today, the Islamic law, mostly confined to the field of family law, is enacted in statutory form by the state, rather than derived from the traditional sources of the sharia as such. Thus, the applied Islamic law is that part of the sharia that is endorsed through the political will of the state: in this sense it is a matter of modern politics or law. We think that it is precisely this legal content which is important for the issue of legal pluralism. Indeed, the Islamic law of Malaysia is not that of Pakistan, or Morocco, Sudan, Egypt, Tunisia or Saudi Arabia. The question raises which Islamic law the Court exactly has in mind.[61]

The theory and practice of Islamic law, formally and informally applicable to millions of Muslims, is yet utterly complex. Provisions about marriage, marriage property, alimony, divorce, father ship, inheritance, custody and guardianship of children not only differ in Shiite and Sunnite Muslim law, but also in the different schools of law within each tradition (and also within the different schools) and between the different Islamic countries. Furthermore, almost all Islamic countries have codified and reformed their applicable Islamic law during the 20th century (sometimes more than once). Such codification consists often of syncretic rules and principles which are inspired by different Islamic legal schools, opinions of different fuqaha or lawyers and even principles and rules originating from other traditions of law, such as the common law or customary practices.

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59 Fadl remarks that muslim legal scholars have often written the words 'And, God knows best' at the end of their legal dissertation. The epistemological recognition of the perfection of God and the imperfection of human interpretation finally justified the practice of legal diversity and the culture of legal discussions. K.A.E Fadl, *Speaking in God's Name. Islamic Law, Authority and Women,* 32 (Oxford: Oneworld Publications, 2001). According to him, no muslim jurist has ever stated that the fiqh has the same status of eternality and invariability as the sharia: 34 and footnote 104; A.A. An-Naim, *Islamic Family Law in a Changing World. A Global Resource Book*, 11-12 (London/New York: Zed Books Ltd, 2002).

60 *Refah v. Turkey, supra* note 11, para. 123.

61 See C. Moe, *supra* note 22, 13-14; A.A. An-Na'im, *supra* note 59. He argues that the field of Islamic law, like all other law, derives its authority from the political will of the state. According to him, acknowledgment of this reality will open the door for more innovative approaches to reform that may still be guided by Islamic principles, without being confined to traditional understandings of sharia. (Id., 2-3). But, he recognizes, like El Fadl, that the sharia ceases to be what it is supposed to be, that is to say containing open-ended and flexible provisions, by the very act of enacting it as the positive law of the state (Id., 18). Moreover, the notion of sharia as an immutable body of rules and principles binding on all Muslims in all fields of their life is neither supported throughout history. The state has always exercised secular jurisdiction and supervised the application and enforcement of Islamic law (Id., 16).

Nevertheless, the available information about the current application of Islamic law in the field of marriage, divorce and successions, suggests that, to some degree, there is always an infringement on women's equal rights, despite progressive reforms of Islamic family norms in many states (mainly through procedural devices). Indeed, substantive and procedural conflicts between currently applied Islamic law and international human rights do exist. Still, the Strasbourg Court's claim that Islamic rules on the status of women, clearly diverge from convention values, is peremptory and too strong. The fact that almost nothing is known about the concrete proposals of the Refah party concerning the scope and content of the Islamic law it wants to introduce and implement, should be no reason for the Court to rely on generalizations on Islamic law and legal pluralism. The only concrete policy proposal of the Refah party that the Court mentions is the lifting of the interdiction of the wearing of the headscarf in public institutions. In this regard it is relevant to note that Refah never asked for the legal inscription of an obligation to wear it, but only for the right to wear it.[62]

Moe is suggesting that there has to be greater scope for calling expert witnesses and that such approach may have led to a more nuanced and balanced view of Islamic concepts and practices. Like he and Brems, we are also of the opinion that the generalizing statements of the Court about Islam and Islamic law deny the complexity and heterogeneity of Islam and come dangerously close to orientalism and Islamophobia.[63]

1.4 Malaysia: Islamic law and the Malaysian model of a pluralistic-uniform legal system

"In spite of the rampant pluralism, South East Asia works better than many other regions of the world. A very significant reason for this is the cultural toleration which has allowed almost every world-view to be accommodated in the South East Asian psyche. To a great extent this toleration has extended into the legal world; just as a street in Malacca houses a Buddhist temple, a Hindu Temple, a mosque and a Catholic church, so the Malaysian legal system caters very adequately, in a way which European legal systems clearly do not, for several varieties of law, even providing Special Courts in Sabah and Sarawak to administer 'native' law to the indigenous population."[64]

viii. Malaysia: a 'communitarian-liberal democracy'

Like Turkey, Muslims make up the majority of the Malaysian population. As one of the so-called Asian tigers, Malaysia has developed itself in the course of a mere generation into one of the few Muslim countries with important middle classes and

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62 C. Moe, *supra* note 22, 12-17 and I.T. Plesner, "The European Court on Human Rights between fundamentalist and liberal secularism", Paper for the seminar on The Islamic head scarf Controversy and the Future of Freedom of Religion or Belief, Strasbourg, France 28-30 July 2005, www.humanrights.uio.no/omenheten/seminar/forum/plesne, 13.

63 E. Brems, *supra* note 49, 124 and C. Moe, *supra* note 22, 28 and 31.

64 A.J. Harding, Comparative Law and Legal Transplantation in South East Asia: Making sense of the 'Nomic Din', D. Nelken en J. Feest (eds.), *Adapting Legal Cultures*, 199-223, (Oxford/Portland, Hart Publishing, 2001).
A.J. Harding, *Law, Government and the Constitution in Malaysia*, 216 (Londen: Kluwer Law International, 1996).

growing, although still precarious, civil societies.[65] The Federation of Malaysia – comprising 13 states and 3 federal territories – is formally endorsing the principles of a democratic constitutional state, namely democracy, checks and balances, fundamental rights and liberties and the *rule of law*. Although the constitution adopted at the independence in 1957 was inspired by the western liberal constitutional model – especially the British Westminster model of parliamentary democracy –, it also took into account the existence of ethnic identities in the Malaysian society. Besides a bill of rights, containing an enumeration of the classical individual rights and liberties (with caveats), the Malaysian constitution also accepts group-specific collective rights and foresees the possibility for positive action policies. In this respect the Malaysian constitutional experiment departs from the current constitutional models of western liberalism. Instead, it opts for what some authors have called 'communalism', a 'communitarian-liberal' democracy or 'a liberal democracy with a communitarian ethos'[66], which not only provides for individual rights-safeguards for members of religious and cultural minorities, but also for group rights and group-based quotas in education and public employment. In fact, Malaysia has institutionalised policies of strong "multiculturalism" *avant la lettre*.

More particularly, the Malaysian Constitution recognizes special privileges not only for the members of the then (in 1957) economically weaker group of the Malays (although a small majority), but, since 1963 also for the *natives* of Sarawak and Sabah. Furthermore, the Constitution accommodates legal pluralism regarding family and personal matters. Such constitutional measures to protect collective rights and recognize differences are unusual and seriously challenged in the Western world, especially since they also concern the majority of Malays in the Malaysian society, comprising important Chinese and Indian populations as well.

The Malaysian legal pluralism is rooted in a colonial legacy of co-existence of different normative or legal orders and a dual system of courts. Contrary to European liberalism in the 19th and early 20th century, colonial governance was concerned with the management and even the production of diversity at collective level. Many authors underline that the definition and the boundaries of ethnic and religious identities, the units whose cultural differences the Malaysian state still recognizes today, stems from the colonial era. In her paper about India, Randeria writes that if the UK is a case of a 'non-secular state' in a 'secular' society, then, India – and almost the same can be said about Malaysia – are opposite cases of a constitutionally devised 'secular' state in a highly 'non-secular' society. But, unlike Turkey, Malaysia and India have not chosen to interpret secularism as the eviction of religion and religious law from public life. In contrast to Malaysia however, India's constitution contains a clause stipulating that it is a 'socialist secular' republic.[67] Unlike India and Turkey, Malaysia did not explicitly adhere to a constitutional principle of secularity but on the

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65 See more: M.G. Peletz, *Islamic Modern. Religious Courts and Cultural Politics in Malaysia*, 5 (Princeton/Oxford: Princeton University Press, 2002); M.G. Peletz, The Cultural Politics of Legitimacy, in: R. W. Hefner, *Remaking Muslim Politics: Pluralism Democratization Contestation*, 240-273 (Princeton: Princeton University Press, 2005).

66 Such as India: see paper S. Randeria, "Legal pluralism and Cultural Difference: The Indian Model of a Communitarian-Liberal Democracy", non-published, presented at The International Francqui Colloquium Professor Marie-Claire Foblets, *The response of state law to the expression of cultural diversity*, Brussels, 28 septembre-1 October 2006. See also S. Fenton, Malaysia and Capitalist Modernisation: Plural and Multicultural Models, Vol 45 (Issue 3-4) *International Journal of Comparative Sociology*, 135, 136 (2003).

67 India, Constitution (42nd Amendment) Act 1976.

contrary it constitutionally recognizes an official religion. Strangely enough, Malaysia and Turkey, as opposite as they are, are both characterized by a religious state bureaucracy who is exerting enormous control over the public behaviour of Islamic institutions and believers.[68]

ix. Malaysia: Quasi-secular or quasi-Islamic?

In fact, the issue of secularism has continually impacted upon politics and the courts in Malaysia. Strangely enough, to our knowledge, the courts have not yet considered the issue of quotas and the question of the constitutionality of religion based separate family laws. Instead, questions related to religious symbols, especially the *serban* (the Malay language name for a Muslim male head dress) and the *purdah* (full face veil for muslim women) have been addressed by the courts. For some authors Malaysia is 'a quasi-Islamic state' (or a 'quasi-secular' state). Islam occupies a special place in Malaysian constitutional law: it is

"the official religion of the federal state, although other religions may be practiced in peace and harmony in any part of the federation"

as reads article 3 of the Constitution (which has an 'obscure' meaning[69], see *infra*). Article 11 of the Constitution provides for the freedom of religion:

"Every person has the right to profess and practice his religion and, subject to Clause (4), to propagate it".

But clause 4 empowers the state legislatures to enact anti-propagation laws to regulate the propagation of other religions amongst the Muslims. People are free to belong to any religion of their choice, but there exists a constitutionally backed prohibition to proselytism under the Muslims.

Undoubtedly, although Malaysia can be said to be constitutionally secular, the Islamic religion enjoys a privileged status both in law and policy, as is shown by the following:

1) Islamic educational and other institutions are subsidized and the state legislatures are allowed to enact religious Islamic laws over matters enumerated in the Constitution and to create sharia courts ; article 121A of the Constitution further stipulates that civil courts have no jurisdiction over matters falling within the jurisdiction of sharia courts (cf. infra);
2) the monarch and the sultans of each state are declared the 'Heads of Islam'
3) privileges are accorded to the Islamic religion in public policy: the *ulama* of the religious departments and sharia court officials are appointed and paid by state governments (and have strong influence over how Islam evolves in Malaysia); different allocation ratios for mosques and non-Muslim places of worship exist; lists of words and expressions exists that are forbidden for non-muslim use; there is insufficient burial ground for non-Muslims; …

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[68] See for Turkey: E. Shakman Hurd, Contested Secularisms in Turkey and Iran, unpublished paper presentend at the Copenhagen Conference, *Beyond secularism – Comparative Perspectives*, *supra* note 28; for Malaysia: K. Meerschaut, *supra* note 30, 110-118.

[69] A.J. Harding, Islam and Public Law in Malaysia: Some Reflections in the aftermath of the Susie Teoh's case, in C. Mallat (ed.), *Islam and Public Law* (London/Dordrecht/Boston: Graham & Trotman, 1993).

The preferential status of Islam in the Constitution, politics, case law, administration and policy raises the question if Malaysia is not marked by a strong establishment of the Islamic religion, which would be incompatible with the religious liberty of dissident Muslims and non-Muslims.

But, all in all, until recently, Malaysia was never described and labelled as a theocratic state: it can be *"best characterized as an intermediate hybrid along the secular-theocratic continuum"*.[70] Indeed, since the independence, the Malaysian political leaders[71] and the courts have underlined that

"this country is not an Islamic state as it is generally understood",

"the constitution merely provided that Islam shall be the official religion of the state";

"politics and religion cannot be combined together, and the implementation of Islamic law in criminal and civil affairs (not including personal law) to all people in the country is not suitable in a multi-racial state".[72]

Also, the comment of the commission that has elaborated the text of the constitution states:

"We have considered the question whether there should be any statement in the constitution which would have the effect that Islam should be the state religion. There was universal agreement that if any such provision were inserted, it must be made clear that it would not in any way affect the civil rights of non-Muslims […] and shall not imply that the state is not a secular state".[73]

In addition, case law has already confined the operation of article 3 of the Constitution to a ceremonial and ritual function. In the *Che Omar* case of 1988 the Malaysian Supreme Court made an important distinction between civil laws and the public law: Islamic law can be only applied to Muslims and only in the sphere of personal and family law. Article 3 of the constitution has never had as objective to enlarge the application of Islamic law to the domain of public law. Would it have been otherwise, the formulation of this article would have been being different, like for example: 'Any law contrary to the injunctions of Islam is void'.[74] Constitutionally,

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70 L.A. Thio and J. Ling-Chien Neo, "Religious Dress in Schools: The Serban Controversy in Malaysia", 55 International Comparative Law Quarterly, 671, 673 (2006).

71 Except Mahathir who has provocatively declared on 29th of September 2001 that Malaysia was already an Islamic state.

72 Mohammed Imam, "Freedom of Religion under Federal constitution of Malaysia - A reappraisal", Current Law Journal, 10 e.g. (1994); Mohammad Hashim Kamali, Islamic Law in Malaysia. Issues and Developments, 30-32 (Ilmiah Publishers, Kuala Lumpur, 2000); Parliamentary vs Providential Systems (1979) 2 Malayan Law Journal iv. See also Lee Min Choon, Freedom of Religion in Malaysia, Kairos Research Centre Sdn.Bhd., Kuala Lumpur, 1999, 23-26.

73 M. H. Kamali, Islamic Law in Malaysia, 33, 35 (Kuala Lumpur, Ilmiah Publishers, 2000). Also P.-L. Tan, Paying the Price for Religious Freedom-A Non-Muslim Perspective, in W. M. Aun (ed.), Public Law in Contemporary Malaysia, 134, 149-152 (Petaling Jaya, Addison Wesley Longman Malaysia Sdn.Bhd., 1999). A.R. Baginda and P. Schier (eds.), Is Malaysia an Islamic State? Secularism and Theocracy-A Study of the Malaysian Constitution, 42 (MSRC-KAF Inter-Cultural Discourse Series I, 2002).

74 Conversely, the *High Court* in the case *Meor Atiqulrahman bin Ishak v. Fatimah bte Sihi* ('Meor') of 6 August 1999, sought to utilize article 3 as a source of public law values in construing fundamental liberties. The *High Court* in Meor, even held that *"Islam is not of equal*

Malaysian laws (secular and Islamic laws) can thus not be reviewed in the light of Islamic principles. Malaysia inherited the English common law tradition at its independence. A large component of its received law therefore consists of the common law derived from its former colonial power, Britain. Nevertheless, the Constitution recognized Islamic family law and brought it under the legislative powers of the member states of the Malaysian federation[75].

In Malaysia, Islamic law is subject to the supremacy of the constitution and the federal law. Article 4 of the Constitution declares that the constitution is the supreme law of the land, such that incompatible legislation is void. Article 75 of the Constitution stipulates that in case of conflict between the federal law and state law, federal law shall be applicable. The supremacy of the constitution means that native law, received law and religious legal practice are subject to the constitutionality test. Moreover, article 160 of the Constitution, which defines a.o. law, does not refer to Islamic law at all. In this sense the Malaysian constitutional law is different from for example that of Pakistan or Egypt. Article 2 of the Egyptian constitution e.g. stipulates that the principles of Islamic source shall be the major source of legislation. In this regard it is interesting to mention that such a stipulation doesn't necessary provoke conservative or reactionary legal developments. For example, in Egypt, case law concerning genital mutilation has shown that judicial review on the ground of Islamic principles gave the judiciary the opportunity to invoke certain principles of Islamic source, which support a legislative banning of this ritual.

Following the contended announcement of Mahathir that Malaysia is already an Islamic state, some academics concluded that *"Malaysia is neither a full-fledged Islamic State nor wholly secular"* and that

"in view of the fact that Muslims constitute the majority of the population, and Islamization is being vigorously enforced, Malaysia can indeed be described as an Islamic or Muslim country".[76]

Since the early eighties, the government has indeed introduced a policy directed towards the 'infusion or application of Islamic values' in Malaysian policy. Some authors also affirm that the provision for religious freedom cannot be amended easily and that any law to legislate belief 'will trigger a massive constitutional debate that

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status with the other religions; it does not sit alongside or stand together. Islam sits above, it walks first… Islam is like the teak tree". The Court interpreted the Islamic religion as a sort of quasi-constitutional *grundnorm* to which legislation, including the school dress code, must conform. According to this Court, Article 3 of the Constitution does not allow the subordination of Islamic tenets to civil regulations. L.-A. Thio and J. Ling-Chien Neo, *supra* note 73, 672 and 680; Malaysia, High Court Malaya, 6 August 1999, *Meor Atiqulrahman Ishak v Fatimah bte Sihi*, 5 Malayian Law Journal, 375 (2000). The Court of Appeal overruled the decision of the High Court on 11 December 2004, on the ground that wearing the serban was not an 'essential practice': (2) *Malayian Law Journal*, 25 (2005). The Federal Court confirmed this decision on 13 July 2006 and ruled that since the serban was not an integral part of Islam, the decision of the school to ban the wearing of serbans, did not affect the religious freedom of the pupils. The Court also asked provocatively the question if for example the riding of a camel is also an Islamic practice. http://thestar.com.my/news/story.asp?file=/2006/7/13/nation/14821069&sec=nation&focus=1; http://ktemoc.blogspot.com/2006/07/judge-turban-islamic-why-not-ride.html. (Last consulted 13 December 2006).

75 See: the State list- 9th list of the Constitution of Malaysia, Article 95B.

76 A.R. Baginda and P. Schier, *supra* note 72, 13-75.

will humiliate Malaysia internationally, cause divisions within the *ummah* and embarrass the judiciary'.[77]

x. Legal pluralism in family law and Islamic family law

As a matter of fact, the historical developments in Malaysia have led to the existence of three constitutionally recognised systems of family law (and in a limited sense of penal and land law): one secular system for non-Muslims, one Islamic system for Muslims and a particular customary system for the 'natives' of Sabah and Sarawak. The organization and procedure of the Islamic and respectively native courts are a power attributed to the thirteen state legislators. Islamic family law, substantive and procedural, is thus subject to federalism (competence of the member states) and communitarianism (only for Muslims or natives). Such a construction entails that there are different versions of Islamic law enactments in the different states of the Malaysian federation.

The constitutional attribution of this competence to the member states implicitly represents the recognition of a strong legal pluralism, providing for the possibility of the accommodation of one's own law and the establishment of a particular judiciary system for minority groups. This is all possible because the Constitutional provisions concerning equality before the law and non-discrimination on grounds of religion, gender, race, etc. explicitly exclude their application upon the legislation concerning personal laws (article 8 (5) Constitution).[78] The result is that a constitutional limitation on the application of this principle of equality and non-discrimination is foreseen in an area in which gender discrimination has to be challenged and which pose the most serious threats to the individual rights of others, especially women.

The Malaysian Islamic revival movement of the years '70 en '80 (which sought to give Islam greater prominence in the public sphere) and the aforementioned policy -the islamization policies that begun in the early '80s- have led to legislative reforms of Islamic law. In the period of 1983-1997, the states, starting with Kelantan, issued new and separate legislation regarding family law, Islamic courts, evidence and procedure. Regarding substantive family law, two different models can be distinguished. On the one hand, there is the Kelantan model, named after the state Kelantan, which is a more conservative Islamic state, loyal to the traditional Shafii School of law. On the other hand, there is the federal model, a legislative model that has been elaborated under the auspices of the federal government, especially for the federal territories. The latter was more inspired by the Islamic reforms in other countries such as Pakistan and India, and by other schools of law, such as the *Hanafi*

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77 P.A. Martinez, The Islamic State or the State of Islam in Malaysia, 23(3) *Contemporary Southeast Asia*, 474, 494 (2001). Farish Noor, a Malaysian scholar who specializes in politics and Islam, warns nevertheless that "*the idea of a secular state is dead in Malaysia"* and states that *"an Islamic society is already on the cards. The question is what kind of Islamic society this will be."* T. Fuller, Malaysia's secular vision vs. 'writing on the wall', *International Herald Tribune*, 28 august 2006, http://www.iht.com/articles/2006/08/28/news/letter.php (last consulted 12 december 2006). This article mentions also that at the heart of the *Lina Joy*-case (*infra* note 92), a case about conversion out of Islam, lies the question of which is supreme in Malaysia: religious law or the secular constitution.

78 On August 1, 2001, a constitutional amendment added the word 'gender' to the anti-discrimination list of clause 2 of article 8. Previously, the protection against gender discrimination guaranteed in the general clause 1 of article 8 was not upheld in clause 2. Before, this clause included only religion, race, decent and place of birth.

and *Maliki* school, which in fact are not widely endorsed in Malaysia. The legal actors, who were the constructors of this model, came from a Malaysian elite with a common law education. The changes were introduced top-down. This model was privileged by the federal government and a majority of member states[79] and is inclined to choose progressive legal rules from other schools or Islamic statutes from other countries, such as the extraordinary exertions to modernize Islamic courts and rules of procedure and evidence, and the clear aversion for irresponsible repudiations, unequal rights of divorce, polygamy and arbitrariness in the judicial procedure.[80] With regards to polygamy, although practiced by a very small minority (5% of marriages) but yet a very important symbolic issue, the reforms led to restrictions on men's ability to engage in polygamy by giving the Islamic courts the power to scrutinize applications for subsequent marriages in order to ensure that justice be done to all women and children. However, amendments in 1994 eased these restrictions so that Muslim men could register polygamous marriages as long as they paid a fine. Moreover, the condition that the subsequent marriage should not lower the standard of living enjoyed by the existing wife and children, was deleted.[81]

The Malaysian example shows that the content of Islamic law is contextual and can possibly evolve in a direction which meets the western legal tradition. It is an interesting example of hybridizing, transposition, convergence, mixing, absorption and syncreticism. Surely, much of the progressive reforms of the Islamic family law are moving in a similar direction as their secular equivalents. Sometimes they are formulated in exactly the same manner: in fact, the Malaysian Islamic law statutes are often based upon existing secular statutes and differ only if Islamic doctrine explicitly holds opposing views.[82] The described evolutions emerged in a top-down way and

79 G.W. Jones, *Marriage and Divorce in Islamic South-East Asia*, 48-55 (Kuala Lumpur: Oxford University Press) ; A. Ibrahim, *Family Law in Malaysia,* 3rd ed., 9-11 (Malayan Law Journal Sdn Bhd, Kuala Lumpur, 1997); D.L. Horowitz, The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change, *supra* note 53, 268-269, 273. Horowitz makes the distinction between the Federal territory model and the Kelantan model. While a federal commision, composed by *syariah* experts and lawyers of the department of the general attorney, was working at a legislative model of Islamic family law, another commission, established by the government of Kelantan, was drafting a similar and in some instances conflicting model. As a result two models exist now, the Kelantan and the federal territory model. In the federal department of the Prime Minister, finally a technical commission was established, composed by different academic lawyers, familiar with secular and Islamic law and a High Court magistrate. Remarkably absent in this commission are ulama, Muslim scholars without legal academic qualifications. This commission prepares drafts of legal acts and tries to persuade legal advisers, departments and representatives of the different sultans to adopt these drafts of legal enactments. It strives for uniformity under the member states in the Islamic legislation and in many domains this aim has been attained. D.L. Horowitz, *supra* note 53, 264, 268-269, 273. The Islamic enactments which came into existence in the federal territories in this period, are the following: Islamic Family Law (Federal Territories) Act 1984, in force since 1987; Syariah *Criminal Offences* (Federal Territories) Act 1997 (Act 559) and *Syariah Criminal Procedure* (Federal Territories) Act 1997 (Act 560).

80 D.L. Horowitz, *supra* note 53, 571 (part II).

81 Z. Anwar, What Islam, Who's Islam? Sisters in Islam and the Struggle for Women's Rights, in: R.W. Hefner (ed.), *The Politics of Multiculturalism*, 227-253 (Honolulu: University of Hawai'i Press, 2001) D.L. Horowitz, *supra* note 78, 285-289 (part I); N. Noriani Nik Badli Shah, *Marriage and Divorce. Law Reform within Islamic Framework*, 65-69 (Kuala Lumpur: International Law Book Services, 2000). Z. Kamaruddin, *Islamic Family Law issues 2000*, 7 and 108-109 (Kuala Lumpur: International Islamic University Malaysia Press, 2001).

82 F.ex. regarding the permission of polygamy for Muslim men (declared illegal for Hindu and Buddhist men): the dilemma of reconciling gender equality with recognition of cultural difference has been dealt with by procedural and conditional devices.

were legitimized by the use of Islamic legal methods, especially *ijtihad* (free interpretation or pragmatic interpretation of Islamic texts), *takhayyur* (free selection between rules and opinions of different Islamic schools of law) and *talfiq* (the combining of points of view of different schools of law and lawyers in a single legal rule). The use of these methods has been widely accepted within the Malaysian society. The direction taken by the reforms can be understood in the light of the identity of the reformers (who represented both the common law and the Islamic law tradition), the force of the parallel secular legal system, the aim of the reformers to create an authentic comparable legal system and the opportunity to borrow from a variety of supposedly legitimate sources of rules and institutions.[83]

Academics, lawyers and policy-makers who were involved in the reforms of the Islamic family law statutes, argued that "Islamic law, properly understood, is a regime of rights": the structural and substantive reforms wanted to halt the tendency of the Islamic courts to emphasize responsibilities, while neglecting the dimension of rights and rules of procedure and evidence.[84] Without the political competition between the two existing Islamic political parties, the UMNO (dedicated to protect the Malay identity and interests) and the PAS (a party that broke away from UMNO and is willing to give religion a greater role in shaping the nation-state), without a framework of lawyers familiar with both legal traditions, the process of change would have been totally different. Henceforth, this process of change produced paradoxical and hybrid results: it turned out to be more Islamic and more western at the same time. While the search for Islamic authenticity was very strong, the secular legal system yet remained the object of important respect from the reformers. Horowitz rightfully concluded that *"the more Islamic law there is in Malaysia, the more it will be like the common law"*.[85]

xi. Some critical points about the legal pluralism in Malaysia

As mentioned before, the Malaysian constitution indirectly protects cultural diversity in family law through a constitutional entrenchment of legislative competences for the member states and via an exception to the anti-discrimination provision. This construction has as negative consequence that it can be interpreted as protecting religious or native personal laws from invalidation as a result of gender discrimination. The federal constitution therefore can fail to protect women against a legal system and social structures in which the equality between the sexes is put at risk.[86]

Moreover, since 1988 different cases before the common federal courts – concerning religious freedom, conversions out of Islam, family law and fundamental freedoms – have showed some important legal and political problems and tensions of the

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83 D.L. Horowitz, *supra* note 78, 569 (part II).

84 Peletz is referring here to a personal communication with Dr. Horowitz. M.G. Peletz (2002) *supra* note 65, 109, footnote 13. However, he notices that this local juridical discourse about duties is well corresponding with the actual political climate and the state discourses about citizenship. They emphasize the responsability of the Muslim citizen, as a Malay or a Malaysian, but not their rights.

85 D.L. Horowitz, The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change, *supra* note 53.

86 See also about Zambia: C. Himonga, How state law accommodates religious, linguistic, cultural and ethnic diversity in Zambia, non-published paper congress *Law and Cultural Diversity*, September 2006, 2.1.4, 13-14.

Malaysian conception of the relation between Islam and democratic constitutionalism. In particular, the refusal of the secular superior courts to deal with issues of conversion out of Islam has created a vacuum or 'legal limbo' regarding judicial review.[87] A reorientation to the human rights dimension seems necessary. The social and legal problems related to the exit from the Muslim Malayan community are a crucial criticism of the system of separate personal laws for Muslims. The Constitution defines a Malay – a person belonging to the Malay ethnic group – as a Muslim. [88] This definition raises two questions: has a Malay always to be a Muslim? And if a Muslim is quitting his religion, doe (s)he remains Malay? Interpretations and institutional options have to be compatible with the core of religious freedom, including the freedom of conscience, thinking and religion, the freedom to change of religion (thus 'free exit') and the freedom to practice a religion in private and public. If apostasy and conversion out of Islam are banned and sanctioned by religious law and institutions, then a democratic constitutional state should have the minimal duty to protect the right of dissidents to leave their own churches or mosques.

In addition, the strong establishment of a specific religion by the state (massive state interference and control of established religions, including the checking of the standard sermon and the monitoring of other activities in mosques) will also be incompatible with the minimal interpretation of democratic constitutionalism.[89] The state cannot prevent the exclusion of homosexuals or adultery women as sinful persons, but it may not legally endorse it, such as is the case in Malaysia. Sharia penal law in Malaysia is exerting an ample control on the moral public behaviour of Muslims. For example, some member states have penal provisions for lesbians, sodomy, pre-marital sex, *khalwat* ('close proximity'), pimps, incest and prostitution, and also apostasy laws.[90] Sharia criminal offences acts of many states contain a provision making it a criminal offence for a person

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87 The Malaysian courts held that the issue of conversion out of Islam is under the jurisdiction of the sharia court. Some judgment even hold that article 11 of the Constitution does not protect religious conversions out of Islam as a matter of personal choice; *cf. Daud bin Mamat & Ors v majlis Agama Islam & Anor*, 2001(2) *Malayian Law Journal*, 390 (2001); see also *Lina Joy*, 2006(2) *Malayian Law Journal*, 144 (2006). Such a restrictive reading of religious profession has been in this case judicial linked with article 160 of the Constitution: 'as Malay', a person 'remains in the Islamic faith until her dying days'. The *Lina Joy* case has been in the Federal Court for months. The Court said that the long time before passing sentence in the appeal of Lina Joy, who has converted from Islam to Christianity, was due to the fact that the issue is 'sensitive and needs careful examination'. Recently the Federal Court in a 2-1 majority decision ruled on 31 May 2007 that only the syariah court has the power to determine whether a person is still a Muslim. See *New Straits Times*, 31 May 2007, on the webpage: www.nst.com.my/Current_News/NST/Thursday/Frontpage/20070531073056/Article/index_html. (Last consulted 25 June 2007).

88 A Malaysian (other than a Malay) is a holder of the Malaysian nationality and can be a member of a Chinese or an Indian ethnic group.

89 See also V.M. Bader, Religious Diversity and Democratic Institutional Pluralism, *supra* note 29*,* 265-29. Bader defines a 'strong establishment' as a constitutional or legal establishment of a monopolistic religion, which always implies an administrative and political monism aimed at religious national monism. He refers to Greece, Serbia and Israel as examples. According to him, such 'strong establishment' is incompatible with the minimally required institutional differentiation and with the most minimalist interpretations of religious freedoms and equality (at p. 269).

90 The legislative competence of the states concerning Islamic penal law is limited by the *Muslim Courts (Criminal Jurisdiction) Act 1965*: the limit is three years detention, or 6 strokes or a fine of 5000 ringgit (or a combination of the three). Serious criminal facts sanctioned by *hudud* or *qisas* Islamic punishments are not under the competence of the Islamic courts.

"who acts in contempt of religious authority or defies, disobeys, or disputes the orders or directions of the Yang diPertuan Agong as head of the religion of islam, the Majlis or the Mufti, expressed or given by way of fatwa".[91]

The main problem in Malaysia is that the rule of law is seen as a concurrent system of values and not as a supreme and basic condition. The case law and the judges are not showing an active commitment to the constitution and to international human rights. From our analysis of case law[92] it appears that the Malaysian courts are in fact not really reviewing state law provisions which collide with equality or other fundamental rights enshrined in the Constitution. And when it comes to review, the courts generally interpret the fundamental rights and freedoms very narrowly.[93]

Accommodation policies (including limited-scope legal pluralism) are allowed in a democratic constitutional state, but this should not turn into etnocultural hierarchy,

91 See for example *Syariah Criminal Offences (Federal Territories) Act* 1996, article 9. See also P.A. Martinez, *supra* note 76, 482.

92 See K. Meerschaut, supra note 30.

93 For example 1) in *Kamariah bte Ali Iwn Kerajaan Kelantan*, (2002) 3 *Malaysian Law Journal*, 657, a case concerning apostasy, the Court of Appeal stated that: "Article 11 of the Federal Constitution (in relation to Islam) cannot be interpreted so widely as to revoke all legislation requiring a person of the Muslim faith to perform a requirement under Islam or prohibit them from committing an act forbidden by Islam or that prescribes a system of committing an act related to Islam. This was because the standing of Islam in the Federal constitution was different from that of other religions. Firstly, only Islam, as a religion, is mentioned by name in the Federal Constitution as the religion of the Federation and secondly, the Constitution itself empowers State Legislative Bodies (for states) to codify Islamic Law in matters mentioned in List II, State List, Schedule Nine of the Federal Constitution ('List II')'. See also *Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor*, Federal Court, Kuala Lumpur, 5 maart 1999, (1999) 2 *Current Law Journal*, 5. Since this case the secular courts take the position that the competence to deal with the conversion out of the Islamic religion, belongs to the shariah courts (on the ground of article 121 (A) of the constitution); see also *Daud Mamat & Ors. v. Majlis Agama Islam/ Adat & Anor*, (2001) 2 *Current Law Journal*, 161-172: *"(...) Returning to the current facts, as the Plaintiffs are yet to be found guilty of the second charges of apostasy ... for all intents and purposes I have to conclude that they still are Muslims.(...) Indisputably...then by virtue of article 121(1A) of the Federal Constitution, my powers are curtailed. That being so, the plaintiffs being legally Muslims will still remain within the jurisdiction of the Syariah Court, and thus outside my jurisdictional purview."* And *"The act of exiting from a religion is not a religion, and hence could not be equated with the right to 'profess and practice' their religion. To seriously accept that exiting from a religion may be equated to the latter two interpretations would stretch the scope of Article 11(1) to ridiculous heights and rebel against the canon of construction. On that score I reject the contentation of the plaintiffs that their rights pursuant to Article 11 (1) had been infringed"*; see also *Lina Joy v Majlis Agama Islam Wilajah Persekutuan & Anor.* High Court, (2004) 6 *Current Law Journal*, 242-272. In this last case the court describes Malaysia as a hybrid between a secular and theocratic state.
2) Another example is the absence of review regarding the legal possibility for coerced marriages in the Kelantan-model. 3) The problems of mixed marriages regarding the custody, choice of religion and education of children show the same stance of the courts: see High Court Sabah & Sarawak 11 december 2002, *Chang Ah Mee v. Jabatan Hal Ehwal Agama Islam*, *Current Law Journal*, 458 (2003); High Court Malaya, Kuala Lumpur, 11 september 2003, *Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah*, 1 *Current Law Journal*, 505 (2004); High Court Malaya, Kuala Lumpur 13 april 2004 *Shamal Sathiyaseelan v. Dr Jeyaganesh C Mogarajah*, 2, *Current Law Journal*, 416 (2004); High Court Malaya, Kuala Lumpur, 20 juli 2004 *Shamal Sathiyaseelan v. Dr Jeyaganesh C Mogarajah*, 3, *Current Law Journal*, 516; 4 (2004)) The more conservative amendments of the polygamy and talak provisions in 1994: see footnote 67; and 5) alimony: although there is evolving case-law, which interprets the Islamic duty of muta'ah more and more as a lump som alimony, this is still very modest. See D.L. Horowitz, 'The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change', *l.c.*, part II, 556 en 563-566 and Zaleha Kamaruddin, *Islamic Family Law issues 2000* , *o.c.*, 346-349 en 352 .

exclusion, stratification, essentialising and cementing of difference. Nevertheless, this danger is always present in multiethnic societies. The very thin line that exists between accommodation and imposition of differences makes judicial review and the role of independent courts quintessential.

1.5 Conclusion: a plea for a nuanced and context-sensitive form of balancing.

'The law in its majestic equality forbids the rich as well the poor, to sleep under bridges, to beg in the streets and to steal bread' (Anatole France, 1894)

Our version: The law, in its majestic equality and neutrality, forbids the majority as well the minority, to live by their own, culturally inspired, legislated rules.

Tradition and modernity cannot be presented as binary opposites; neither can Islamic law and western law, or Islam and democracy. One reason to look at legal pluralism and accommodation policies elsewhere, is that the experiences of management of diversity in 'alternative modernities' can hold new perspectives for our thinking about the relation between religion and law, and religion and politics. Even historical non-democratic or non-liberal types of institutional pluralism may include important lessons (such as for example the millet system of the Ottoman Empire, which provided for an individual choice between religious and civil jurisdiction). Also, the British indirect colonial governance showed high degrees of tolerance of cultural and institutional diversity and, at the same time, it yielded stability and peaceful cohabitation.[94] Moreover, we have to remember that the institutionalisation of group rights and legal pluralism in the non-western world is part of the entangled history of modernity in Europe and its colonies.[95]

Malaysia can certainly teach us something about issues of law and diversity. The important reforms of the Malaysian Islamic family law in the eighties and early nineties have shown that interesting creative and contextual institutional and legal ways can be found for the interaction, articulation and compromise between religion and state, and between legal pluralism (involving accommodation of Islamic rules and courts) and (gender) equality. Nevertheless, the consequent negative developments in the Malaysian Islamic legal field have also shown that political compromises have to be principled: they should be democratic (in the broadest sense: also giving space to the voices of minorities and of vulnerable minorities within minorities such as women) and constitutional (with respect for human rights, especially as the freedom from religion).

Drawing on experiences in Malaysia and elsewhere as well as on theoretical reflections, we contend that it is necessary to move beyond the limits of binary thinking. The accommodation of legal pluralism should not be excluded too quickly and can, in our opinion, be compatible with the minimal norms of a constitutional democratic state. The challenge is to think beyond the thesis of 'strict separation' of

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94 See V.M. Bader, Democratic Institutional Pluralism and Cultural Diversity, in: Juteau D. & Harzig C. (eds.) *The Social Construction of Diversity,* Berghan, 2003, pp. 131–167.

95 S. Randeira, "Legal pluralism and Cultural Difference: The Indian Model of a Communitarian-Liberal Democracy", non-published, presented at The International Francqui Colloquium Professor Marie-Claire Foblets, *The response of state law to the expression of cultural diversity*, Brussels, 28 septembre-1 October 2006, 12. In fact group rights are contrasting with Western legal traditions: S. Gutwirth, Le droit à l'autodétermination entre le sujet individuel et le sujet collectif. Réflexions sur le cas particulier des peuples indigènes, (1) *Revue de droit international et de droit comparé*, 23-78 (1998).

religion and state defended by radical secularism: the legal-institutional choices are not limited to the dichotomy between at the one side a strict or complete (constitutional, legal, administrative, political and cultural) separation between state and organized religions, and on the other side theocratic forms of religious government. Even in a legal pluralistic system, the state can be a relational and impartial arbitrator, which is pluralistically (not 'neutrally') mediating between the different (religious) claims. There should to be a combination of *liberalism in a traditional sense*, with emphasis on individual rights and freedoms, *legal pluralism*, the coexisting of different normative systems against the background of constitutional and international principles and *deliberative liberalism*, which also includes the right of members of minorities and groups to participate into the shaping and ongoing construction of the public and political culture and into deliberations regarding the recognition of cultural diversity,…[96]

A multiplicity of human rights, constitutional principles and interests are involved in the matter of legal pluralism – some overlapping, some competing. When balancing these rights and interests in relation to the accommodation of religious law, one should contextualize. Balancing Islamic law and religious freedom on the one hand, and secularism and equality on the other is far too reductionist and simplistic. The issue of accommodation of Islamic law is not an issue of general and abstract statements but it demands careful attention for the practice and understanding of Islamic law. Such balancing is thus not about 'the' sharia or 'the' Islam or 'the' secular republic. The contextual framing of the issue of Islamic law and legal pluralism is necessary.[97] Human agency plays a crucial role in the conception and development of Islamic laws (in plural). The operation of Islamic law is the result of human decisions and actions. In understanding it, the geographic, historical and political contexts need to be taken in account. With Hurd, we argue that we fail to understand the rise of Islamic forms of modern politics and law as long as they are portrayed as a backlash against modernization or a revival of pre-modern Islamic tradition.[98] The Refah judgment, for instance, expressed a simple binary vision in which there apparently is only one choice, a choice between Kemalist secularism and Islamic theocracy. The assumed conflict between Islamic law and women's rights remained uninvestigated. But, as we have seen, there was not even a concrete party programme proposal for the introduction of Islamic law. Neither was there any provision which advocated the creation of a theocratic state or which aimed to undermine the secular character of the state: on the contrary, the programme of the party expressly recognised the principle of secularism.[99] A positive affirmation of religious pluralism and critical respect for religious freedom, requires that the ECHR

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96 C. Himonga, *supra* note 85, 15-16 en M. Deveaux, *Cultural Pluralism and Dilemmas of Justice*, 35 (Ithaca, Cornell University Press, 2000).

97 See also A. An-Naim, *supra* note 59, 2-3.

98 E.S. Hurd, *The politics of Secularism in International Relations*, (Princeton: Princeton University Press, 2007).

99 This was mentioned in the joint dissenting opinion of judges Fuhrmann, Loucaides and Nicolas Bratza, First Judgment in the Refah Partisi Case, 31 July 2001. these judges found it not necessary to investigate the precise nature or effect of the legal pluralistic system to which reference was made by Mr. Erbakan, since these statements couldn't in their view pose any threat to the secular order of turkey, since they date from 1993, more than four years before the decision to dissolve the party and since no evidence can be found that the party, once in government, took any step to introduce Islamic law.

would check if the ECHR-states can provide serious evidence of threaths of public order or secularity.

In addition, any analysis of this kind needs to give a thorough consideration to the meaning and scope of concepts such as secularism/neutrality/laïcité and equality. As regards the Refah-case, it can be argued that this party was not pursuing any anti-secular activity, but that instead, it struggled for a renegotiation of Turkish secularism.[100] Many authors are pleading for "alternative secularisms", which are more inclusive and morally pluralist implying the acceptance of a plurality of moral positions with or without religious influence. Equality can also be understood in a more inclusive and complex way, which acknowledges differences among people, rather than insisting on sameness. In an increasingly diverse pluralist world, a more complex understanding of secularism and equality needs to be investigated.

[100] In her paper presentend at the Copenhagen conference Elizabeth Shakman Hurd argued that what we are witnessing in Turkey and Iran, is not a threat to modern politics, but rather the modern politics of secularism. E. Shakman Hurd, *supra* note 68. The religio-political activities in these countries signify contestation and renegotiation of the specific state-authorized and regulated form of secularism.