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CONTRASTED IDENTITY CLAIMS BEFORE EGYPTIAN AND BELGIAN COURTS

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Introduction

Our research will examine two social areas which, at first sight, might appear difficult to compare. For a number of reasons, the Belgian and the Egyptian legal systems have been called upon to pronounce judgements on similar problems related to the acceptance and the interpretation of so-called Islamic norms. In dealing with these issues, these jurisdictions consult a diversity of normative and legislative codes. It is this interaction which we wish to study.

For a number of years now, Belgium has been a country of Muslim immigration, whereas, traditionally, Egypt has been a multi-religious country. Nevertheless, these two countries have their legal systems of Romano-Germanic origin in common. On the other hand, the attitude of the authorities (including the legal authorities) in dealing with institutions and legal pluralism, and more especially the role of Islamic norms seen as a source of law, cannot be explained in the same fashion. In Belgium, recourse to the protection of basic rights (religious freedom, liberty of expression) enables the tribunals, on a case to case basis, to apply the rules of a form of legislation put forward as Islamic. In Egypt, on the contrary, an internal situation which superimposes Islamic law (*shari'a*) on positive legislation enables both those brought before the court and the judges to act on different normative levels.

Let us first establish the context within which the role-players (both Belgian and Egyptian) on the legal scene took recourse to the Islamic origins of law. By so doing, we should like to offer a comparative reading of the way in which the courts and the tribunals in the two countries handled legal adherences and identities. This comparison will be supported by a concrete example taken from recent jurisprudence: the issue of whether headscarves may be worn in state schools.

The legal contexts of reference to Islam

Belgium: a hybrid and uncertain status, dependent on legal practice

With regard to the integration of Muslim communities, legal demarches in European societies today are going through a turbulent time. Our first question

is to see how the judges find themselves confronted by the legal status of Muslims living in Belgium.

The issue of the integration of Muslim communities into the Belgium legal system is, today, at the very heart of the dilemma: "culture in plural terms, or culture in the singular". This dyad, which involves a very political option, represents a real challenge to the legal authorities. Belgian courts, for a number of years now, have found themselves confronted by difficult legal questions which put judges in a position to arbitrate the relationship between the laws of the country of reception and respect for the Islamic culture imported by the immigrant Muslim communities. Belgian courts deal with this dilemma in a number of different ways.

Some courts opt for the equivalence of life-styles, of different cultures, accepting the differences; others, on the contrary, support the principle of equivalence within uniformity. Faced with this difficult choice, Muslim immigrants occupy a very special place, given that to this must be added the fact that Islam expresses a given identity (Dassetto, 1996). The choice is all the more difficult given that a great many Muslims, despite the fact they have settled in Europe, tend to retain a very close contact with their country of origin (e.a. Boulahbel-Villac, 1994).

On the legal level, the dilemma may be presented in simple terms, but it is in fact very complex. There are two possible options: either the judge opts for the solution of a multicultural society which respects the identity of each and every individual, their languages and their cultures. Historically, this is the attitude taken by Belgian law with regard to foreigners in the field of personal status. This is the technique of the rule of the nationality of foreign citizens in all issues with regard to family relationships and civil status (e.a. Rigaux and Fallon 1993, 290 sq.). Along the same lines, some of the international conventions signed by Belgium (and in particular the Convention on Human Rights on the International Convention on the Rights of the Child) stress the need for the signatory states to respect the culture and the religion of all. Here we find a beautiful ideal of tolerance and reception which nevertheless bears with it a danger which should not be underestimated, that of the "cultural isolation" of Muslim communities who find themselves pushed to the margins of the societies which have taken them in. Out of respect for the imported Muslim culture, a community finds itself hemmed in within a system of norms which socialise its members within a group of the same origin and which separates them from the majority society. We shall give some examples.

On the other hand, there is the second option: to avoid the pitfall of fragmented development, the judge opts for the other possibility, that of a society united around a given number of common values: immigrant communities are systematically subjected to Belgium pragmatic law, by considering that the concepts used (such as equality of the sexes, the rights of men and women, the rights of the child, etc.) by the national legislator can only

be defined in terms of the disposition of the laws which he lays down. This represents an option for the ideal of equality in the light of a wider conception of integration into the values and the model of the majority society. This second solution is traditionally the one followed when it comes to all matters of public law: social and economic rights, rights to movement, administrative rights, etc. On such issues, Muslim communities in Belgium are therefore, as far as the principle is concerned, subject to Belgian pragmatic law. Such a solution, since it effectively applies to all Muslims coming before the courts, suffers from many points of view from a lack of flexibility with regard to those dispositions of what we might call "Islamic legal culture". Here we think, to mention one example which we shall deal with later, of the problem of the regulations with regard to clothing for some migrant women who are forbidden to wear headscarves in the work place, or the huge problem of statutory holidays and, in particular, those holidays which coincide with the feasts of the Christian calendar or, finally, the problem of clandestine abattoirs.

The solution of the immediate application of Belgian pragmatic law also plays a large role in the field of personal status (family relationships, the individual's civil status), regardless of his nationality or religious adherence, on every occasion that the courts hand down a judgement against a foreign legal or religious law or institution which runs contrary to the maintenance of public order and accepted standards of behaviour. Here we automatically think of the growing number of cases in recent years where courts have rejected requests for the effective recognition under Belgian law of divorces by repudiation (Ballion, 1989; Foblets, 1997); or yet again, the court's refusals to comply with requests for the recognition of polygamous marriages between a Muslim husband and his co-wives (Lagarde, 1993).

The legal fate of Muslim communities under Belgian internal law is, to some extent, divided between the first and the second solution. Torn between two quite different logics, and logics which are largely incompatible, it varies not only depending on the legal domain, but also according to the legal juridical conscience of the legal authorities. This is particularly true when it comes to implementing the function concept of public order (Lagarde, 1993; Heyvaert, 1995).

Put in legalistic terms, the issue of the status of Islam within Belgian internal law is deceptive. Islam enjoys no status which would enable it to define a defined area within which "Belgian Islam" could work effectively. To raise the question on the basis of principles would mean looking at the issue from the wrong point of view.

It is in practice that, for a number of years now, the place of Islam in the Belgian pragmatic order has become apparent. The repetition of similar situations, the emergence from time to time of forms of behaviour inspired by Islam in public, has led to the development of a number of de facto situations, without, however, making them into precedents. The wearing of headscarves,

which we shall look at in greater detail later, was tolerated for a long time. Yet for some time now, it has been the subject of strict bans, usually upheld by the judiciary. There are any number of examples.

Moreover, adherence to Islam is perceived differently depending on the points of view of private law on the one hand, and public law on the other. International private law permits a bond to a person's national law of origin. A foreigner's personal status enables a Muslim man or woman who has retained the nationality of their country of origin to obtain, on the part of Belgian courts, the recognition of legal decisions handed down in that country of origin, or indeed, and this might seem a true privilege, the right to organise their family relationships in Belgium in line with the laws of the country of his or her nationality.

In public law, the concept of "Muslim identity" generally has to do with religious behaviour, in, for example, the framework of the protection of freedom of conscience. Or yet again, by looking at a totally new trend, the cultural minority as defined in article 27 of the United Nations Pact with regard to civil and political rights which contains prescriptions other than those already contained in the principle of equality and non-discrimination.

Up until now, these issues have been modest, indeed embryonic. Faced with Islam, Belgian courts and Belgian judges have done little more than re-use *grosso modo* the mental and legal frameworks which existed prior to the post-colonial emergence of Muslim communities within its borders (Foblets, 1994).

The Belgian experience with regard to Islam is composed of hesitations and complexities arising to some extent from the difficulties the authorities in the receiving country have in accepting the new social reality created by the stable presence of a Muslim minority within the national boundaries, and resulting also to some extent from the Belgian authorities' abysmal ignorance of Islamic culture. This ignorance became clear, among other things, from the way in which the Belgian state itself, at the beginnings of the 1970s, sought to play a leading role in trying to entice Islam into its own legal space.

In its constitution Belgium does not recognise any official state religion, nor even a majority religion. According to Belgian law, belief is a purely private affair. In order to protect the mutual independence of the State and the religious communities within its boundaries, the Belgian state — curiously enough — takes responsibility for what it refers to as the "temporal aspects of worship", in other words, part of the infrastructure and running costs of "recognised religions". This represents an original solution, and one which is relatively unique, which is the outcome of a long history of rivalry between the power(s) of the State and the Church. Following the example of the legal framework drawn up to guarantee the protection of long-standing religious communities in Belgium, the law which protects the independence of Islam under Belgian law takes as its starting point a clear demarcation between the

zones of intervention between the religious and the political spheres. As far as Islam is concerned, we can, to a certain extent, condemn Belgian legislators for acting as automatons, without waiting for an explicit and clear protest from the Muslim communities established in Belgium. Today, 25 years after the law came into effect, it would appear that the means foreseen in order to protect the temporal aspects of Islamic worship in Belgium are not adapted to the special needs of the Muslim communities in Belgium and their vast internal heterogeneousness (Bastenier, Dassetto, 1990; 179 sq.). As a result, with the sole exception of the establishment of the teaching of Islam in state schools throughout the country, the law until now has had no effect.

We shall not, here, look in detail into the problem of the integration of the Muslim community under Belgian law (e.a. Verwilghen and Carlier, 1992). We shall, by examining the very controversial issue of the wearing of headscarves, try to sketch out some of the questions which the ordering of the relationships between the Belgian state and the Muslim community within its boundaries raise on the legal level, at the crossroads of two legal systems: Belgian law as a Western construct on the one hand, and the law of the country of origin which to a certain extent looks to Islam on the other. We shall, more specifically, seek to demonstrate the lack of determination of Belgian legislation with regard to this issue of the Islamic headscarf, by demonstrating that this lack of determination, in its turn, reflects a general difficulty facing European society today, namely that of considering, dealing with and granting a specific status to Islam within the context of a secular society.

Via this illustration, and going beyond the concrete questions with regard to the originality and the practicality of the solutions developed, we arrive at the question of the legal and cultural pluralism of Belgian society and, with it, that of European society. The gradual settling of Muslim communities in our countries which took place beginning in the 1960s and 1970s, and the irreversible effects it has had on the younger generations emerging from this immigration represents a new challenge to legislation: creating a maximum degree of compatibility between the original legal system (or systems) of the immigrant communities and the legal system of the country of reception.

Egypt: a single law with a multiplicity of sources

Whatever the importance which might have been given to Islamic laws and to its norms in the establishment of contemporary pragmatic Egyptian legislation, here we need only look at what continues to exist as an explicit reference to Islam. Indeed, it is not our aim to examine the Islamic relationship of the rules of law, but simply to look at the referential plurality with which the Egyptian judge is confronted. We can distinguish three areas: penal law, civil law and constitutional law.

In Egypt, Islam is the State religion (Const. art. 2) and its public administration is governed by a triangle composed of the *Shaykh al Azhar*, the

mufti of the Republic and the Minister of *waqf*, under the direct authority of the President of the Republic (cf. Luizard 1995, Paradelles 1995, Zghal 1997). As far as penal issues are concerned, the only explicit reference to Islam consists of the obligation to consult the Mufti of the Republic with regard to the pronouncement of the death penalty by the Criminal Court (Paradelles 1995: 77).

Civil law contains a certain number of more substantial references to Islam. With regard to procedure, the issue has recently been raised of whether this *hisba*, i.e. action in order to preserve Islam open to all Muslims without them necessarily being directly involved, is still acceptable under Egyptian law. Law no. 3, of 1996, ratified this procedure while restricting its implementation. Moreover, under civil law there are a number of explicit measures, the most important of which are to be found in article one of the Civil Code of 1948 which lays down the principle of the exclusive competence of legislation on all issues it regulates and, "in the absence of an applicable legislative measure", the competence of the judge to make a ruling "on the basis of custom and, should this be lacking, on the basis of the principles of Islamic *shari'a* (C.C. art. 1). Thus Islamic law is endowed with the role of second subsidiary source of legislation. In addition, Islamic *shari'a* and its principles are given an explicit place in various parts of the Code, particularly with regard to rights of succession (art. 875) and inheritance (art. 915). As far as personal status is concerned (marriage, divorce, separation, alimony, guardianship of children, inheritance, etc.), this is totally dependent on the religion of the individuals involved, since all religions recognised in Egypt are endowed with specific legislative texts and competent legal chambers at all levels of jurisprudence. As far as Muslim's are concerned, a whole series of texts has codified the hanafite judicial tradition.¹ In family matters, this is dealt with principally in the laws 25-1920 and the decree 25-1929, both of which were amended by the law 100-1985 (El Alami 1994:cf. infra). In parallel, the law 77-1943, 71-1946 and 25-1944 were brought in to regulate in detail inheritance law. We also note that, quite naturally, the reference to Islam is no longer to be found within these texts, given that they are applicable solely to Muslims, with the exception of the hybrid situation of inter-religious marriages which bans a Muslim woman from entering into marriage with a non-Muslim.

The Constitution certainly plays a central place in the role of Islam in Egypt. This is basically due to article 2 which stipulates that "Islam is the state religion, Arabic is the official language and the principles of Islamic *shari'a* are the principal sources of legislation". This article was the subject of an amendment in 1980, which elevated the principles of *shari'a* from a principal source of legislation to that of the principal source of legislation. Moreover, this measure constitutes the base of the claim to unconstitutionality brought before the Egyptian High Constitutional Court (*al-mahkama al-dusturiyya al-'ulya*).

¹ For the Coptic Orthodox, personal status with regard to marriage and divorce is regulated by a law dating from 1938.

To take up Bernard Botiveau's propositions: "the legal system today, in its general principles and its configuration, offers a number of fundamental characteristics usually to be found when defining the legal organisation of a modern State" (Botiveau 1986): the separation of legal and administrative juridical systems, of civil and repressive jurisdictions, the independence of the judiciary, etc. The present system is unified and close to the legal organisation of those countries of the French legal tradition. There is no longer any specifically Islamic jurisdiction, since the religious tribunals were abolished and replaced in 1955 by special sections of the State Courts and tribunals. Civil justice is divided into partial tribunals (for issues of minor importance), county courts, the Court of appeal and the Court of Appeal. Administrative justice is handed down by the Council of State, an institution made up of three sections (judicial, consultative and legislative) whose highest authority is the administrative High Court (Kosheri, Rashed and Riad 1994). Egypt also has a constitutional Court, The Constitutional High Court, established by the Constitution which has been active since the promulgation of its organic law (law 48-1979) and the adoption of its internal regulation (cf. Jacquemond 1988 and 1944). The Constitutional High Court is competent in issues with regard to the interpretation of the law, monitoring constitutional issues and deciding conflicts of competence between the courts. At the request of an appeal court judge it can be called upon to decide on the constitutional status of a law.

Having looked at the sources of the law and the role played by Islamic principles and judicial competencies, we can then go on to examine the attitude of Egyptian judges on issues referring back to Islamic law.

First of all we should like to look at the interpretation given by the Constitutional High Court to article 2 (amended) of the Constitution. An examination of its jurisprudence demonstrates that, initially, when it comes to dealing with issues of unconstitutionality, it has tended not to become involved in interpreting *shari'a*; rather it has followed a strict juridical principle (HCC 4 May 1985). In another decision, taken on the same day, the Constitutional High Court formulated a principle which has become law, that of the non-retroactive implementation of article 2. Thus the Court rejected the right to pass judgement on the constitutionality of texts pre-dating 1980. One might therefore think, initially, that the Constitutional High Court was trying to avoid the danger of interpreting *shari'a*, preferring to limit itself to the machinery of its decisions to "arguments of pure pragmatic law" (Jacquemond 1994). Nevertheless, if we examine the Courts more recent judgements, we see that this is no longer the situation, for the simple and excellent reaction that, whereas a number of years ago all the legislative texts pre-dated the 1980 reform, the material has accumulated and, as a result, the possibility of appeals to unconstitutionality referring to texts which post-date this reform are on the increase. Thus, in a decree dated 15 May 1993, the Court made explicit reference to *shari'a* and its interpretation. Making a distinction between the absolute principles and the relative principles of *shari'a*, the Court specified that its control is exercised

solely on absolute principles, without the latter necessarily being clearly defined.

The jurisprudence of the Constitutional High Court does not, however, represent the only case in which reference is made to Islam in Egyptian legal decisions. We should like to offer a typology (of necessity brief) of the four categories of decisions. The first category is that which objectivises the content of Islam as a recognised religion and possibly a privileged one, or of *shari'a* as a legal point of reference. The second type consists of those arguments which use Islam as a base for decisions which have, first and foremost, to do with the institutional form of the State or a certain concept of public order. The third category of decisions consists of an over-valuation of the rules of pragmatic law in which the wording itself is self-sufficient and therefore cannot justify any such recourse. Finally, the fourth type, a number of legal decisions which, in the name of *shari'a*, went so far as to invalidate pragmatic law.

The objectivising category focuses on those situations in which reference is made to Islam as a religion, and its claims to the free exercise of that religion. This is true, for example, of the issue of wearing headscarves in school, and we shall come back to this later. In such a case, the definition of the Islamic norm constitutes the very object of a dispute brought to court and in which there can be recourse to measures having a bearing on religion, liberty of conscience and the right to practise religion in pragmatic law. The decisions of the Constitutional High Court, when they hand down a verdict on the nature of *shari'a* as a legal point of reference, also belong to this category (cf. *supra*).

The "instrumentalisation" category has to do with those situations in which Islam is used as a basis for a decision dealing with a certain concept of public order. In this case, an attack on Islam is used either by the judge or by the parities concerned to another end. A number of motives can be invoked. Either it is claimed that there has been an attack on Islam as the State religion and the foundation of the state institutions, or it is a question of Islam as the religion of the majority, and the calling into question of which is seen as an attack on public order. It is within the framework of such judgements that the decision which defined the Baha'i religious sect as heretical can be classified.

The hypothesis of "over-validation" involves recourse to motives which, in themselves, are not the object of legal dispute. Here the judge takes as his basis general principles such as that of religion and the law which emanates from it in a State which has made Islam its religion. This as such would not seem to arouse any specific problems. Recourse to such principles serves to confirm pragmatic law. It is merely seen as a stylistic quasi-formulation to which nothing can be opposed. Bernard Botiveau speaks of a recourse to *shari'a* as a support. (Botiveau 1993: 225).

Finally, when it comes to the "invalidity" hypothesis, the issue takes on a very specific character once it becomes a matter of turning to *shari'a* and its

normative formulation in order to deny any validity of pragmatic law. This is true of certain judgements handed down by Judge Ghurab, in which he hands down a sentence which he describes as Islamic and which runs contrary to the pragmatic law in force and which, he, at the same time, describes as illegitimate (Ghurab 1986). As a result, the legal and judiciary system finds itself confronted with a proposition which is, of course, unacceptable, and which leads it to react in consequence (judicial reprimand and administrative measures which second the judge to a non-contentious court). What sets apart Judge Ghurab's position is his explicit invalidation of pragmatic law, whereas the fact of having recourse to the principles of the Islamic religion as a subsidiary basis for a legal decision is not unusual.

The legal handling of the Islamic point of reference: the case of the headscarf

Belgium : the manifestation of a religious conviction ?

Our illustration is taken from the growing phenomenon throughout Europe of the headscarf worn by an ever-increasing number of women — of all generations — who look to Islam in order to demand the right to express and demonstrate their religious identity in public.

The response outlined in the number of decisions on this issue in Belgium (Blaise, De Coorebyter, 1992; Versteegen, 1994-1995; Van Loock, 1994) has largely to do with the pluralist state school system. The response can be summarised fairly easily: for girl pupils to wear symbols as a means of demonstrating their membership of a religious community is not, in itself, incompatible with the governing principle of a plurality of opinions within the public education system, to the extent that it constitutes the exercise of the liberty of expression and the manifestation of religious beliefs, on condition, however, that this liberty is exercised while respecting the liberty of others.

By laying down this rule, the courts were simply applying the general principle of all public liberty: liberty is the rule, possible limitations are the exception.

This interpretation of the limitations and the fact that the latter reveal different degrees of tolerance on the part of school governing bodies and the courts can explain why a specific form of clothing has assumed such importance and has come under the media and symbolic spotlight to such a degree.

For some this recognised liberty would not enable girls to wear symbols which, given the conditions under which they are worn individually or collectively, or by their ostentation or protesting nature, (1) represent a form of pressure, provocation or propaganda and, as such, attack the liberty of other pupils or teachers or, to an even greater extent, other members of the same religious community; (2) would compromise their health or safety (long

distance identification); (3) would disturb teaching activities (e.g. physical education) and the educational role of teachers; or, finally (4) would create a disturbance and, as a result, upset the normal functioning of public order.

Thus a distinction is made between the different types of standard laid down as alternatives or cumulatively as conditions for the respect of the exercise of the public liberty of these young women: the health and the security of the pupils. ; the normal functioning of educational activities; the educational role of the teachers, the problems caused within the college or the school.

Implicit within the jurisprudence we see the problem of the compatibility of certain manifestations of collective identity and the objectives of teaching. Up until now, only the facts of a given situation, on a case to case basis, can enable us to judge the problem.

In France, for some time now, the fear has been of a development similar to those which have taken place in a number of Islamic countries with regard to women's dress: women find themselves pressurised by their environment. In order to avoid precipitous developments, the courts are careful not to base the authorization to wear a symbol such as a headscarf on the practise of practices which are essentially religious and external, because this might well represent a threat to the liberty of conscience of those who, while belonging to the same community or the same religion, had no intention of adopting the same practices (Gaspard and Khosrokhavar, 1995).

In its conclusions, under a decree handed down by the French State Council and dated 2 November 1992, the Commissioner of the (French) government, summarised the position of the latter in a manner which offers food for thought. It responded to the claim by some people that the headscarf should be banned in the name of the dignity of women. In the eyes of the Commissioner, such an approach "(...) is not based on the symbol itself but on the way in which it is perceived. What is at issue is not the headscarf as such, but the symbol it represents and the interpretation given to the place of this symbol within the Islamic religion". Refusing to intervene in what the Commissioner would have considered to be interference on the part of the French authorities in the internal affairs of a religious community, he concludes that the symbol at issue is not, in itself, contrary to the principles which the educational system in France is called upon to protect, thus its wearing was permissible, as long as provocation or incitement to proselytism was excluded. Thus it is all a question of interpretation.

We should try, in vain, to provide a better resume of the present state of affairs. There is, in fact, no objective symbol. Any symbol only has a meaning to the extent that it represents something and, moreover, it is because of this representation that it is worn. The headscarf, worn as a symbol, does not represent the same thing for those women who wear it voluntarily, out of religious conviction or as part of a search for a personal and collective cultural

identity, or even through pressure from their surroundings, and for those who see it on the streets or in the schools. In the West the headscarf or the veil is often seen as the symbol of the young women or women in Muslim society, or, at least, in a certain vision of Islamic society. The discussion with regard to the clothing imposed on women in the name of religion is, today, very much alive in the countries of origin. For some women, who object to the respect demonstrated by Western courts when it comes to the wearing of veils by Muslim women, the headscarf, unlike those symbols which have an inherent religious significance, such as the cross or the kippa, has no inherent religious meaning. Islam calls for modesty, not the veil.

The refusal of the government Commissioner to become involved in such a debate is understandable. While waiting for the whole debate to cool down, in France and in Belgium the problems are dealt with case by case. In the long term, the problem remains.

In short, wearing a headscarf in school represents only one aspect of a vast question, and a much older one, which has to do with the role and the visibility of religion in the public sphere in a secularised society.

Egypt : "the ways and customs of an Islamic society"

Here we shall only briefly summarise the interpretation given by the Egyptian Constitutional High Court of the ministerial decree governing the wearing of uniform and of the headscarf in state schools. The article by Kilian Bälz in this present volume provides a detailed study of the issue.

In summary, the facts are the following. M. Mahmud Wasil, as the guardian of his two daughter Maryam and Hagir, brought a court case against the Minister of Education calling for the suspension and the dismissal of the decision which banned his two daughters from attending secondary school. When he went to enrol them in the school he was informed of their rejection on the basis of a ministerial decree which promulgated a ban on pupils wearing the full veil (*niqab*); this decree states that pupils must wear a uniform which conforms to the characteristics laid down in the decree. For M. Wasil this contravened the rules of articles 2 and 41 of the Egyptian Constitution which stipulates, in the case of the first, that Islam is the state religion and that the principles of *shari'a* are the principal sources of all its legislation and, as far as the second is concerned, that individual liberty is protected and that any attack on this is forbidden. In an emergency meeting, the administrative tribunal recognised the validity of the request and of the suspension of the implementation of the decree while waiting for the Constitutional High Court to hand down a judgement with regard to the constitutionality of the law under discussion.

In its decision of 18 May 1996, the Court began by reiterating its interpretation of Article 2 of the Constitution and the principle it establishes,

according to which interpretative opinions with regard to issues of controversy do not, of themselves, have any direct power on persons other than those directly involved. It is up to the judge to pronounce judgement with regard to the objectives of *shari'a*.

For the Court, the decree in question requires all girls to wear the uniform of the school they attend. The logic behind the uniform is to ensure respect of modesty and the customs and ways of society. The legislator can only impose certain restrictions with regard to apparel, without these being contrary to the principle of the respect of individual liberty, if it is done in order to preserve identity. In the view of the Court, Islam has improved the condition of women, which is why it encourages them to protect their modesty. Islam orders them to wear the headscarf because this constitutes a protection against immodesty. As a result, women, when it comes to clothing and with regard to God's law, cannot make arbitrary decisions. On the contrary, a woman's clothing should express the responsibility which she takes upon herself in the world.

The form of women's clothing is not, however, laid down absolutely in Qu'ranic texts. The door is therefore left open for interpretation. As a result, the judge can rule on vestimentary custom, as long as it respects the habits and ways of Egyptian society. Clothing should be both modest and practical. The canonical texts do not force women to veil themselves completely: there is no religious obligation to wear the niq'b. In the view of the Court, communication is essential socially and uncovering the face meets this necessity.

The ministerial decree stipulates that all students should be free to adopt the veil if they so choose, as long as it does not hide the face and their guardian can certify that this decision has not been taken under duress. The clothing must, moreover, respect the customs and ways of society. As a result, the court affirms that the decree did not contravene article 2 of the Constitution.

With regard to the respect of religious liberty as laid down in article 46 of the constitution, the Court makes a distinction between, on the one hand, liberty of conviction and, on the other, liberty of religious practice. Liberty of religious conviction is defined as the liberty of an individual not to be obliged to accept a religion in which he does not believe or to deny a religion he has made his own. Moreover, the Court stresses that religions must show tolerance the one for the other and that their respect is mutual, and the role of the state is to promote this. As for liberty of religious practice, it is defined as the right of the individual to give concrete expression to an internal conviction in such a way that it is materialised in daily life. This liberty can be limited by the pursuit of higher interests such as public order and good behaviour. Education is part of these higher interests which the State is required to protect and which authorises restrictions on religious liberty. In this sense, the Ministerial decree, which does not attack liberty of conviction but merely restricts the liberty of practice, does not run contrary to the Constitution. Moreover, it involves an issue which is open to interpretation, and in which the legislator is sovereign.

Since, in the view of the Constitutional High Court, the decree handed down by the Minister of Education did not contravene articles 2 and 41 of the Constitution, it decided to reject the request. In practical terms, this means that girls cannot attend school wearing the full veil.

The nature of the reference to Islamic norms

In Belgium it is through the issue of the headscarf that the legal and effective status of Islam has become the subject of different decisions. When it is applied to the legal identification of the Muslim community, the controversy with regard to Islam as the source of rights and responsibilities, in Belgium and more or less throughout Europe, finds itself confronted, on the one hand, by the champions of cultural assimilation and, on the other, the fiercest defenders of immigrant culture. In Belgium, for a number of years now, the issue of Islam has led to a kind of ideological cleavage, rather like that which the country experienced, and to a certain extent continues to experience, with regard to integration, to the extent that the adversaries of any assimilation of the Muslim communities will reject it in the name of the (immigrant) cultural identity, whereas its supporters will deny this identity in order to make the policy of assimilation more credible. Here, quite intentionally, we find an example of the two extremes.

First and foremost what we must do is make an inventory of the principal issues which, on the basis of the concrete problems have been regularly encountered in recent years in legal practice, here with think, for example, of legislation with regard to the effects of repudiation, the handling of polygamous relationships, the dowry as a precondition for the validity of a marriage, the institution of matrimonial guardianship, the right of succession, etc., each of which, in its own way organises and determines the architecture of legal investigation into the status of Islamic law within the legal systems of secularised states. Such an inventory would enable us to see more clearly some of the consequences of an implementation of legal techniques, there where such techniques are called to define the legal status of ordinary people who find themselves falling between the two stools of different cultural and pragmatic models.

The example of the veil should already enable us to demonstrate the way in which certain courts are already working towards a system of attitudes which should be developed with regard to Muslim immigrants, a system which should reinstate all its complexity depending on the individuals and the groups involved, and the rights and the interests concerned. Such efforts should result in research comparable to that carried out in The Netherlands in the 1980s, under the title "Moslems in de Nederlandse rechtspraak" (Muslims in Dutch jurisprudence.) (Rutten, 1988). Some judges would appear to fulfil a role abandoned by the executive power and the executive legislator, and it is there decisions which, to a certain extent, structure the approach to legal and

cultural conflicts between the Islam which has taken root in Europe and the legal system of the host society.

Egyptian law, for its part, is an expression of the search for a definition of the State religion and the role to which it is entitled within a totally pragmatic and modern legal system. As in Belgium, it takes into account a search for what, in short, can be described as identity, with the difference that in this case it is not a desire to affirm oneself in an alien context but rather to define oneself within a migrant context. Just as in Belgium, the Egyptian courts must ask themselves what within the religious precepts are legally enforceable. Thus religion, as such, has no legal power: it can only play a role in the legal field on condition that a pragmatic text opens the door, or a judge allows it to play a role. We should not, in any case, underestimate the extent and the impact of the pragmatic aspects of Egyptian law. This does not mean to say that religion has no pragmatic impact on the decision of Egyptian judges, but simply that this norm can only be exercised on condition that it is moulded in a positive form which makes it acceptable, without, of course, ignoring the vastness of the interpretation which the judge might give it.

The difference in context nevertheless results in this major difference in that the Egyptian judge passes sentence in terms of definition, whereas the Belgian judge makes a judgement on the basis of the level of acceptability. When faced by the interpretation of the religious norm, the Egyptian judge will seek to endow it with an religious status, one which has an historic base and is socially sanctioned, which he alone would be able to apprehend both as a norm imposed on society and as a social norm to be translated into law. To go back to our example, the veil belongs to those practices which have left a trace, albeit sedimentary, in a normative form. Integrated today in a legal context, the formal obligation to wear the veil, the norm of which is recognised, is sanctioned legally and morally by a judge imposing his form of interpretation as a contemporary and cultural interpretation of an a-temporal desire. Constitutional justice, in its search for a morality to match its vision of the religious and social normality has, as a result given substance to a formal norm inherited from history. It is here that we see that, while claiming to interpret the natural norms, the judge has in fact created one.

We can now draw some conclusions from this attempt at a comparative approach. First of all we should state that the differences which have become apparent between Belgium and Egypt in their ways of referring to Islam can be explained by differences in context. Given this fact, we also see that this reference can, on occasion, take similar forms. This is true of any reference to public liberties. Moreover, it is this common reference to public liberties in Belgian and Egyptian cases with regard to headscarves which originally inspired us to carry out this comparative study. In addition, we should note that the Islamic order plays a different role in the two contexts, something which can be explained by their different sociologies. Thus Belgium respects the foreigner's right to self-expression through the instruments of private

international law and the definition of public liberties, whereas Egypt tends to re-attribute to a pseudo-autochthonous legal order (but which, juridically speaking, is foreign) that central role which it was claimed to enjoy in the past in the legal system (since the present legal system is sometimes itself defined as foreign). It is true that both make use of the techniques of legal conflicts: they are therefore described as belonging either to the domain of private internal law or that of public liberties. Likewise, in both cases, the limits of any recognition of a foreign order are related to a desire to maintain the homogeneity of the existing legal system. In Belgium, therefore, it is a matter of the limits of public order and, in Egypt, a question of the open definition of *shari'a* to limit the dangers of upheaval. The two countries adopt a contrasting attitude towards the incorporation of identical norms. In the one case it is a question of accepting the plurality of the system whereas, on the other, it is a question of maintaining its homogeneity. Thus Belgium rejects the idea of a religious law, but ensures the protection of religion on the basis of public liberty. Egypt, for its part, seeks to offer a religious liberty to the concept of public liberty and to affirm the religious foundation of pragmatic law.

This leads us to raise questions with regard to the various logics which govern the decisions of Belgian and Egyptian judges with regard to Islam. We see that different contexts, different logics, different forms of interaction and the implementation of different decisions can lead to similar consequences: to give substance to religiously differentiated legal norms. We can, in this case, ask to what extent Islamic norms can only exist within a situation in which the recourse is available to the various role players at the time or the context (eventually the legal context) would enable them to mobilise them. It would then be this mobilisation which would lead to the substantialisation of these norms. This would mean that, no matter the context, there would be no Islamic law the rules of which could be imposed in a given situation. On the other hand, there would be pragmatic guidelines, pragmatic precedents, partial norms, more or less established, within a reconstructive context. Here we would find ourselves confronted by repertoires whose implementation would be defined by the context: the substance of such repertoires would be brought about by the interaction of these precedents (pragmatic patchworks) and the strategies of the role players (which might eventually take the form of a normative "shopping").