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ISLAMIC HEADSCARVES AND FEMALE CIRCUMCISION: UNVEILING THE THREAT POSED BY ISLAM TO HUMAN RIGHTS¹

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“Let there be no compulsion in religion: Truth stands out clear from error...”

English translation of The Holy Qur’an, surah Al Baqarah (The Cow), verse 256.³

“But every woman that prayeth or prophesieth with her head uncovered dishonoureth her head: for that is even all one as if she were shaven. [6] For if the woman be not covered, let her also be shorn: but if it be a shame for a woman to be shorn or shaven, let her be covered...[14] Doth not even nature itself teach you, that,...if a woman has long hair it is a glory to her?”

The Bible, Corinthians 1, Chapter 11, verses 5, 6 and 14.⁴

ABSTRACT: This paper is, in part, a response to the NZPGLeJ Editor-in-Chief Herman Salton’s article, “‘Veiled Threats?’ Islam, Headscarves and Freedom of Religion in France and the United States”, which was published in the first issue of this journal. However, it moves beyond Salton’s article as it seeks to address familiar assumptions regarding the inherent incompatibility of Islam with human rights, particularly women’s rights. By focusing on two distinct issues, the Islamic headscarf and the practice of female circumcision, questions are raised as to whether Islam and human rights, especially women’s rights, are truly incompatible or whether there are other issues at stake. It also discusses the defamation of religions, particularly Islam, and the recent steps taken by the United Nations Commission on Human Rights in relation to this issue. The paper concludes by providing some insights into the likely future direction that the headscarf debate may take in New Zealand.

¹ A reference to Herman Salton’s article “‘Veiled Threats?’ Islam, Headscarves and Freedom of Religion in France and the United States’ in NZPGLeJ [2005/1] UPD1, hereinafter referred to as Salton. The terms “headscarf”, “veil” and “hijab” (the Arabic term for “veil”) are used interchangeably in this article as they are all taken to refer to the same thing, namely, a piece of material worn on the female head that covers the hair and neck but leaves the face uncovered. For a description of the variations between Islamic headscarves, see <http://news.bbc.co.uk/1/hi/world/europe/3328277.stm> (at 16 April 2005).

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³ ‘Abdullah Yusuf Ali, The Holy Qur’an: Text, Translation and Commentary New Revised Edition, (Amana Corporation, Maryland, 1989) p106. Since Muslims regard the Arabic Qur’an (literally, “the Recitation”) as a divine proclamation from God (Allah), revealed to the prophet Mohammed through the angel Gabriel, only the Arabic text can be referred to as “The Qur’an”. Any translations of the Arabic Qur’an, whether they are in English or in any other language, are nothing more than that: mere translations. Translations are never referred to by Muslims as “The Qur’an”. Whereas translations will differ from one to another, all copies of the Qur’an are identical.

⁴ King James Version of the Bible, available online at <http://www.hti.umich.edu/k/kjv/> (at 16 April 2005). This particular quotation from the Bible is also used by Aesha Lorenz Al-Saeed, “Behind the Veil: Women’s Headscarves in Schools” 4 April 2003, <http://www.scoop.co.nz/stories/HL0304/S00040.htm> (at 16 April 2005).

I THE HEADSCARF AND WOMEN'S RIGHTS: PROTECTING FRENCH SCHOOLGIRLS

One of the core justifications for the French Government's decision to impose a ban on the wearing of headscarves in French schools was apparently the "desire to protect young girls who are obliged to wear the headscarf".⁵ Herman Salton, in an article published in the inaugural issue of the *New Zealand Postgraduate Law e-Journal*, explained that the two main rationales for the ban were, first, an apparent desire on the part of the French government to protect French schoolgirls' rights and, second, to reassert women's equality with men.⁶

The allegations leveled at the headscarf were, *inter alia*, that it was being forced upon young girls, it was "infringing upon women's fundamental rights, on a daily basis," and that it was undermining the equality of the sexes.⁷ French President, Jacques Chirac, also believes that French people see "something aggressive" in the headscarf, explaining that "wearing a veil, whether we want it or not, is a sort of aggression that is difficult for us to accept."⁸

This attack on the headscarf, viewed by Muslim women and men the world over as a mark of modesty and piety, rather than as a concession of women's inequality or an act of aggression, seems to be based on either misinformation or a lack of credible information. The French Government's 20-member commission (led by former minister Bernard Stasi) which was responsible for the report that contained a recommendation to ban the headscarf from state schools, does not appear to have surveyed the estimated 1,500 – 5000 wearers of the headscarf to determine whether they felt that it reduced their equality with men (or boys) or whether it infringed upon their "fundamental rights on a daily basis". There seems to have been an abject lack of interest in hearing what the girls who wore the headscarves had to say, whether they were wearing them by force or whether their choice of headwear was a voluntary one. Moreover, it may have been informative to ask their classmates whether they felt a class member wearing a headscarf made them feel uncomfortable, "pressured", or "provoked" in some way.⁹ Instead, the opponents of the headscarf relied on *perceptions* of what the headscarf meant to its opponents,

⁵ See Salton, above n 1, 21, n 61. The French ban on the wearing of headscarves in state schools was passed in March 2004 and came into effect in September 2004.

⁶ Ibid 5-6. Salton states that the two main issues that led to the ban were the defence of the ideal of *laïcité* and the protection of women's rights.

⁷ Ibid 23, citing the *Rapport de la Commission de Réflexion sur l'Application du Principe de Laïcité dans la République*, the *Travaux Préparatoires* and the *Circulaire 2004-084*, see Salton, above n 1, fn 63-68, fn 61 and fn 62 respectively. See also Salton, above n 1, 8, n 22, 23.

⁸ Chirac's words reported by Jon Henley, "Something aggressive about veils, says Chirac" *The Guardian* 6 December 2003, available at: <http://www.guardian.co.uk/france/story/0,11882,1101321,00.html> (at 16 April 2005).

⁹ In 1989, a French court ruled that the wearing of religious insignia in state schools was permissible as long as it was not done with the aim of "pressure, provocation, proselytism or propaganda". Hence, much of the debate focused on whether headscarves fell into these categories: <http://news.bbc.co.uk/1/hi/world/europe/3328277.stm> (at 16 April 2005).

perceptions formed mainly (though not exclusively) by non-Muslims, who did not wear nor likely ever would wear a headscarf for religious reasons.

A The decision to wear a headscarf

It may be true that some wearers of the headscarf were asked or maybe even (God forbid) told to wear it by their parents. That allegation, however, could not be made regarding Alma and Lila Lévy, the French schoolgirls who were excluded from their high school for insisting on wearing the headscarf, since their father is Jewish and their Algerian Muslim mother was reported in the media as choosing not to wear the headscarf herself. However, even if one presumes that some French schoolgirls were told by their parents to wear a headscarf, that doesn't necessarily imply that they were being discriminated against and in need of protection in the form of a nationwide-law banning all headscarves from state schools. In France, as everywhere, parents often try to influence the clothing that their children choose to wear in an effort to ensure that their children are dressed appropriately – nothing new in that.

In New Zealand, all children (and adults) are forced to wear protective clothing on their heads, whenever they cycle to or from school, or anywhere else.¹⁰ The wearing of the helmet is forced upon New Zealand children by law (and hopefully also by parents) because it is seen as a way of helping to prevent head injuries caused by cycling accidents. For girls who have reached or are nearing the age of puberty, the headscarf is also seen by its wearers (and sometimes their parents) as a kind of protection. Unlike the helmet, which protects the head from physical injuries, the headscarf is perceived by those Muslims who choose to wear it as a way of preserving a female's modesty and protecting her from the unwelcome attention of men.¹¹ The similarity between the helmet and the headscarf is somewhat limited, however, since the helmet is compulsory attire for all cyclists in New Zealand¹² but the Islamic headscarf is never obligatory – it is always (or always should be) the choice of the individual girl/woman whether or not it is worn. There is no compulsion in religion, or at least, not in Islam.¹³

It is a fact that many women who were not born into the religion of Islam have chosen to become Muslim and have adopted the wearing of the headscarf,

¹⁰ Traffic Regulations 1974, Amendment No 24, regulation 38A.

¹¹ The inherent attractiveness of a woman's hair, particularly long hair, seems to have been understood in the New Testament of the Bible, as this is understood to be the meaning of 1 Corinthians chapter 11, verses 14 and 15, see King James Version of the Bible, above p 2, n 4.

¹² Unless they apply for and are granted an exemption, for example, on religious grounds.

¹³ The principle that there is no compulsion in religion is clearly stated in the Qur'an: see translation of 'Abdullah Yusuf Ali, surah Al-Baqarah, verse 253, above p 2, n 3. 'Abdullah Yusuf Ali's commentary on this verse attempts to explain its meaning as follows: "Compulsion is incompatible with religion: because (1) religion depends upon faith and will, and these would be meaningless if induced by force..."; see Yusuf Ali's translation, supra n 3 at p106. Applying to the French schoolgirls, it is clear that they ought never to be forced to wear the headscarf, since wearing it is an act of faith and will.

voluntarily. They are neither children nor are they under their husband's often-alleged domination.¹⁴ This has occurred in France as elsewhere in the world. Women who have chosen to wear the headscarf of their own volition often report that they enjoy wearing it, because they say it provides "peace, freedom and dignity, and no fear of being possessed by strangers."¹⁵ Western Muslim women also report that they feel pride when wearing the hijab,¹⁶ that they feel protected from the harassment of men when wearing the hijab,¹⁷ and they see the hijab as a "protection of the modesty of women and society as a whole".¹⁸

Aside from grown women, many children or young adults choose to wear the headscarf, some from an early age, because they feel that they are obeying God's command to them in the Qur'an:¹⁹

And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers, their husbands' fathers, their sons, their husband's sons...

The conundrum is this: how is it possible that Muslim women see the headscarf as a method of protecting their modesty and obeying God when the French Parliament sees the headscarf as an attempt to undermine the equality of the sexes and as an infringement of girls' fundamental rights? How is it possible that the French Parliament has banned headscarves in schools in an effort to protect fundamental

¹⁴ One might argue that female children are forced to wear the headscarf by their parents, and that Muslim women born into the religion are forced to wear it by their oppressive husbands. Neither of these criticisms is valid when the woman is an adult, and has grown up in the West, and moreover, is often not married.

¹⁵ Khaula Nakata, "A View Through Hijab" in *The Hijab... Why?* Dr Saleh As-Saleh (trans) (The Co-operative Office for Call & Guidance at Badiyah, Riyadh, 1995) 4. Nakata, a Japanese woman who became Muslim, explains why she chose not only to wear the hijab, but also the nikab (face covering). Incidentally, Tokyo has recently begun its first women-only subway car during the morning rush hour in a bid to clamp down on groping, which is reported to be rampant on Tokyo's crowded trains. A police report in February 2005 said that groping on trains had tripled over the past eight years. Other Japanese cities, such as Osaka, have already introduced women-only cars during rush hour: Aljazeera.net "Japan women get own subway cars": http://english.aljazeera.net/NR/exeres/C624B9D1-7435-4EF5-A611_FF2B39A04B4F.htm (at 4 April 2005). Segregation of the sexes is not, then, a purely Islamic practice, and it would seem to have benefits in Western states which pride themselves on the "equality" of the sexes, such as Japan.

¹⁶ Sumeyra Dyer in *Islam: Our Choice* (Muslim Converts Support Group of Australia, Victoria, 1995) 4.

¹⁷ Ruth Anderson in *Hijab (Veil): The View From the Inside* (World Assembly of Muslim Youth, Riyadh, 1995) 17. Anderson, an American woman who became Muslim, stated that when asked to discard her hijab or expose that part of her body ordered to be covered by the Divine Law (that is, the Qur'an) she felt that she was being asked to disobey Islamic principles and her basic belief: Ibid 20.

¹⁸ Aminah Riddle in *Islam: Our Choice* (Muslim Converts Support Group of Australia, Victoria, 1995) 32.

¹⁹ Surah Al Nur (The Light), verse 31 [abbreviated], English translation of the Qur'an by 'Abdullah Yusuf Ali, above n 3.

rights, when Muslim women (and presumably some girls) see it as their fundamental right to cover their heads and dress modestly? Do Muslim schoolgirls have to remove their headscarves in order to experience equality and freedom of religion?

B Protecting women's rights or ulterior motives?

The authors of the Stasi report and the French Government were content for the public to perceive the headscarf-in-schools debate as being based on the issue of equality between the sexes and women's rights. But if that were true, one would have expected a great deal more interest to have been shown in trying to understand why girls wanted to wear the headscarf. Had there been a genuine desire to understand why the headscarf is so important to those who wear it – not just to those who *look* at it – there may not have been the same level of support for a legislative ban.

The overwhelming public and parliamentary support for a ban on headscarves may stem not from a desire to protect French schoolgirls, but from two age-old concepts, fear and misunderstanding. Samuel Huntington has cited a 1991 study in France which showed that the four countries feared most by the French public were all Muslim: Iraq (52 percent); Iran (25 percent); Libya (26 percent) and Algeria (22 percent).²⁰ Western political leaders, including the French prime minister, declared in 1995 that Islamic fundamentalism was “at least as dangerous as communism” to the West.²¹ Salton, in his article, also noted the apparent fear that the French public experience at the sight of the headscarf.²² It is suggested that a general fear of Islam, a misunderstanding about the reasons why the headscarf is worn and a strong desire to halt the perceived influence of Islamic “fundamentalism” had more impact on the banning of the headscarf than did the stated objectives, especially the supposed objective of protecting the girls themselves and upholding women's rights.²³

II FEMALE CIRCUMCISION – A “TENET” OF ISLAM?

The Stasi commission's report described the headscarf as representing a “resurgence of sexism, that translates into pressures as well as verbal, psychological and physical violence.”²⁴ It linked the headscarf to other practices such as female genital mutilation and polygamy, perhaps hoping that in making such a link, the headscarf

²⁰ Samuel P Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon and Schuster, Great Britain, 2002) 215, citing a survey that appeared in *Le Monde* on 20 September 1991.

²¹ Huntington, above n 20, 215.

²² See Salton, above n 1, at 5-7, n 15.

²³ The term “fundamentalism” is placed in quotation marks here because it is a problematic value-laden term which, when used to describe a group, carries inherently negative connotations. The perception seems to be that headscarf-wearers are “fundamentalists”, but as the quote from the Qur'an shows (see above n 3) it is a requirement for Muslim women to cover their heads. Thus, any Muslim woman who chooses not to cover her head is not adhering to one of the tenets of her religion. A woman who chooses to cover her head should not then be labeled as a “fundamentalist,” she should perhaps be described as a practising Muslim.

²⁴ See Salton, above n 1, 8, n22. The translation cited here is Salton's.

would be tainted by the negativity generated by these concepts. There is nothing new or novel in these tactics. As Salton has described, the relationship between Islam and the West has often been strained, due in large part to misunderstandings and exaggerated or inaccurate accounts about Islamic beliefs and practices.²⁵

Unfortunately, Salton may have inadvertently added to this body of misconception. After mentioning the practical problems that may arise in accommodating the tenets of Islam in civic life, and adducing a list of possible confrontations between Islam and the State, he goes on to conclude that:²⁶

These are very delicate matters where balancing freedom of religion and efficiency of the public service can prove extraordinarily difficult. Moreover, they are quite apart from the even more contentious issue of whether some Islamic tenets violate basic human rights for women – something that practices like circumcision and arranged marriages seem to suggest. (emphasis added)

The false assumption, that female circumcision is an “Islamic tenet”, is often made when adducing evidence of Islam’s incompatibility with Western values, especially its alleged incompatibility with women’s fundamental human rights. Attaining clarity on this issue is essential to dispelling concerns that Islam and the West are inherently incompatible.

A A Definition of “female circumcision”

The term “female circumcision” is used to refer to a wide range of procedures:²⁷

The simplest form involves a small cut to the clitoris or labial tissue. A Sunna circumcision removes the prepuce (a fold of skin that covers the clitoris) and/or the tip of the clitoris. A clitoridectomy removes the entire clitoris and some or all of the surrounding tissue. The most extreme form of genital mutilation is excision and infibulation, in which the clitoris and all of the surrounding tissue are cut away and the remaining skin is sewn together. Only a small opening is left for the passage of urine and menstrual blood.

It is clear from the above medical description that so-called Sunna circumcision²⁸ (removal of the prepuce or covering of the clitoris, not the clitoris itself) is practically different from a clitoridectomy (complete excision of the clitoris) and infibulation (complete excision of the clitoris, the surrounding tissue and then the sewing together of the remaining tissue), sometimes referred to as “Pharaonic circumcision”. The first procedure is arguably comparable with male circumcision, in that it only involves the removal of the prepuce, or hood, of the clitoris, whilst

²⁵ Salton, above n 1, 20-21.

²⁶ Ibid 25.

²⁷ Dr Joseph F Smith Medical Library, available at <http://www.chclibrary.org/micromed/00048160.html> (at 27 April 2005).

²⁸ “Sunna” means “tradition” in Arabic and usually refers to the traditions or ways of the Prophet Mohammed.

the latter two procedures are more extreme, sometimes referred to as “female genital mutilation” (“FGM”), and have no comparable male procedure.

Although there is a practical distinction between the different procedures, the World Health Organisation presently refers to all of them under the term FGM.²⁹ Most international and domestic instruments adopt the same definitional approach. In this article, the former, less radical procedure (“Sunna circumcision”) is referred to as female circumcision,³⁰ and the latter two, more extreme procedures are referred to jointly as FGM.³¹ It is acknowledged that some writers prefer to use a more general, non-politicised description of the procedures, such as “female genital modification” or “female genital cutting”, arguing that the term FGM is an ethnocentric, and therefore, inappropriate term.³²

B A “tenet” of Islam?

The apparently widely-held perception that female circumcision and/or FGM are an “Islamic tenet” is negated by the following four observations. First, female circumcision and FGM predate Islam. These practices have been traced back to antiquity, and were probably first recorded as being practiced in the second century BC.³³ A Greek geographer, Agatharchides of Cnidus, apparently wrote about FGM being practised on the western coast of the Red Sea, modern day Egypt, in around 132BC.³⁴ However, its true origins probably lie even further back in time, in Pharaonic Egypt, where it is claimed to have arisen out of the ancient Egyptian belief in the bisexuality of the gods.³⁵ Boyle suggests that although female genital cutting pre-dates Islam, such modesty conventions “corresponded with Islamic

²⁹ The United Nations’ terminology was changed from “female circumcision” to “female genital mutilation” in 1991 on the recommendation of the WHO.

³⁰ Amnesty International describes the procedure which involves only the removal of the clitoral hood as “the least radical procedure”: see Amnesty International, “What is Female Genital Mutilation” available at <http://www.amnesty.org/ailib/intcam/femgen/fgm1.htm> (at 28 April 2005).

³¹ Many descriptions of female circumcision and FGM adopt a 4-type analysis. They add an additional type of procedure which ranges from a symbolic pricking of blood to a number of other possible practices such as stretching the clitoris, cauterization by burning and so on. For a description of the standard four types, see, for example, Ocnus.net “When culture harms the girls” (23 March 2005) available at <http://www.ocnus.net/cgi-bin/exec/view.cgi?archive=66&num=17302> (at 28 April 2005).

³² See Elizabeth Heger Boyle *Female Genital Cutting: Cultural Conflict in the Global Community* (John Hopkins University Press, 2002) 4-6.

³³ Therefore, it was occurring approximately 800 years before Islam, which is usually said to have begun in 610AD, being the year that the Prophet Mohammad received the first revelations. But note that Muslims do not regard Islam as having such a commencement date since they regard all prophets as being Muslim, starting with Adam and including Moses and Jesus, with Mohammed being the last of the Prophets.

³⁴ Agatharchides of Cnidus, a Greek philosopher, historian and geographer, wrote five books in around 132BC, entitled “Journey around the Red Sea” or “On the Red Sea”.

³⁵ Elizabeth Heger Boyle, *Female Genital Cutting* above n 32 at 27.

ideals of family honour and female chastity and seclusion.”³⁶ This may have contributed to the widespread adoption of the practice in the area.³⁷

Second, female circumcision and FGM are currently not practised by all Muslims, nor by all Arabs.³⁸ Most of the Maghreb countries, as well as Turkey and Iran, ignore the practices altogether, and it is not common in the Middle East. Neither are these practices common in the birthplace of Islam, Saudi Arabia, being confined there to immigrants and some Bedouin tribes.³⁹ The less invasive practice of female circumcision is mainly practised by the Bedouin in Israel.⁴⁰

According to Amnesty International, FGM “is practised extensively in Africa and is common in some countries in the Middle East. It also occurs, mainly among immigrant communities, in parts of Asia and the Pacific, North and Latin America and Europe.”⁴¹ Female circumcision and FGM are often performed in African nations as rites of initiation into adulthood, rather than for religious reasons. The late President of Kenya, referring to the practice among the Kikuyu people, claimed that FGM was inherent in the initiation into adulthood and was an inherent part of being Kikuyu.⁴²

Third, female circumcision and FGM have been practised by Western doctors in non-Muslim countries, such as Australia, the United States and Great Britain, who previously supported its use as a medical cure for a range of (alleged) psychological ailments, such as nymphomania.⁴³ In the United States, female circumcision and the more extreme procedures of clitoridectomy and infibulation (FGM), were prescribed for patients up until 1925, and perhaps even as late as the 1950s, as a method of controlling and suppressing female sexuality. Presently, the practice of female circumcision (as that term is used in this article, namely, only the removal of the prepuce, or hood, of the clitoris) is considered to be a form of elective surgery, performed by some plastic surgeons at the choice of women, for the purposes of enhancing sexual response.⁴⁴

³⁶ Ibid 27.

³⁷ Ibid 28.

³⁸ By “Islamic tenet” one presumes that Salton has in mind a principle, belief or theory that belongs to Islam and is practised by all, or at least the majority of Muslims, although Salton himself does not define the term.

³⁹ See Sami A Aldeeb Abu-Sahlieh “Legitimization of Male and Female Circumcision” *Medicine and Law* (July 1994) Vol 13, No7-8, 575-622, available at <http://www.cirp.org/library/cultural/aldeeb1/#n19> (at 27 April 2005).

⁴⁰ See Elizabeth Heger Boyle, above n 32, at 25, citing a study by Asali et al in 1995.

⁴¹ Amnesty International, <http://www.amnesty.org/ailib/intcam/femgen/fgm1.htm#a11> (at 27 April 2005).

⁴² Jomo Kenyatta, late President of Kenya, quoted by Amnesty International at <http://www.amnesty.org/ailib/intcam/femgen/fgm1.htm#a3> (at 27 April 2005).

⁴³ See Elizabeth A Esterbrooks, “Female Genital Mutilation”, Model United Nations Far West – 50th Session available at: <http://www.munfw.org/archive/50th/who2.htm> (at 27 April 2005).

⁴⁴ For further information on this elective procedure, see the “Clitoral Hood Information Page”, available at: <http://www.geocities.com/hoodectomy/hoodectomy.html> (at 27 April 2005).

Fourth, female circumcision and FMG are currently practised by several non-Muslim groups, such as Coptic Christians in Egypt, Ethiopian Jews and African animist tribes. In Tanzania, regions that are predominantly Christian have the highest percentages of circumcised women.⁴⁵ Presently, the World Health Organisation estimates that there are approximately 100 to 140 million girls and women throughout the world who have undergone some form of FGM procedure, the majority of whom live in sub-Saharan Africa.⁴⁶ FGM procedures are common in 25 (some say 28)⁴⁷ African countries, being practised by individuals who hold a range of religious and cultural beliefs. Amnesty International states that, “FGM predates Islam and is not practised by the majority of Muslims, but has acquired a religious dimension.”⁴⁸ In light of the fact that female circumcision and FGM are practices that are confined to neither Muslims nor Arabs, it is argued that it is misleading to refer to either female circumcision or FGM as an “Islamic tenet”.

C The Islamic perspective on female circumcision and FGM

Islamic law has two main sources: the Qur’an and the Sunnah of the Prophet Mohammed. The Sunnah (literally “the way” that the Prophet Mohammed lived his life) is known to us via a compilation of reports from different sources, called the Hadith. Two additional but weaker sources of law are Qiyas, the process of analogical reasoning from a known junction to a new junction, that is, applying known law to new situations, and finally, the ijtiḥad (independent thought to arrive at a consensus), including the tenets of the schools of Muslim law through the centuries. Opinions of Muslim scholars (fatwas, or legal opinions) are an important part of ijtiḥad.

The first two sources of Islamic law (the Qur’an and the Sunnah) contain aspects of the religion that are binding on Muslims, whereas fatwas are morally forceful but not legally binding. Different scholars often issue different fatwas on the same issue, depending on their interpretation of the Qur’an and the Sunnah.

Neither male nor female circumcision are specifically mentioned in the Qur’an, therefore, it is the Sunnah and the scholars’ fatwas that are the sources of the Islamic perspective on this subject.

⁴⁵ See Boyle, above n 32, at 31.

⁴⁶ Department of Gender and Women’s Health, World Health Organisation (WHO), “Female Genital Mutilation: The prevention and the management of the health complications - Policy guidelines for nurses and midwives” WHO/FCH/GWH/01.5, WHO/RHR/01.18 (World Health Organisation, Geneva, 2001) 4 [hereinafter referred to as “the WHO report”].

⁴⁷ Amnesty International lists 28 countries as actively practising some form of female circumcision or FGM, with an estimate of the percentage of women girls in each country who undergo a procedure. The percentages range from 5% in the Democratic Republic of Congo and Uganda, to 98% in Somalia: see <http://www.amnesty.org/ailib/intcam/femgen/fgm9.htm> (at 27 April 2005).

⁴⁸ See Amnesty International <http://www.amnesty.org/ailib/intcam/femgen/fgm1.htm#a11> (at 27 April 2005).

There are a range of opinions amongst Islamic scholars as to the status of both female circumcision and FGM in Islamic law. At one end of the spectrum, Canadian academic Sheikh Ahmed Kutty takes the view that, whilst circumcision for boys is obligatory, there is no evidence in either the Qur'an or the Sunnah that suggests it is compulsory for women.⁴⁹ Kutty draws a comparison between men and women who converted to Islam at the time of the Prophet Mohammed:⁵⁰

While one finds a number of traditions from the Prophet, peace and blessings be upon him, which clearly indicates that he ordered pagan males who converted to undergo circumcision, it is not stated anywhere that the Prophet, peace and blessings be upon him, ordered any woman who entered Islam to undergo this practice.

Kutty's view finds support from the highest Sunni Muslim authority in Egypt, a country where female circumcision and FGM are widely practised. In 1997, in the midst of a legal attempt to overturn the Egyptian Health Minister's controversial ban on FGM procedures, Sheikh Mohammad Sayyed Tantawi, then (and presently) head of Al-Azhar University, stated that: "The 'ulemas' (theologians) of Islam are unanimous in agreeing that female circumcision has nothing to do with religion."⁵¹ That view was not shared by all Islamic scholars in Egypt.⁵²

There are also scholars who state that Islam permits female circumcision, but not the extreme form of FGM (including infibulation) practised mainly in Africa. The Egyptian-born President of the European Council on Fatwa and Research, Sheikh Yusuf Al-Qaradawi, takes the view that female circumcision is not a religious obligation and whoever chooses not to do it is not committing a sin. However, he

⁴⁹ Sheikh Ahmed Kutty is a senior lecturer and an Islamic scholar at the Islamic Institute of Toronto, Ontario, Canada.

⁵⁰ Sheikh Ahmad Kutty, "Female Circumcision: Is it really obligatory?" (28 August 2002) *IslamOnline - Fatwa Bank*, available at: <http://www.islamonline.net/fatwa/english/FatwaDisplay.asp?hFatwaID=79655> (at 27 April 2005). Kutty goes on to observe that: "It is common knowledge in Islam that if the Prophet, peace and blessings be upon him, had wanted female circumcision to be an integral aspect of religious practice in Islam in the same way that male circumcision is, he would have said so clearly. Since he did not do so, we can safely assume it is not a prescribed ritual of Islam."

⁵¹ See "Egyptian Ban on Female Circumcision Upheld" BBC News, 28 December 1997, available at: <http://news.bbc.co.uk/1/hi/world/42914.stm> (at 27 April 2005). Al-Azhar University is regarded as being the most highly respected Islamic university in the world. Tantawi was appointed the head imam in 1996.

⁵² Sheikh Gadd al-Haqq, a prominent Islamic cleric in Egypt, issued a fatwa stating that although female genital cutting was not required by Islam, it was nevertheless a religious custom and an honourable deed for women. He recommended local clerics to encourage families to circumcise their daughters, just as they encourage individuals to pray. That fatwa led to a lawsuit, brought by the Egyptian Organisation for Human Rights, which alleged, inter alia, that Gad el-Haqq had misrepresented the sayings of the Prophet Mohammed by equating the circumcision of girls with that of boys. The lawsuit was dismissed on the basis that the plaintiffs lacked standing: see Elizabeth Heger Boyle *Female Genital Cutting: Cultural Conflict in the Global Community* (John Hopkins University Press, 2002) above n 32, 3-4.

states that he personally supports the practice of moderate Islamic female circumcision (removal of the prepuce, or covering, of the clitoris) and “whoever finds it serving the interests of his daughters should do it”.⁵³ He bases his fatwa on a Hadith of the Prophet Mohammed who is reported to have said to a midwife who practiced FGM before the time of Islam: “if you cut, do not overdo it because it brings more radiance to the woman and it is more pleasant for the husband.”⁵⁴ Al-Qaradawi interprets that Hadith to mean that female circumcision (the removal of only the prepuce), which was being practised before Islam, is permitted because it is “better for a woman’s health and improves her conjugal relation with her husband.”⁵⁵

There are two other Hadiths which specifically mention female circumcision and are often quoted by supporters of the practice. One Hadith reports that the Prophet Mohammed stipulated: “If both circumcised parts meet or if they touch each other, it is necessary to wash before prayer”.⁵⁶ From this, it may be deduced that men and women were circumcised in the Prophet Mohammed's time but this in itself does not shed much light on whether it was a permitted, recommended or obligatory practice. It is merely an acknowledgement that men and women were sometimes both circumcised, and that they both had to purify themselves before prayer. The other Hadith reports that the Prophet Mohammed said: “Circumcision is a *sunnah* for the men and *makrumah* for the women”.⁵⁷ The term ‘sunnah’ here means that it conforms to the tradition of Mohammed and “makrumah” means a combination of modesty, dignity and pride.⁵⁸ However, this latter Hadith is regarded as being a ‘weak Hadith’ due to concerns over the chain of narration.

Based on the foregoing Hadiths and scholarly exposition, the following conclusions can be drawn. First, female circumcision was practised before Islam, and the practice was allowed to continue but only if those performing it did not “overdo it” or “exaggerate”. Female circumcision (the removal of the prepuce) is therefore a

⁵³ See Sheikh Yusuf al-Qaradawi’s fatwa on female circumcision at *IslamOnline*, available at: <http://www.islamonline.net/fatwa/english/FatwaDisplay.asp?hFatwaID=31397> (at 27 April 2005).

⁵⁴ This Hadith was narrated by Umm-Attiyah (a woman who heard a conversation between Mohammed and a midwife). Instead of “radiance to the woman”, it is sometimes translated as “radiance to the face”. Umm-Attiyah related many Hadiths and is generally regarded as being reliable. It is often quoted as the main evidence for female circumcision. Another translation of this Hadith reads: Cut slightly without exaggeration (ikhtafidna wa-la tanhikna), because it is more pleasant (ahza) for your husbands”.

⁵⁵ *Ibid.*

⁵⁶ Hadith related by Al-Turmuzy, in *Tuhfet al-Maudood*, p117. Al-Turmuzy is generally regarded as a strong or reliable narrator of Hadiths. The translation of the Arabic into English is that of an Arabic speaker but not an official translator.

⁵⁷ This Hadith was first related by Ibn-Abbas, and also by Ahmad, Hadith no. 5/75, and Al-Bahaqi Hadith no.8/325. This Hadith is regarded as being “maoqouf” and “marfo’a” which means either that one of the people in the chain of narrations is missing, or one of the people in the chain of narrations has related other Hadiths of questionable reliability. Therefore, this reduces the reliability of this Hadith and it is therefore called a “weak Hadith”.

⁵⁸ The translations of Arabic terms into English are those of an Arabic speaker but not an official translator.

permitted practice but it is certainly not obligatory. It has a different status in Islam to the practice of male circumcision (which also involves the removal of the prepuce), which is generally regarded as obligatory for all Muslim boys and men.⁵⁹

Second, the extreme forms of FGM (such as excision and infibulation) are forbidden in Islam. The Prophet Mohammed's express limitation on the practice of female circumcision was that if it was done, it should not be exaggerated.

Third, some scholars claim that even before the less invasive practice of female circumcision (the removal of the prepuce) can be performed, certain conditions must be met, such as that the girl/woman must be medically examined to determine whether the procedure is necessary. For some women, who are born without a prepuce, the procedure would be unnecessary and illogical, even if it were desired. In other cases, it is claimed that a girl or woman may have a physical abnormality which warrants the procedure.⁶⁰ Also, if it is going to be performed, it must be done by a medical professional using appropriate medical equipment which has been properly sterilised, in order to avoid the risk of infection.⁶¹

In summary, the weight of evidence would support the view that Islam permits the pre-Islamic practice of female circumcision to continue, but it is not obligatory. If it is performed, it must not be extreme and certain conditions, such as physiological need and medical expertise must be met. However, it is forbidden to carry out extreme FGM procedures such as infibulation in Islamic law.

As a footnote to this analysis on Islam's position, it is interesting to note that some Western gynaecologists still support the practice of female circumcision for patients who suffer from sexual dysfunction caused by anatomical disorders. Researchers at the Boston University School of Medicine found that roughly one quarter of the women they treated suffered from a condition called "clitoral phimosis" and that female circumcision (removal of the prepuce) could be of assistance in treating this condition.⁶² This may lend support to the Islamic practice of allowing the procedure in some circumstances, providing the conditions outlined above (medical examination, physiological need, medical professionals, proper equipment) are met.

⁵⁹ There have been some calls, particularly in the United States, to also ban male circumcision – so-called male genital mutilation "MGM" – but so far this has not received much support, probably due in part to the fact that over 50% of American boys are estimated to be circumcised and, unlike female genital mutilation, there are said to be no long-term negative side effects of male circumcision.

⁶⁰ This position can be reconciled with Western medical practices, where the removal of the female prepuce is sometimes performed as elective surgery on women.

⁶¹ These conditions, based on the Sunnah, are reasoned to exist by Sheikh Yousef bin Abdullah Al-Uraifi, *The Manners of receiving a Newborn in Islam* (Al-Watan, Riyadh, 1412 Hijiri, 1997) 77. The translation of this text from Arabic into English is by an Arabic speaker but it is not an official translation.

⁶² See Scientific American.com 31 October 2000 "Anatomy and Sexual Dysfunction" available at: <http://www.geocities.com/hoodectomy/hoodectomy.html> (at 28 April 2005).

D Female genital mutilation and international law

The extreme procedure of FGM is not only forbidden in Islam but it is widely regarded internationally as a violation of women's and girls' human rights. A number of international instruments have been adopted in an attempt to eradicate this inhumane practice.⁶³ The United Nations has been at the forefront of this campaign and has enacted conventions relating to women's rights and children's rights which address violence against women on religious or cultural grounds, including the Convention for the Elimination of all Forms of Discrimination Against Women ("CEDAW").⁶⁴ The monitoring body of CEDAW, the Committee on the Elimination of Discrimination Against Women, has issued several recommendations relating specifically to FGM. General Recommendation 14 (1990) calls on states parties to take appropriate and effective measures with a view to eradicating the practice, including introducing appropriate health care and education strategies and including information about measures taken to eliminate FGM in their reports to the Committee.⁶⁵ The UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief protects the rights of the child against abuse carried out in the name of a particular belief or cultural tradition, stating that: "Practices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development..." (Article 5(5)).

In short, there are many international instruments which seek to eradicate the practice of FGM. The fact that the international instruments address the practice of FGM wherever it is carried out, rather than classifying it as a practice that is confined to Muslims, serves to underline the point that FGM is a widespread practice that is not confined to Muslim populations. The fact that such a diverse range of instruments have been enacted is also evidence that FGM is performed for a diverse range of reasons: some religious (based on Muslim, Christian, Jew and animist beliefs); some based on ideas of hygiene, cleanliness, and health; some based on gender identity, some based on the need to control women's sexuality and reproductive functions and some based on cultural identity.⁶⁶

⁶³ See the WHO report, above n 46, 6-9.

⁶⁴ The UN Convention on the Elimination of All Forms of Discrimination against Women, which came into force in 1981, contains an article which indirectly addresses the problem: Article 5 of the Convention requires states to work towards "the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes".

⁶⁵ See also Amnesty International, *Female Genital Mutilation* available at: <http://www.amnesty.org/ailib/intcam/femgen/fgm5.htm> (at 28 April 2005).

⁶⁶ *Ibid.*

E Domestic law

In Africa, 14 countries have enacted laws criminalising FGM.⁶⁷ In industrialized nations, 11 states have passed laws regarding FGM.⁶⁸ Some Western states also have enacted laws which forbid girls from being taken out of the jurisdiction for purposes of having the procedure carried out.⁶⁹ Western states' legislation usually does not draw a distinction between female circumcision, as that term is used here, and FGM, preferring to prohibit any and all practices that "mutilate in whole or in part" the female genitalia.⁷⁰

F The link between female genital mutilation and the headscarf debate in France

The Stasi report that recommended the banning of the headscarf in French public schools specifically referred to female sexual mutilation, perhaps trying to imply that it is one of the supposed outcomes of allowing girls to wear a headscarf.⁷¹ In making this connection, the authors of the report showed how such imagery could be manipulated to convince the public that the headscarf was just another way, like FGM, of violating girls' and women's rights. It is suggested that simply mentioning the phrase "female circumcision" or "sexual mutilation" is bound to add weight to one's argument, in much the same way as using the term "terrorism" to describe one's enemies gives one the immediate moral high ground. The distinction between female circumcision (the removal of the prepuce) and FGM (complete excision and/or infibulation) is not a distinction that is made by most people, and was not made by the authors of the Stasi report. The term "female circumcision" is usually taken by the public to mean the same thing as FGM.

It is submitted that Western secular states, such as France ought to openly acknowledge that the practice of FGM, whilst clearly a violation of females' human

⁶⁷ Centre for Reproductive Rights, 27 February 2005, available at: http://www.crlp.org/pub_fac_fgmicpd.html (at 28 April 2005). The 14 African countries (with the year enacted in brackets) are: Benin (2003); Burkina Faso (1996); Central African Republic (1966); Chad (2003); Côte d'Ivoire (1998); Djibouti (1994); Egypt (Ministerial Decree, 1996); Ethiopia (2004); Ghana (1994); Guinea (1965); Kenya (2001); Niger (2003); Senegal (1999); Tanzania (1998); Togo (1998); Nigeria (multiple states, 1999-2002); see the Centre for Reproductive Rights.

⁶⁸ The Centre for Reproductive Rights lists 10 states: Australia, Belgium, Canada, Denmark, New Zealand, Norway, Spain, Sweden, United Kingdom and the United States. France is missing from this list because it doesn't have specific FGM legislation, but FGM is also illegal in France under article 312 of the Penal Code.

⁶⁹ For example, the United Kingdom has enacted the Female Genital Mutilation Act 2003 which provides in section 3(1) that it is an offence to aid, abet, counsel or procure a person who is not a United Kingdom national or permanent United Kingdom resident to do a relevant act of female genital mutilation outside the United Kingdom: see <http://www.hms0.gov.uk/acts/acts2003/20030031.htm> (at 28 April 2005).

⁷⁰ That phrase is taken from the definition of female genital mutilation in the United Kingdom's legislation.

⁷¹ See extract from the report in Salton, above n 1, p 22, n 66.

rights, is not restricted to Muslim societies.⁷² Equally as importantly, Western states such as France ought to acknowledge that FGM is not required by Islam, but that, on the contrary, it is forbidden in Islam. The evidence provided above shows that FGM is not presently, nor has it ever been, an Islamic tenet, as implied by the Stasi report and expressly stated by Salton.⁷³ Misunderstanding of this fact can lead to only further mistrust of Islam, especially its treatment of girls and women. It should be stated clearly that the only obligatory circumcision in Islamic law is male circumcision, according to scholars of the highest eminence.⁷⁴

Despite many Islamic scholars having repeated this point, the perception still remains that FGM is a “tenet” of Islam.⁷⁵ Educating governments and the greater public about religious beliefs and practices might be the only way to solve the “formidable” problems of integrating Islam with Western societies to which Salton refers. Educating Muslims about the status of female circumcision and FGM in Islam would be an integral part of this process.

III “IRRATIONAL” RELIGIONS AND “RATIONAL” LAWS

If investigation, inquiry and education are possibly the best way forward, then describing religion as being, by its own nature, “irrational”, as Salton has concluded, is probably not a positive step. Salton claims that “religion tends by its own nature to be irrational, so the law – which on the contrary is, or should be, rational – will necessarily have problems in dealing with the dilemmas of the spirit.”⁷⁶

⁷² Genital Mutilation” (Model United Nations Far West (MUNFW) 50th Session Issues, available at: <http://www.munfw.org/archive/50th/who2.htm> (at 15 April 2005).

⁷³ See statements from Sheikh Ahmed Kutty and Sheikh Mohammed Sayyed Tantawi, above 16-17.

⁷⁴ “Circumcision is to cut off only the foreskin of the male sexual organ, and not to cut off more than that nor even a part of the private part, as practised in some primitive lands.”: Shaykh ‘Abdul-‘Aziz bin Abdullah bin Baz, Shaykh Mohammed bin Salih Al-‘Uthaimin, Shaykh “Abdullah bin ‘Abdur-Rahman Al-Jibreen and the Permanent Committee and decisions of the Fiqh Council, Fatawa Islamiyah - Islamic Verdicts (Darussalam, Riyadh, 2002) 343, under the heading “The Shari’ah Definition of Circumcision”. These three scholars are usually said to adhere to the “Wahabi” school of Islam, popular in Saudi Arabia and widely regarded as a more conservative strain of Islamic doctrine. If even they, as Islamic conservatives, regard circumcision as being limited to males, it would seem to underline the point that female circumcision is not an Islamic tenet.

⁷⁵ See also Sheikh Mohammed Ali Al-Hanooti who has ruled that “Circumcision of women has nothing to do with Sunnah [the way of the prophet Mohammed], nor does it have any solid evidence in the Shari’ah [Islamic law]. I advise those Muslims who practise female circumcision to stop it”: <http://www.islamonline.net/livefatwa/english/Browse.asp?hGuestID=iOiazG> (at 16 April 2005).

⁷⁶ See Salton, above n 1, 26. It is acknowledged that Salton did not have cause to define the term “irrational”. Correspondence with the author suggests that rather than wanting to convey the negative connotations inherent in the term “irrational”, Salton was perhaps trying to contrast the “non-spiritual” aspect of law with the inherently spiritual aspect of all religion. However, even if Salton’s statement has been misconstrued, the point remains that in Islam as a religion, there is nothing “irrational” which clashes with the “rational” law, in the sense that law and religion are intimately connected in a way that they are not so connected in other religions. For example, the sharia’a law, that includes the day-to-day laws which govern people’s lives in an Islamic state, are based squarely on spiritual laws. Therefore, the claim that “the law...will necessarily have problems in dealing with the dilemmas of the spirit” is not applicable, theoretically at least, in Islam. It is on

Most religious adherents, be they Muslim, Christian or followers of any other faith, do not regard their beliefs as “irrational”. Given that Islam is the subject of Salton’s discourse, perhaps it is specifically Islam that he has in mind when he refers to irrationality. To the approximately 1.3 billion people across the world (around 22 percent of the world’s population) who claim to adhere to it, Islam is viewed as a highly rational system of human organisation, coming directly (as Muslims believe) from God.⁷⁷ To describe their religion as “irrational” will probably not assist in finding a way of reconciling Islamic beliefs and practices with Western values and culture.

A Rational French laws

Man-made laws to which Salton refers as being “rational” have been shown in the past to be somewhat less than deserving of that description. When Napoleon introduced the Code of Napoleon in 1804 he proclaimed that “Women ought to obey us. Nature has made women our slaves!”⁷⁸ A noteworthy provision of the Code, Article 213 (which was not revised until 1938) stated that the husband owed protection to his wife, and the wife owed obedience to her husband.⁷⁹ Furthermore:⁸⁰

Under this provision, a married woman, whose status in the code was similar to that of a child or a lunatic, could not change her residence, travel, obtain a passport, or choose a doctor without the approval of her husband. The husband controlled his wife's contacts and could oversee her correspondence.

The gender inequalities in nineteenth-century French civil law were matched by inequalities in criminal law, which harshly punished women’s sexual transgressions. Penalties for a wife's adultery were severe, whereas a husband could only be

this basis that the “irrationality” comment, and the conflict between law and religion, must be addressed.

⁷⁷ The figure of 1.3 billion is taken from a survey of the number of adherents of each major religion of the world, available at: http://www.adherents.com/Religions_By_Adherents.html (at 16 April 2005). The writer does not claim that this figure is exact, since the exact figure is not overly important to the point that is being made here. Other figures suggested range from 0.7 billion to 1.2 billion: http://www.religioustolerance.org/isl_num.htm (at 16 April 2005).

⁷⁸ Mary Ann Glendon *The Transformation of Family Law* (University of Chicago Press, Chicago, 1989) 89.

⁷⁹ Ann Elizabeth Mayer “Reform of Personal Status Laws in North Africa: A Problem of Islamic or Mediterranean Laws?”, *Women Living Under Muslim Laws (WLUML) Occasional Paper 8*, July 1996, 5; available at: <http://www.wluml.org/english/pubs/rtf/occpaper/OCP-08.rtf> (at 16 April 2005).

⁸⁰ See Jacques Foyer, “French Law” in *The Reform of Family Law in Europe* AG Chloros (ed) (Deventer, Kluwer, 1978) 79-80; Dorothy Stetson, *Women’s Rights in France* (New York, Greenwood Press, 1987), 83-84.

punished for his adultery if he brought his mistress to the family home.⁸¹ Mayer writes:⁸²

Legal steps to give French women their long-deferred equality were taken within the span of just one decade, the period 1965-75. Only in 1965 did a wife get the right to work without her husband's permission, and only in 1970 did husbands finally forfeit the rights that came with their status as head of the family (*chef de famille*).

Thus it would appear that man-made laws are not always “rational”, even though, as Salton points out, they ought to be, and even though their instigators might consider them rational at the time of their introduction. It is submitted that the underlying reason which led to the enactment of the laws in the Code of Napoleon in 1804 was probably fear and misunderstanding: a fear of women becoming too strong and too powerful for men to control if given the same legal and political rights as men; a misunderstanding of the equality that ought to exist between men and women. It is suggested that fear and misunderstanding seem to be driving developments in France, and elsewhere, in the present day, but these days the fear is no longer of the power that *women* might yield, rather, the fear now is of *Muslims* (even Muslim girls) and the power that they might yield if given full equality of rights such as the freedom of religious expression. In short, the fear underlying the granting of women’s rights in nineteenth century France has been supplanted by the fear of granting religious freedom to minorities, especially the Muslim minority, in present day Western secular states such as France. The whole issue is far more complicated than the French Government has been willing to admit, concentrating as it did on issues of equality between the sexes, when the real issue was the fear (justified or not) that ordinary French citizens feel at the growing power of Islamic “fundamentalism” in their country, and probably in Europe as a whole.

IV “AN INTOLERABLE SYMBOL OF DISCRIMINATION AGAINST WOMEN”

Whether the growing fear of Islam in Europe is well-grounded or not should be the subject for debate. To determine whether the fear is warranted, the only solution can be an honest, thorough inquiry into the bases for so-called religious beliefs and practices. A thorough inquiry would reveal that the headscarf and the practice of FGM are not on the same side of the ledger. Headscarves are worn because it is a requirement in Islamic law that women cover their bodies and dress modestly. This is understood by Muslims to be better for them as individuals, for the sanctity of marriage and for society as a whole. By comparison, FGM is forbidden in Islam as an extreme form (of the probably permitted but not obligatory practice) of female circumcision (the removal of the prepuce, not excision and infibulation). Headscarves are usually worn voluntarily by young women and adults. FGM is usually carried out on babies or young girls who have no choice in the matter. Headscarves are usually placed on one’s head by one’s own physical actions. FGM

⁸¹ Mayer, above n 79, 21.

⁸² A summary of the evolution of women's status in French law can be found in Foyer, "French Law", above n 80, 75-109; also Mayer, above n 79, 5.

is usually carried out by a process of holding the baby/girl/woman down while the procedure is carried out.

Following on from a process of honest inquiry there is also a need for education and discussion involving all groups in society – Muslims and non-Muslims alike – regarding the underlying reasons why adherents favour practices such as wearing a headscarf (or turban, or yarmulke or habit for that matter). Muslims – as much as any group – need to be educated about the fact that FGM is forbidden in Islamic law.

The problems that presently exist in integrating Muslims into Western societies such as France can only be exacerbated if governments ignore the underlying problem and instead try to clothe the issue simply in terms of Islam's encroachment upon "secularity" and its alleged attack on "women's rights". French feminists seem to have hijacked the headscarf debate by turning the issue into one of women's rights, when the girls themselves are not demanding the "right" to take off the headscarf. The non-Muslims' apparent concern for headscarf-wearing schoolgirls seems rather hollow when the law banning headscarves was passed by, what Salton calls, a "devastating majority of men", because "women make up only a fraction of the total number of French MPs".⁸³

As for the future of the headscarf in France, it is interesting to note that some sectors of the French public were so upset over the wearing of headscarves in schools that they signed a petition, published in the French-language *Elle* magazine in December 2003, calling for the outright banning of the Islamic headscarf. The sixty female signatories, that included celebrities, sociologists and philosophers, declared the headscarf to be an "intolerable symbol of discrimination against women" and called for a complete ban on "this visible symbol of the submission of women".⁸⁴ Perhaps the ban on wearing the headscarf in public schools is only the beginning.

A Perception and reality

When Ferushta Ludin, a school teacher in a state school in Stuttgart, Germany was banned by local educational authorities from teaching with a headscarf, she took her case to Germany's constitutional court. She argued that she should not be barred from teaching whilst wearing a hijab because the German constitution guaranteed her freedom of religious expression and unlimited access to public jobs. The minister responsible for education in the state of Baden-Wuerttemberg, Annette

⁸³ Salton, above n 1, 23.

⁸⁴ As the original petition was published in French, I have relied upon other media reports of its translation: including *The Guardian*, available at: <http://www.guardian.co.uk/france/story/0,11882,1101321,00.html> (at 16 April 2005); Aljazeera.net <http://english.aljazeera.net/NR/exeres/47FF05A2-E892-4650-859A-608F640EBB1F.htm> (at 16 April 2005). According to the latter source, the petitioners apparently wrote that: "The Islamic veil sends us all - Muslims and non-Muslims - back to a discrimination against women which is intolerable."

Schaven, argued that the headscarf was political and "understood as a symbol of the exclusion of woman from civil and cultural society" (emphasis added).⁸⁵ The problem here, as in France, is that the headscarf is understood to be a symbol of exclusion and inequality: but understood by whom and why? The Muslim women who wear it do not understand it that way,⁸⁶ thus it must be a reference to non-Muslims. But why should non-Muslims view the headscarf in such a negative light? If the women themselves want to wear it, why should others want to step in and protect them from their own personal wishes?

After all, women around the world (in most countries) are free to wear revealing clothes that many Muslim women (and perhaps even non-Muslims) find inappropriate at times, perhaps being too revealing or unsuitable for a particular person in a given situation. The London-based Arabic daily newspaper, *Al-Quds Al-Arabi*, made this point in relation to the French ban on headscarves, when it observed that, "It is illogical that French laws allow girls to wear short tight skirts, show their breasts, plunge into vice, and then prevent them from covering their heads...Covering one's head is illegal, but showing breasts, bottoms and legs, that is legal."⁸⁷

The viewpoint expressed in *Al-Quds Al-Arabi* is probably representative of many Muslims, namely, that there is an apparent inconsistency in preventing girls from covering their heads based on a desire for modesty when there are neither social nor legal consequences for girls who choose *not* to cover other parts of their body. As such, many headscarf-wearing Muslims feel as if they are being directly targeted and that Muslim women and girls are being unfairly forced to uncover.

B The real target?

The incoherence of banning the headscarf in the secular state schools of France is further highlighted by the fact that many other religions were not overtly targeted, and exhibiting signs of one's political affiliations did not seem to concern either the Stasi Commissioners or the general public.⁸⁸ If adherence to the principle of *laïcité* was the underlying reason for the ban on headscarves, then ought not the French Government to have banned any signs of one's religious affiliations, not just signs worn on the head or around the neck? Logically, the ban should have specifically

⁸⁵ Catherine Field, "Culture Clash Comes to a Head" *New Zealand Herald* 30 September 2003, 2.

⁸⁶ See above at 4-5, where it is argued that many women who voluntarily wear the headscarf enjoy wearing it and feel that it gives them protection and sexual equality.

⁸⁷ See report in "Bad Press for Headscarf Ban" BBC News (13 December 2003) available at: <http://news.bbc.co.uk/1/hi/world/europe/3316605.stm> (at 16 April 2005).

⁸⁸ It is interesting that "big crosses, headscarves and kippas" were specifically mentioned (Salton, above n 1, 4, n 12) but wearing T-shirts that display one's membership of, for example, animal rights groups and therefore belief in animal welfare, was not seen as a concern.

included T-shirts, badges, stickers, even facial hair, if any such symbol might give away one's religious beliefs and impinge on the principle of *laïcité*.⁸⁹

Perhaps the truth is that this ban was aimed squarely at Islam, that it was the culmination of at least two decades of increasing anger within French society at the conspicuousness of headscarves, especially in schools, and that this law was what the French public believed was needed to stop the increasing strength of a foreign and unwanted religious and political movement within their country. By striking at schools, a sphere within state control, the French public were seemingly taking a stand against Islam, a stand that they could not (or at least not yet) take to the wider community, since forcing all Muslim women to remove their headscarves would (at present) not be politically or practically viable.⁹⁰ It is suggested that the headscarf ban was powered by something more than an apparent need to protect girls' rights, or the need to respect the principle of *laïcité*.

V DEFAMATION OF RELIGIONS

The United Nations Commission on Human Rights adopted a resolution on 12 April 2005 by a roll-call vote of 31 in favour, 16 against, and five abstentions regarding its concern over the defamation of religions, particularly Islam.⁹¹ The resolution, drafted by Pakistan on behalf of the Organisation of the Islamic Conference, "noted with concern" that "defamation of religions is among the causes of social disharmony and leads to violations of human rights."⁹² The resolution

⁸⁹ Education Minister Luc Ferry suggested beards could also be banned from schools, because they have become associated with Islamic radicals, and Jean-Yves Souben, headmaster of the Garcia-Llorca high school, north of Paris said "Things in schools could become surreal, I have a beard, like half the male teachers in the French education system!": "French Headscarf Ban Set to Misfire", *New Zealand Herald* (3 February 2004) available at: <http://www.nzherald.co.nz/index.cfm?ObjectID=3547065> (at 16 April 2005). The banning of beards may have been used as a humorous example of how difficult it is to ban all signs of religious affiliation, yet beards have been banned in Turkish educational institutions. On 23 July 1998 the Vice-Chancellor of the University of Istanbul issued a circular stating that students with beards and students wearing the Islamic headscarf would be refused admission to lectures, courses and tutorials: see Press Release of the Chamber Judgments of the European Court of Human Rights *Leyla Şahin v Turkey* Application No 44774/98, (29 June 2004) available at: <http://www.echr.coe.int/Eng/Press/2004/June/ChamberjudgmentsSahinandTekin.htm> (at 3 May 2005).

⁹⁰ Although such a ban might be attempted in the future, as the *Elle* magazine petition showed that there is some support for banning the wearing of headscarves completely. A ban on the wearing of face coverings has been introduced in Italy, after the lower and upper Houses of the Italian Parliament recently passed "anti-terrorism measures" including the imposition of a term of imprisonment of two years, or a 2000 euro fine, for anyone covering their faces in public. This "anti-terrorism" measure applies to women wearing the nikab or face-veil: see BBCNews "Italian anti-terror law enacted" (30 July 2005) available at: <http://news.bbc.co.uk/2/hi/europe/4731711.stm> (at 9 August 2005).

⁹¹ United Nations Commission on Human Rights (12 April 2005) *Combating Defamation of Religions* (E/CN.4/2005/L.1), [hereinafter referred to as "the UNCHR Resolution"] available at: <http://daccessdds.un.org/doc/UNDOC/LTD/G05/119/82/PDF/G0511982.pdf?OpenElement> (at 16 April 2005).

⁹² The UNCHR resolution, above n 91, preambular paragraph 14, p3.

noted with “deep concern” the recent trend of “statements attacking religions, Islam and Muslims in particular, especially in human rights forums”.⁹³

A UNCHR Resolution on Defamation of Religions

To better illustrate some of the arguments put forward here, some of the key articles of the resolution are set out below:⁹⁴

The Commission on Human Rights...

...

- (1) *Expresses deep concern* at negative stereotyping of religions and manifestations of intolerance and discrimination in matters of religion or belief still in evidence in some regions of the world;
 - (2) *Strongly deplores* physical attacks and assaults on businesses, cultural centres and places of worship of all religions as well as targeting of religious symbols⁹⁵;
 - (3) *Notes with deep concern* the intensification of the campaign of defamation of religions, and the ethnic and religious profiling of Muslim minorities, in the aftermath of the tragic events of 11 September 2001;
 - (4) *Expresses deep concern* that Islam is frequently and wrongly associated with human rights violations and terrorism;
 - (5) *Also expresses deep concern* at programmes and agendas pursued by extremist organizations and groups aimed at the defamation of religions, in particular when supported by Governments;
- ...
- (8) *Stresses the need* to effectively combat defamation of all religions, Islam and Muslims in particular especially in human rights forums.

It is notable that half of the 16 states that voted against the adoption of the above articles were European countries. Their objections were summarized by the representative from the Netherlands, who spoke on behalf of the European Union and associated countries. Their objection to the resolution seems to have been based upon its focus on Islam and Muslims. The European countries wanted a “broader, more balanced text, based on the right to freedom of religion or belief and

⁹³ Ibid, preambular paragraph 15m p3.

⁹⁴ Ibid, extracts from the operative articles of the UNCHR resolution.

⁹⁵ It is unclear whether “religious symbols” includes, or could include, headscarves. The French Government seems to have taken the view that headscarves are religious symbols, hence it could be argued that the ban on wearing them is the type of action that the resolution is seeking to prohibit.

of expression.”⁹⁶ France was one of the countries that voted against the adoption of the above resolution.⁹⁷

It would be too simplistic to suggest that the voting occurred along Muslim versus non-Muslim lines. The states that voted in favour of the resolution included mainly those in which Islam is the dominant religion, but there were also many exceptions, such as Argentina, Brazil, China, Costa Rica, Cuba, Ecuador, Mexico, Paraguay, the Russian Federation, South Africa and Sri Lanka.⁹⁸ On the other hand, all of the countries that voted against the UNCHR’s Resolution mentioned that it ought not to have singled out Muslims and Islam for special protection.

It is suggested this resolution, its text and its voting record, illustrate two points. First, that many states are acutely aware of the fact that Islam is regularly defamed and that this practice has increased since 11 September 2001. Article 4 states that Islam is frequently and wrongly associated with human rights violations and terrorism. That is quite evident from the frequent connection that is made between the headscarf and women’s oppression, a connection that was used in France to help enact the headscarf ban. It is also evident in the connection that is often made between Islam and practices that clearly do violate human rights, such as FGM, as discussed above. The United Nations Commission on Human Rights has shown that these are not isolated cases of defaming Islam; rather, they are indicative of a systemic problem that exists in the media, on the Internet and is even propagated by some governments.

The second key point that can be made regarding the resolution is that it indicates the appearance of a sort of “faultline” which has developed between Western, mainly “secular” states such as the European Union, Canada, the United States (if it can be called a “secular state”) and Australia, and the rest. The former group of states (loosely called “the West”) have all experienced a relatively recent influx of immigrants, among whom are many highly visible Muslim immigrants whose integration is often seen as problematic by the existing populations. The issue of the headscarf has heightened the feeling that these minority Muslim groups are not adequately integrating into society. The experiences of these countries have shaped the way their governments and their publics view the right of freedom of religion, and the ways in which they are willing to let that right be exercised. By comparison,

⁹⁶ Ian de Jong, (Netherlands), United Nations Press Release (12 April 2005) “Commission Adopts Resolutions on Combating Defamation of Religions and on Right to Development” available at: <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/F5FAD16BD4CDAFE5C1256FE1006B4504?opendocument> (at 16 April 2005).

⁹⁷ Ibid. The 16 states that voted against the UNCHR resolution were: Australia, Canada, Dominican Republic, Finland, France, Germany, Guatemala, Hungary, Ireland, Italy, Japan, Netherlands, Romania, Ukraine, United Kingdom, and the United States.

⁹⁸ Ibid. The 31 states that voted in favour were: Argentina, Bhutan, Brazil, Burkina Faso, China, Congo, Costa Rica, Cuba, Ecuador, Egypt, Eritrea, Ethiopia, Guinea, Indonesia, Kenya, Malaysia, Mauritania, Mexico, Nepal, Nigeria, Pakistan, Paraguay, Qatar, Russian Federation, Saudi Arabia, South Africa, Sri Lanka, Sudan, Swaziland, Togo and Zimbabwe. The five abstentions were from Armenia, Honduras, India, Peru and Republic of Korea. Gabon was absent.

“the rest” of the countries, such as the states in South America, Africa, the Middle East and Asia that voted in favour of the resolution, have not experienced these difficulties, either because they are mainly Muslim (or have significant Muslim populations) already and thus the integration of immigrant Muslim minorities is not an issue, or because they understand the concept of “freedom of religion” differently. Perhaps they do not feel that their fundamental values, such as secularity, are being threatened by the religious minorities who are living amongst them.

VI A CLASH OF “ISLAMIC ORIENTATIONS” RATHER THAN “CIVILIZATIONS”

It is suggested that there is less a “clash of civilizations” operating here, than a clash of responses to the challenge of Islam: the anti-Islam states versus the pro-Islam and the neutral-Islam states.⁹⁹ The “pro-Islam” and “neutral-Islam” states cannot be categorised as belonging to one single civilization, but they do have in common either sympathy for or empathy with the defamation of Muslims and Islam. The argument here is that Islam has become a sort of political point of reference with each country assuming a different position on the compass depending on its reaction to and tolerance for Islam (or to be more precise, Islam as it is perceived in each particular state).

Based on the reactions of states to the United Nations’ Commission on Human Rights’ Resolution on Combating Defamation of Religions, an alternative framework is put forward here which may enhance our understanding of what we can expect in the future. The scenario suggested here is that what we are witnessing is a clash - not exactly between civilizations as Huntington has suggested - but between states who are aligned according to their “Islamic orientation”. Lined up on one side are states from Africa (Bhutan, Burkina Faso, Congo, Eritrea, Guinea, Kenya, Mauritania, Nigeria, South Africa Sudan, Swaziland, Togo and Zimbabwe), South and Central America (Argentina, Brazil Costa Rica, Cuba, Ecuador, Mexico and Paraguay) and the Middle East and Asia (China, Egypt, Ethiopia, Indonesia, Malaysia, Nepal, Pakistan, Qatar, the Russian Federation, Saudi Arabia, Sri Lanka).¹⁰⁰ These states all arguably share a “pro-Islam” or “neutral-Islam” orientation.¹⁰¹

⁹⁹ This is rather simplistic and it does not explain why all of the 16 states voted against the UNCHR resolution, and why the 31 states voted for it. Instead of “anti-Islam”, one might read this as meaning, “those that are struggling with the presence of Islam inside their country and have taken steps to minimize its influence”. That is the essence of the idea that is trying to be conveyed here.

¹⁰⁰ Only the states that voted on the UNCHR resolution on the defamation of religions are listed here.

¹⁰¹ This is necessarily a rather loose generalisation. One could take issue with many of these states and point to instances in which they have not acted as “pro-Islam” or “neutral-Islam” states. The most glaring example would probably be the Russian Federation, given its history of involvement in Afghanistan and, more recently, Chechnya. However, the Russian Federation did vote in favour of the UNCHR resolution, thus allowing it to be placed in this grouping for the purposes of the current argument.

On the other side of the compass are the European Union and associated states (Finland, France, Germany, Hungary, Ireland, Italy, Netherlands and Romania), predominantly Christian countries aligned with the European Union states (Australia,¹⁰² Canada,¹⁰³ the Dominican Republic,¹⁰⁴ Guatemala,¹⁰⁵ the United Kingdom,¹⁰⁶ Ukraine¹⁰⁷ and the United States¹⁰⁸) as well as Japan.¹⁰⁹

These (loosely called) “anti-Islam” states cannot be said to belong to one “civilization” - they cannot be grouped together by their similarity of religion, geographical area or historical ties - thus presenting a problem for any “clash of civilizations” type of methodology. However, their responses to the Resolution on the Defamation of Religions is evidence that they do share some form of negative feeling towards Islam and that they object to affording Islam and Muslims specific protection.

In support of this proposition, it is noted that many states have shown themselves as being so anti-Islam that they are willing to vote against an entire resolution, which for the most part is quite general in its condemnation of the defamation of *all* religions, because they object to Islam being singled out in some places for special attention.¹¹⁰ This distinction between states on the basis of their “Islam orientation” is underlined by the fact that some states that voted in favour of the resolution did so even though they would have preferred other religions to have been specifically mentioned. China, for example, said that it voted for the resolution because it was against the defamation of any religion, including Islam. Cuba likewise said that “no religion should be defamed but Islam requires special treatment” and Costa Rica

¹⁰² Australia is 76.4% Christian, although this is made up of different denominations: see CIA, The World Factbook (10 February 2005) available at: <http://www.cia.gov/cia/publications/factbook/geos/dr.html> (at 16 April 2005).

¹⁰³ Canada is at least 82% Christian since its population is 46% Roman Catholic and 36% Protestant, but the 18% “other” does not specify whether other Christian groups are also included in the latter figure: Ibid 59.

¹⁰⁴ The Dominican Republic is 95% Roman Catholic: Ibid 59.

¹⁰⁵ Guatemala is predominantly Roman Catholic and Protestant, and indigenous Mayan beliefs are also practised.

¹⁰⁶ The United Kingdom is predominantly Christian (there are estimated to be 40 million Anglicans and Roman Catholics), although interestingly Muslims (at 1.5 million) outnumber some Christian denominations (Presbyterians at 800,000) and are the second largest religious group, behind the Christians: Ibid, above n 59.

¹⁰⁷ The Ukraine is predominantly Christian orthodox: Ibid 59.

¹⁰⁸ The United States is predominantly Christian with a total of 78% (Protestant 52%, Roman Catholic 24% and Mormon 2%), Ibid 59.

¹⁰⁹ Japan is 84% Shinto and Buddhist: Ibid 59.

¹¹⁰ Of the 18 operative articles in the UNCHR resolution, only 4 articles specifically refer to Muslims or Islam or both. The other articles use general phrases such as “racism”, “xenophobia” and “defamation of religions”, which obviously refer to all religions. Despite that, of the 16 states that voted against the resolution, those that made a comment explaining their vote all mentioned their opposition to Muslims and/or Islam being singled out for attention, and they would have preferred a resolution that mentioned all religions, not just Islam. Honduras’ representative specifically mentioned Christianity and Judaism as two religions which ought to have been specifically mentioned, along with Islam.

voted for it even though it expressed the hope that next year it would “have a more universal language.”¹¹¹

Although this writer does not entirely agree with Huntington’s “clash of civilizations” analysis, he does seem to have hit upon something when he states that, “The underlying problem for the West is not Islamic fundamentalism. It is Islam...The problem for Islam is not the CIA or the U.S. Department of Defense. It is the West...”¹¹²

It is suggested that what we have seen recently regarding the UNCHR’s Resolution on the Defamation of Religions and the earlier ban on the headscarf in France is evidence of a trend which sees states aligning themselves according to their approach to the challenges posed in their individual counties by Islam, what I have referred to above as their “Islamic orientation”.

The argument that many South American states are placing themselves in the “pro-Islam” or “neutral-Islam” camp found strong support recently with the holding of the inaugural Summit of South American-Arab Countries, in Brasilia, from 10-11 May 2005.¹¹³ The Summit concluded with the adoption of the Declaration of Brasilia, which included several provisions aimed at supporting Arabs, particularly Palestinians, and which is generally at odds with the United States’ policy.¹¹⁴ This development of increased co-operation between the states of South America and the Middle East provides support for the argument that has been advanced here, that nations are aligning themselves increasingly according to their “Islamic orientation”.

VII WHERE WILL THE HEADSCARF BATTLE BE FOUGHT NEXT?

The question of whether Muslim girls and women should be allowed to wear headscarves in educational institutions, and elsewhere, may have only just begun. The issue has already arisen in many countries, besides France. Germany, the

¹¹¹ See UNCHR Press Release 12 April 2005, available at: <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/F5FAD16BD4CDAFE5C1256FE1006B4504?opendocument> (at 16 April 2005).

¹¹² Samuel P Huntington *The Clash of Civilizations and the Remaking of World Order*, above n 20, 217-218. The writer does not agree with the words that are left out of this quote regarding the claim that both the West and Islam are convinced of their superiority. This quote is used here to illustrate the importance of Islam as a political polemic.

¹¹³ See the official website of the Summit of South American–Arab Countries available at: http://www2.mre.gov.br/aspa/en_home.htm (at 16 May 2005).

¹¹⁴ The Brasilia Declaration condemns the Israeli occupation of Palestine and calls for the withdrawal of Israel to its pre-1967 borders. It also denounces the United States’ economic sanctions against Syria and although it denounces terrorism, it also asserts the rights of peoples to resist foreign occupation in accordance with the principles of international legality and in compliance with international humanitarian law: see Aljazeera.net “Brazil summit policies at odds with US” (11 May 2005) available at: <http://english.aljazeera.net/NR/exeres/8362939C-770A-4A62-95FB-416DA1B4AE7C.htm> (at 16 May 2005).

United States,¹¹⁵ Canada, Turkey,¹¹⁶ Belgium, Denmark,¹¹⁷ and Italy¹¹⁸ have each experienced their own headscarf controversies and this trend looks set to continue.¹¹⁹

The difficulty of banning the Islamic headscarf is proving problematic for other religions, such as Judaism, Catholicism and Sikhism, which also have religious requirements for covering the head. Catholic nuns in Germany have voiced their strong opposition to removing their habits in classrooms if the proposed bans on headscarves in some states are implemented. Some German nuns feel that their habits cannot be compared to the “oppressive” headscarf of the Muslims and claim that the crucifix cannot even be mentioned in the “same breath as the headscarf”.¹²⁰

It is predicted that the battle over the headscarf will remain a hot issue around the world, as each government turns its attention to the issue and finds its own way of dealing with it. The headscarf debate has recently spread from the classroom and workplace to the sports field. An American basketball player was allegedly prevented from playing for her college team after she converted to Islam and insisted on wearing long-sleeved shirts, pants and a hijab.¹²¹ The battle over the headscarf in Europe, far from being dampened down by legislative bans, looks set to expand as the issue heads to the European Parliament in Strasbourg.¹²²

¹¹⁵ An 11-year-old American schoolgirl was suspended for five days in 2003 for refusing to remove her hijab: see Aljazeera, Shaista Aziz “US Schoolgirl in hijab victory” available at: <http://english.aljazeera.net/NR/exeres/9A905A11-1711-4876-A45F-AA83FB0E1E2D.htm> (at 16 May 2005).

¹¹⁶ Two Turkish sisters were arrested and held in custody in 2003 for attending demonstrations demanding the right to wear the hijab. Turkish law bans the hijab in universities, higher educational establishments and Islamic colleges: <http://english.aljazeera.net/NR/exeres/A30164A1-0E41-4C43-B452-5F648D537680.htm> (at 16 April 2005).

¹¹⁷ Denmark’s Supreme Court has ruled that a supermarket was entitled to fire a Muslim woman who wore her hijab to work. The woman had signed a contract which banned headgear in front of customers: <http://www.prohijab.net/english/denmark-hijab-news.htm> (at 16 April 2005).

¹¹⁸ An Italian woman has been fined twice for wearing the all-enveloping veil, sometimes called the burqa, in her hometown in the province of Como. She was ticketed under a 1931 law, imposed under the fascist dictator Benito Mussolini, which prohibits citizens from “masking themselves in public”: <http://www.prohijab.net/english/italy-hijab-news.htm> (at 16 April 2005).

¹¹⁹ For country-by-country updates of hijab issues, see the Assembly for the Protection of Hijab website: <http://www.prohijab.net/english/hijabban-news.htm>.

¹²⁰ See Kate Connolly, “Nuns defend habits in row over Islam scarf ban” Telegraph (16 January 2004) available at: http://www.telegraph.co.uk/news/main.jhtml;sessionid=PFP1OKLD14OYPQFIQMGSM54AVCBQWJVC?xml=/news/2004/01/16/wnun16.xml&secureRefresh=true&_requestid=38106 (at 26 April 2005).

¹²¹ Andrea Armstrong claims that she was forced to quit her team after insisting on wearing the Islamic clothing, as her coach told her that the clothing would make her teammates feel uncomfortable and that Islam oppresses women: <http://www.prohijab.net/english/USA-hijab-news.htm> (at 16 April 2005).

¹²² On 21 February 2005, a Written Declaration Calling for the Right of Religious Dress in France and Throughout the European Union was launched at the European Parliament in Strasbourg (0005/2005). Pro-hijab groups, such as the Assembly for the Protection of the Hijab, supported by other religious groups whose adherents wear headgear, such as Sikhs, are attempting to have the European Parliament adopt their declaration, which would protect the right to wear religious

Countries which have a significant or majority Muslim population are not immune from the issue. Nigeria, Turkey, Morocco, Tunisia, Uzbekistan, Malaysia, Singapore, the United Arab Emirates, and even Saudi Arabia, have experienced how difficult it is to ban the wearing of the headscarf in schools, universities and in the workplace. The fact that many “Muslim” countries have tried to restrict the wearing of the headscarf (or restrictions on boys’ Islamic headwear) supports the argument being advanced here that there is not really a clash of civilizations, rather a clash of approaches or orientations towards Islam. If the clash of civilizations hypothesis were true, then all Muslim countries would be expected to have taken the same approach to the wearing of the headscarf, namely, they would unanimously support the wearing of it. That has not been the case.¹²³

A New Zealand and the headscarf debate

New Zealand has already had a taste of things to come with the recent case in Auckland concerning the Afghan women who requested that they wear the *burqa* in court whilst giving evidence.¹²⁴ In the sphere of education, New Zealand schools – like their French counterparts – have had to address whether students should be allowed to wear items that are outside the school dress code on the basis of students’ religious beliefs.

B Islamic dress in New Zealand schools

In 1994 the New Zealand Human Rights Commission (HRC) had to determine whether a school’s requirement that a Muslim student wear shorts and socks rather than trousers amounted to discrimination.¹²⁵ The student, a 4th form boy, maintained that, because of his religious beliefs, he felt compelled to wear clothes that covered all of his legs in loose-fitting clothing. The HRC reviewed the school’s uniform code, which the school strictly enforced because it claimed that: “in a school with such a diversity of race, culture and social economic background the

headwear in Europe. To become a resolution debated in the European Parliament, at least half of the Members of the European Parliament will have to support the Written Declaration within 3 months, that is, by 21 May 2005. As of 12 May, only 70 of the required 367 signatories had signed up: see <http://www.prohijab.net/english/main.htm> (at 16 May 2005). An English version of the Written Declaration is available at <http://www.prohijab.net/english/written-declaration/EN.doc> (at 16 May 2005).

¹²³ In Uzbekistan, Human Rights Watch reported that many university students were expelled for wearing Islamic clothing, including the headscarf, in 1997 and 1998: <http://www.hrw.org/reports/1999/uzbekistan/uzbek-04.htm> (at 16 April 2005).

¹²⁴ *Police v Abdul Zahoor Razamjoo* Auckland District Court (CRN 30044039397-8), 17 January 2005.

See Griffiths, D “There’s no Art to Find the Mind’s Construction in the Face: Some Thoughts on the Burqa Case in New Zealand” NZPGLeJ (2005/1) UPD2.

¹²⁵ C149/94 Human Rights Commission, 17 August 1994, available at <http://www.hrc.co.nz/index.php?p=13684&id=13957&wd0=marlborough&wd1=girls&wd2=college&format> (at 2 May 2005).

uniform symbolises that despite the differences ... when the students come together they do so as equals."¹²⁶ The HRC was required to weigh this against the provision that prohibits “indirect discrimination” in section 65 of the Human Rights Act 1993.¹²⁷

The HRC found that requiring the Muslim boy to wear shorts and socks indirectly discriminated against him on the grounds of his religious beliefs and that granting him a dispensation to wear trousers (which 6th form boys wore) would not undermine the objectives of the uniform code. It also noted that some Somali girls had been allowed to wear headscarves in the past and that a nearby primary and intermediate school had allowed the complainant’s sisters to also wear headscarves. The school resolved the matter by then granting the complainant a dispensation to wear trousers, agreeing to allow other male Muslim students to seek dispensation and amending the uniform code to allow dispensation for uniform requirements in special circumstances for religious or medical reasons. The fact that the matter had to come before the HRC in order to find resolution says something about the resistance that some New Zealand schools have to allowing their students to wear clothing that aligns with their religious beliefs. The finding of the HRC that the school had indirectly discriminated against the boy says even more about the way that New Zealand legislation protects religious freedom, especially when contrasted with many other countries, particularly those of the European Union, discussed above.

C Cultural versus religious symbols

In 2004, the issue of wearing spiritual symbols arose at Marlborough Girls College, which had a uniform policy that permitted the wearing of visible greenstone pendants or bone carvings, considered as Maori “taonga” (treasures), but required Christians and those practising other religions to keep their pendants on a long chain so that they would not be visible.¹²⁸ A student, Megan Church, was told that she could not visibly display her crystal amethyst pendant, which she asserted she had worn since she was 10 years old due to the stone’s “calming effect”. A HRC mediator was asked to assist in resolving the dispute. The HRC Disputes Resolution Manager observed that: “Schools are increasingly finding themselves in the position of needing to accommodate a diverse range of cultures. While this

¹²⁶ See C149/94 HRC.

¹²⁷ Section 65 reads: “Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of this Part of this Act has the effect of treating a person or group of persons differently on one of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under any provision of this Part of this Act other than this section, that conduct, practice, condition, or requirement shall be unlawful under that provision unless the person whose conduct or practice is in issue, or who imposes the condition or requirement, establishes good reason for it.”: Human Rights Act 1993, section 65.

¹²⁸ See New Zealand Herald, “Dress code dispute goes to mediation” (10 March 2004) available at: <http://www.nzherald.co.nz/index.cfm?ObjectID=3553734> (at 2 May 2005).

diversity is positive, allowing for it in uniform policy can be complex.”¹²⁹ The matter was resolved privately between the parties. The student no longer attends Marlborough Girls High. The dress-code at the school remains essentially the same: the display of “taonga” which is displayed for “cultural reasons” is permitted but “religious or spiritual items may be tucked out of sight.”¹³⁰

This school’s approach to the outward display of cultural, religious and spiritual symbols is interesting. It is difficult to see why cultural symbols are permitted to be visibly displayed on the students but religious and spiritual symbols are not. This distinction bears more than a passing resemblance to the French ban on ostentatious religious symbols in public schools, revealing an apparent desire in a New Zealand secondary school to prevent students from visibly disclosing their religious beliefs. It is argued that this approach may amount to indirect discrimination, a violation of section 65 of the Human Rights Act 1993 (“HRA”) and perhaps also section 15 of the New Zealand Bill of Rights Act 1990 (“NZBORA”). It might be argued that the limitation on the wearing of religious symbols is a justifiable limitation, in terms of section five of the NZBORA, but the school may find it difficult to explain why it is justifiable for cultural symbols to be displayed whilst spiritual and religious symbols must be kept hidden.

The New Zealand HRC, in a draft report that is yet to be released, notes that although primary school education in New Zealand is required by law to be secular, there is no equivalent requirement for secondary education. As such, it may prove difficult to justify the restrictions on religious symbols in Marlborough Girls’ College’s dress-code on the grounds of secularity. The difficulty of banning the display of religious symbols has been expressly noted by the Human Rights Commission in its draft report.¹³¹

Despite the examples discussed above, the wearing of Islamic headscarves in schools has, to date, not been perceived as much of a problem here. There has been one complaint to the HRC regarding a school which did not permit a girl to wear the Islamic headscarf or to lengthen her skirt. That complaint was apparently resolved by a Ministry of Education facilitator.¹³² However, there is a small but conspicuous presence of headscarf-wearing schoolgirls in New Zealand at both primary and

¹²⁹ Mervan Singham, Disputes Resolution Manager, HRC, “Statement on the Marlborough Girls’ College dress code complaint” (24 March 2004) available at: <http://www.hrc.co.nz/index.php?p=13796&id=44867> (at 2 May 2005).

¹³⁰ The 2005 Prospectus of Marlborough Girls’ College notes: “Cultural items, such as taonga, where display is intrinsic to the culture and/or the item may with the approval of the Principal, be worn openly. Religious or spiritual items may be tucked out of sight.” This extract was kindly provided to the writer by Carolyne Jurriaans, Communications Officer at the Human Rights Commission.

¹³¹ See HRC draft report, “Muslim women, dress codes and human rights: an introduction to the issues” at p13: “A blanket ban on religious symbols or dress may also impact disproportionately on students who adhere to certain faiths thereby constituting indirect discrimination under section 65 of the Human Rights Act 1993, unless there is good reason for it. ‘Good reason’ could be to address health and safety concerns or where the practice disrupts other students’ rights.”

¹³² See HRC draft report, above n 131 at p14, n72.

secondary schools. Anecdotal evidence suggests that they are mainly Somali, Fijian-Indian and Iraqi. Most schools resolve the issue by changing their dress-code to allow Muslim students to wear clothing that they feel comfortable with, such as a headscarf for girls, a longer skirt, or trousers.¹³³ Some schools stipulate that if headscarves are going to be worn, then they must be black or white colour only,¹³⁴ or the school's colours.¹³⁵ In New Zealand, parents, teachers and fellow students do not yet seem to have much of a problem in accepting a few girls covering their heads. But perhaps this may change in the future, since it also has to be acknowledged that New Zealand's Muslim immigrant influx has occurred relatively recently, when compared to European countries, such as France.

VIII CONCLUSION

This article has addressed two practices which are widely recognised as being associated with Islam: the wearing of the headscarf and female circumcision. It has sought to determine whether these practices are truly Islamic or whether their connection with Islam has been misinterpreted. By virtue of the analysis regarding these two particular practices, this article has attempted to comment on the wider question of whether Islam and human rights (in the Western sense) are mutually incompatible. It is suggested that several conclusions may be reached from the foregoing.

First, the wearing of a headscarf by Muslim girls and women is considered by those who wear it to be a religious obligation based on notions of modesty and piety. It is not perceived by its wearers as a symbol of oppression or an acknowledgement of inequality. Wearing a head-covering is a manifestation of one's religious beliefs - a human right that has been recognized and protected by both international institutions, such as the United Nations,¹³⁶ and arguably individual states, such as New Zealand.¹³⁷

¹³³ The HRC refers to Wellington East Girls' College and Mt Roskill Grammar School as two schools which have addressed the issue by amending their dress-code: see HRC draft report, above n 131 at 14.

¹³⁴ This is anecdotal evidence based on the current practice of two Hamilton primary schools.

¹³⁵ See HRC draft report, above n 131 at p14 referring to the dress-code at Wellington East Girls' College.

¹³⁶ For example, the United Nations Human Rights Committee has stated that the observance and practice of religion or belief may include the wearing of distinctive clothing or head-coverings. See the United Nations Human Rights Committee, General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art 18), CCPR/C/12/Rev.1/Add.4 as cited in the draft report of the New Zealand Human Rights Commission "Muslim Women, Dress Codes and Human Rights: An introduction to the issues", May 2005 p8, fn 35.

¹³⁷Section 15 of the Human Rights Act 1993 (NZ) provides that: "Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private". Although no specific reference is made to head-coverings in this section, the Ministry of Justice considers that the term "observance" includes the "wearing of distinctive clothing": see Ministry of Justice, The Guidelines on the New Zealand Bill of Rights Act 1990: A Guide to the Rights and Freedoms in the Bill of

Second, the wearing of the headscarf is to be contrasted with the practice of female circumcision, which is a pre-Islamic practice that is permitted in Islam but in a very limited form, in special circumstances if particular conditions are met. Although limited female circumcision is probably permitted in Islam (there are differences of opinion between scholars), there is nevertheless widespread agreement that it is definitely not a religious obligation. However, FGM is forbidden in Islam because it is an extreme practice and is not sanctioned by the sources of Islamic law. Not only is it forbidden in Islam but it is also the subject of numerous international and domestic laws prohibiting its practice.¹³⁸ The contrast between the wearing of a headscarf and the practice of FGM could not be more distinct - one is obligatory in Islam and protected by international and domestic laws, the other is forbidden in Islam and prohibited in international and domestic laws.

Third, Islam and human rights (particularly rights pertaining to women) are entirely compatible. It is suggested that neither the wearing of headscarves nor the practice of female circumcision (in the limited form in which it is permitted) pose a threat to the protection of human rights. As for the former, the wearing of a headscarf is a manifestation of one's religious beliefs – a right guaranteed by states such as New Zealand. As such it cannot logically be seen as both an exercise of religious freedom and as a practice that is incompatible with human rights. As for the latter, female circumcision is only permitted if it is limited to the removal of the prepuce, if it is medically necessary, and if it is undertaken by medical professionals using medical techniques and equipment. These conditions are often completely ignored by those who insist on continuing the practice of female genital cutting. When understood in these terms, it is quite compatible with New Zealand laws regarding female genital mutilation.¹³⁹ Without doubt, FGM is not a tenet of Islam because it is forbidden in Islam. Since the practice of female genital mutilation is not sanctioned by Islam, it cannot logically be used as an example of Islam's threat to human rights.

Rights Act for the Public Sector, available at: <http://www.justice.govt.nz/pubs/reports/2004/bill-of-rights-guidelines/index.html> (at 16 April 2005).

¹³⁸ Female genital mutilation is a crime in New Zealand by virtue of section 204A of the Crimes Act 1961.

¹³⁹ The definition of FGM in section 204A(1) of the Crimes Act 1961 (NZ) is very wide: "Female genital mutilation' means the excision, infibulation, or mutilation of the whole or part of the labia majora, labia minora, or clitoris of any person". It is arguable as to whether this definition includes Islamic female circumcision, which is limited to the removal of the prepuce, or hood, of the clitoris, not the mutilation of the clitoris itself. However, if the definition does include the limited form of female circumcision permitted in Islam (removal of the prepuce only), the procedure could still be performed under section 204A(3), which permits medical or surgical procedures for the sake of the person's physical or mental health. This is entirely consistent with the Islamic conditions which are attached to the procedure, as outlined above at 12-13. Islamic scholars also take the view that the procedure must be medically necessary. However, what is clear is that the procedure could not be conducted on religious grounds alone, by virtue of section 204A(4), which provides that cultural and religious reasons are not to be taken into account in any decisions taken to perform such procedures.

This article has also addressed the way in which the issue of the Islamic headscarf has been addressed in French schools and, to a more limited extent, in New Zealand schools. It is suggested that although the issue of wearing the headscarf in New Zealand schools has not been perceived as much of a concern, eventually the issue is bound to surface here, perhaps when enough of the community feel fearful or mistrustful of the Muslims in their midst. At that point, as in France, the headscarf will probably become a focus of that fear and mistrust. Inevitably, sections 13 and 15 of the New Zealand Bill of Rights Act 1990, will then come under closer scrutiny,¹⁴⁰ along with a number of other provisions which seek to protect New Zealanders who are exercising their freedom of religion.¹⁴¹ Section 15 of the Bill of Rights Act not only guarantees the right to freedom of religion for New Zealanders, but is also protects the *manifestation* of one's religion, which the New Zealand Ministry of Justice interprets as including the *wearing of distinctive clothing*.¹⁴² If the issue of the headscarf does arise here, it is difficult to say for certain how the matter would be resolved: whether the rights of the girls to wear them would be upheld, or whether the school's rights to restrict the wearing of religious symbols would prevail. The decisions of the HRC, referred to above, are not binding but they are a useful insight into what type of approach might be taken here. However, there are clearly some schools which do not see any place for visible religious symbols.¹⁴³ The French experience has shown that many people do not regard the Islamic headscarf as a dress-code issue, but as a religious symbol that has no place in the secular state education system.

One would hope that if and when the headscarf battle arrives here New Zealand might be better prepared for it, having observed the way that other states have handled (and mishandled) the issue. At least New Zealand has some robust statutory provisions that will possibly clarify the issue without the need for any further intervention by either Parliament or the courts. Perhaps New Zealand girls who want to wear a piece of material over their hair will not be perceived as such an "aggressive" threat as are their sisters overseas.¹⁴⁴

¹⁴⁰ See Griffiths' article for a discussion of how these issues have been framed to date.

¹⁴¹ In an as yet unpublished report, the HRC have identified a number of provisions which are relevant to the headscarf issue. As well as sections 13 and 15, the HRC considers that sections 14, 19 and 20 of the NZBORA may also be relevant, together with sections 21(1)(c) and 21(1)(d) of the Human Rights Act 1993.

¹⁴² See the Ministry of Justice' guidelines on the New Zealand Bill of Rights Act 1990, available at: <http://www.justice.govt.nz/pubs/reports/2004/bill-of-rights-guidelines/index.html> (at 16 April 2005).

¹⁴³ That is, Marlborough Girls' College, which is discussed above. This school's dress-code allows cultural symbols to be displayed but not religious or spiritual symbols.

¹⁴⁴ French President Jacques Chirac stated that there was "something aggressive" about the headscarf: *supra* n 8.