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The Marriage of Lille Case: The Intrusion of Popular Human Rights Discourse in Law

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Abstract

In 2008 in France, a tribunal acceded to the demand of a Muslim man for the annulment of his marriage on the grounds that his wife was not virgin. This decision, although in conformity with the prescriptions of the law and the case law, was highly criticized and was therefore finally reversed. Popular reaction against the first decision relied mostly on rights-based arguments. Interestingly those arguments were used against the will of the persons involved in the case. The large-scale reaction illustrates the general fear of the acceptance of Islamic practices in the law.

Full article

1 Introduction

In 2008, a judgment was delivered that sparked a huge reaction within both the media and public opinion in France. A Muslim man succeeded in his claim for the cancellation of his marriage on the grounds that his wife was not a virgin as she had initially professed. The magnitude of the reaction of individuals against this ruling led the government to intervene and request an appeal. These claims were grounded on human rights discourse. Human rights are the product of a transnational consensus, emerging from a transnational space. This space, setting the human rights rules, can be characterized as the 'centre' of the human rights formation. Members of the centre share a common set of values and practices, such as secularity, universality

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or the use of English[2]. At the local level, these values are not universally integrated. On the side of a part of the population which has been familiarized with the ideas of the centre, a periphery remains. The periphery's values are often based on traditions and religion. The coexistence of these two poles has given birth to translators, in charge of the introduction of the transnational discourse and values at the local level[3]. Traditionally this role is fulfilled by the national judges and politicians. One can consider that the media and the activists also play this part. Mastering both the languages of the centre and the periphery, these individuals operate the mediation between those entities. In the case discussed, public opinion has appropriated the language of the centre to challenge the position of the traditional translators. People argued that the annulment did not comply with a correct application of the human rights. The consensus against the annulment led to a decision that was against the will of both parties involved (the woman and her former husband). This consensus was certainly founded on the idea, that seems to be widespread in French society, of the fear represented by Islamic worship.

1.1 The "Marriage of Lille" Case: A Resounding Affair

On April 1st 2008, the Tribunal de Grande Instance de Lille (Court of First Instance) acceded to the claim of the husband to annul the marriage[4]. Article 180 of the French Civil Code allows one of the partners to ask for cancellation if he can prove there was a misunderstanding of the essential qualities of the other partner*. During the procedure, the wife acknowledged that her virginity was a fundamental element in their decision to get married, and agreed on the annulment. However, a few days after the judgment was published it created a large scandal in the media. Politicians, human rights organisations, bloggers and even people in the streets[5] demanded the decision to be reversed. The public's dissent went to such an extent that

2 Halme, Miia, *From the periphery to the centre: emergence of the Human Rights phenomenon in Finland* in *Finnish Yearbook of International Law*, Leiden, Ed. Creutz, Katja, Bril Academic Publishers, 2010, p. 257–258.
3 Merry, Sally Engle, *Transnational human rights and local activism: mapping in the middle*, in 108 *American Anthropologists* 1. 2006, p. 39–49.
4 Tribunal de grande instance de Lille, 01/04/2008, in *Recueil Dalloz* edition 22/05/2008, n° 20, p. 1389. * (In the entire document): translation by the author.
5 Agence France Presse (AFP), 06/06/2008.

the French Minister of Justice, Rachida Dati, who primarily supported the decision, had to resort to an exceptional procedure. She requested that the public prosecutor, as her hierarchical inferior, would appeal against the decision. On November 27th the Court of Appeal of Douai reversed the judgment[6]. It stated that "Virginity is not an essential quality, it has no impact on matrimonial life"*.

It is important to note the difference between annulment and divorce. For an annulment, the grounds must have existed before the marriage. Article 232 of the Civil Code offers a procedure for divorce by mutual consent. Article 242 allows one of the partners to seek a divorce on the basis of a violation of the duties and obligations of the marriage, which can include lying*. In this latter alternative, the wife would have been considered to be at fault because of her lie and not because of her unchaste behaviour. Therefore, the main issue was not the outcome *per se* but the grounds on which it was based. Can the virginity of a woman be considered an "essential quality" of her person?

Strictly legally speaking, the first decision, although criticized, seems to be well-grounded. Many lawyers have admitted this in their comments[7]. So how did it arise that this ruling was so negatively received in public opinion, to such an extent that it led to reversal of the decision? This is an instance of the growing importance that the human rights discourse is taking in national debate. It is interesting to observe the influence of the different discourses that took part in this debate.

6 Court d'Appel de Douai, Première Chambre Civile, Public audience of 17/11/2008, n°0803786, in *La semaine juridique générale*, edition 2009, II, p. 10005.

7 E.g.: Maître Eolas, advocate from the Paris bar, http://www.maitre-eolas.fr/post/2008/05/30/969-n-y-a-t-il-que-les-vierges-qui-puissent-se-marier. Maître Sophie Tougne, advocate from the Paris bar specialized in family law, in Le Point, 30/05/2008. Florence Sturbois-Meilhac, advocate specialized in personal law, Le Figaro, 30/05/2008. Laurence Mayer, advocate specialized in family law, http://www.avocat-divorce-paris.com/actualite-categorie-nullite-de-mariage.html. La gazette des tribunaux, http://la-gazette-des-tribunaux.blogspot.com/2008/06/quand-la-justice-sintresse-la-virginit.html.

1.2 The Success of the Human Rights Phenomenon and the Traditional Division of the Discourse

In the traditional view, coming from the 17th century, human rights are tools for individuals to protect themselves from the State. Since the end of the Second World War, an important number of 'norms, institutions and processes that seek to shield the individual from arbitrary and excessive State action' were born and have expanded to such an extent that some scholars talk about a 'human rights phenomenon'.[8] Miia Halme highlights three elements of the phenomenon: the discourse, the community and the artefacts[9]. The three of them have lately demonstrated a peculiar expansion. This development comes with a change in the shape of international society[10]. As Sally Engle Merry pointed out, a central transnational space, producing the human rights regime, nowadays coexists together with a periphery[11]. As opposed to the former, English speaking and secular, the latter is 'non-English speaking, religion-oriented', and based on traditions. The relationships between these two poles gave birth to translators. These individuals (judges, politicians, legislators) are powerful because they are capable of translating claims from the local periphery to the transnational space and vice versa. The language they master is weightier than the one used by the other members of the periphery. Therefore their interventions are respected because they are grounded in the transnational phenomenon. Due to the extension and the success of the human rights phenomenon in the collective mind, more and more people have appropriated the human rights discourse. The 'Marriage of Lille' case presents a glaring example of this phenomenon.

8 Definition of the Human Rights phenomenon, in Mutua, Makau, *Human Rights discourse: African viewpoint*, in *Human Rights: the new consensus*, Regency press, London, 1994, p.94–98.

9 Halme, Miia, *Human Rights in action,* PhD thesis, Helsinki, University Press of Helsinki, 2008, 256p., p. 7, https://oa.doria.fi/handle/10024/36063.

10 Halme, Miia, *From the periphery to the centre: emergence of the Human Rights phenomenon in Finland* in *Finnish Yearbook of International Law*, Leiden, Ed. Creutz, Katja, Bril Academic Publishers, 2010, p. 1–2.

11 Merry, Sally Engle, *Transnational human rights and local activism: mapping in the middle*, in 108 American Anthropologists 1. 2006, p. 39–49.

2 The Popular Reaction

As soon as the media echoed the case, the first and most remarkable reaction was the popular one. People gave their opinions on their blogs, and expressed their indignation publicly on TV and radio broadcasts. Some forums of news-related websites even had to close due to the amount and the controversial character of the messages[12]. Contrary to the traditional translators, the public opinion does not master the language of international human rights. It has a consequence on the content of their discourse, qualified by Duncan Kennedy as the "lay discourse of rights"[13]. These lay interventions nonetheless have an influence; echoed by the media, they led to a reverse of the decision.

2.1 The Emphasis on Secularity

Policy makers use education as a means to instil the values they want to be shared by the future generations. Miia Halme qualifies them as 'centre values'[14]. In France, the secularity of the State is one of these. This very important feature of the French society is cited in the first article of its Constitution. The 1905 law of separation between Church and State is very often cited and celebrated*. This law recognizes an unconditional freedom of conscience and establishes a strict separation, economically as well as theoretically, between the French Republic and any church. It is part of the education of every pupil in France from the primary school, at least in mandatory civic education classes*. Also it is interesting to note that the reaction did not come only from people belonging to particular movements or groups (e.g.: feminists, extremist parties, etc.). The vast majority of citizens seemed to oppose this decision, which, they argued, was against this very basis of their society. Many people resented that such a shocking thing can happen in 'our' country, in France, the 'country of freedom and secularity'. The integration of this civic value of secularity in education is older than the

12 E.g.: www.20minutes.fr and www.nouvelobs.fr.
13 Kennedy, Duncan, *The Critique of Rights* in *Left Legalism / Left Critique*, Durham & London, Eds. Brown, Wendy & Halley, Janet. Duke University Press, 2002, p. 210 et seq.
14 Halme, Miia, *From the periphery to the centre: emergence of the Human Rights phenomenon in Finland* in *Finnish Yearbook of International Law*, Leiden, Ed. Creutz, Katja, Bril Academic Publishers, 2010, p. 257–258.

inception of human rights. This anchor in the French common mind may explain why this argument was the first tool of the opponents. The emphasis on secularity also shows the importance of the applicant's religion in the case. It raises the recurrent question in the public debate on the meaning of secularity[15]. Does it imply the refusal of all beliefs or the acceptance of all religions? In the opponent's mind, secularity is used as a shield against the drifts, which religion, and especially Islam, can lead to. For the applicants in the case, this reaction can be considered an infringement of their freedom of religion. Marriage is a matter of choice but also of beliefs. The definition of what represents an essential element in the decision to get married is subjective. One cannot only apply objective civic arguments to this very personal situation, and leave all religious considerations aside, on behalf of secularity.

2.2 Essential Quality of a Person: A Subjective Element

The phrase 'essential quality of the person' used in the Civil Code is vague. It leaves room for the judge's interpretation. It is quite certain that when the first version of Article 180 was written in 1803, the virginity of the wife was encompassed in the concept of essential qualities of a person. However, societal values evolve depending on the context. According to a well-established court practice, the error of the person can be either objective or subjective. If subjective, the plaintiff has to prove that the (missing) quality he deplores was decisive in the decision to get married. In the present case, it seems clear that the virginity of the woman was a decisive subjective element for the marriage from the perspective of the husband. In case-law, some similar instances have been accepted and are quite famous, such as the fact that a Catholic man discovered that his wife had already divorced prior to the marriage (1997 case), or the impotence of the husband[16]. It is to be noted that in the 1997 case, the Cour de Cassation (French Supreme Civil Court) did not require that the essential quality had any impact on matrimonial life. This criterion was new in the Douai Court ruling. It is a

15 See for example: Guaino, Henry, special adviser of Nicolas Sarkozy: "Le sept-neuf, l'invité politique », *France Inter*, 01/12/2009.

16 Divorce: Cour de Cassation, Chambre Civile 2/12/1997, 96-10.498. Impotence of the husband: Cour d'Appel de Paris, 26/03/1982 and Tribunal de Grande Instance d'Avranches, 10/07/1973.

means to express that society's conception of the woman in the marriage has changed and therefore the criterion of virginity is not acceptable anymore.

It seems clear that the fact that the plaintiff was a Muslim amplified the intensity of the debate. The aforementioned 1997 case did not have an equivalent media response, although it was also based on a religious – but Catholic – doctrine. In people's mind it is inconceivable that an Islamic precept could be the grounds for a judicial decision. On the contrary, French justice must demonstrate the 'correct' application of rights as reflecting secular values.

2.3 The Centre Showing the 'Good' Way to the Periphery

Although all religions are considered legally equal, Islam seems to suffer from a bad image in Western countries due to prejudices promoted by the media and the general climate. Moderate Islam is associated with extremist practices. This confusion explains people's reluctance to accept Islamic worship. They consider it dangerous and incompatible with a Western vision of democracy and rights. This tense situation reveals the imbalance between two extremes of society. Using Merry's vocabulary, the Islamic community can be considered a periphery, compared to the centre of French society characterized by secularity.[17] Representatives of the centre, in accordance with the dominant pattern of rights, believe that they are in a superior position. This enables them to impose their translation of rights discourse on the less 'rights-developed' societies or segments of the society. They are secure in the idea that they belong to the 'good side' since their claim is in accordance with the majority's concept of human rights. Human rights are seen as unquestionably good arguments. Therefore, members of the majority feel entitled to teach and decide for the woman what is best for her. This reproduces the paternalistic attitude of the occidental countries towards others, imposing their own view upon what is and is not right. What is new is the fact that the vast majority of society now exercises this role, using rights' vocabulary. Because they do not master this language, they use it excessively, and even at the expense of the person they consider a victim.

17 Merry, Sally Engle, *Transnational human rights and local activism: mapping in the middle*, in 108 *American Anthropologists* 1. 2006, p. 39–49.

3 The Discourse of the Traditional Translators

The discourse of politicians, associations or even journalists, is more based on what Miia Halme calls 'human rights artifacts' that are international human rights instruments.[18] As traditional translators, they use the transnational human rights language corresponding to the lay rights claims. Associations jumped at the opportunity presented by this case, which gave them a forum through which they could denounce wider problems (e.g.: forced marriages, women's situation in fundamentalist communities), but in this particular instance they benefited from the support of human rights and a wide audience through media. Lawyers and politicians especially referred to the European Convention on Human Rights (ECHR), which has a positive image. They based their argumentation on various articles of the convention, either to criticize or to approve the annulment[19]. It seems to be the closest international instrument to the individuals. This popularity probably comes from the fact that it can be used by individuals against French Court rulings before the European Court of Human Rights[20]. In practice, the resort to this instrument turns out to be much more confusing than it looks like from the perspective of the lay discourse.

3.1 The European Convention on Human Rights, an Ambivalent Instrument

3.1.1 One Provision for Two Opposing Claims

Considering only the ECHR, one notices that both the former spouses and the public prosecutor, involved in the Appeal before the Douai Court, based

18 Halme, Miia, *Human Rights in action,* PhD thesis, Helsinki, University Press of Helsinki, 2008, 256p, https://oa.doria.fi/handle/10024/36063.

19 Francine Summa, advocate specialized in family law, http://avocats.fr/space/francine.summa/content/_4C269124-8504-461B-A1BF-EC4B89289D16. Laurence Mayeur, advocate specialized in family law, http://www.avocat-divorce-paris.com/actualite-categorie-nullite-de-mariage.html. Patrick Morvan, Law professor at University Paris 2, specialized in social law, http://patrickmorvan.over-blog.com/article-20233700-6.html. Ligue des droits de l'Homme de Toulon, a human rights defense association, http://www.ldh-toulon.net/spip.php?article2714.

20 However, no further prosecution has followed. Therefore the case was not brought before the European Court of Human Rights. The threat of a French condemnation by the European Court might have encouraged the intervention of Rachida Dati in favor of the Appeal, in addition to the popular reaction.

their arguments on the same legal grounds. Article 12 provides a right to marry. In French law, provisions setting up freedoms are considered to embody a negative as well as a positive aspect. Article 12 is therefore also used in support of cancellation: the right not to marry. This involves the right to reconsider the union on legitimate grounds if the law offers this possibility. Article 8 declares the right to privacy and family life[21]. It is invoked by the woman in the appeal, claiming that the public prosecutor's intervention in her private life is a breach of this right. However, she could also, in the manner of her popular defenders, have invoked a breach of privacy regarding her previous sexual activity in order to oppose the cancellation. Article 9 sets up the principle of freedom of thought, conscience and religion. It includes the freedom of one 'to manifest his religion or belief in worship, teaching, practice and observance'. Restrictions to this right must remain exceptional[22]. Both parties in the discussion could invoke Article 9. The supporters of the cancellation put the emphasis on freedom of religion. The plaintiff argued in the appeal that the essential quality he deplored in his wife was her inability to tell the truth about elements of her past that were fundamental within his – and his wife's – community. In this case, out of respect for his freedom to observe his religion, this conviction should have been taken into account. On the other hand, the opponents of the cancellation invoked the need to protect the public order in a democratic society.

3.1.2 The Need for a Balancing Between Rights

This shows that an argument for the support of any point of view can be rights-based. Any rights-claim can have an apparently formally valid counter rights-claim. They cannot all be legally correct though, otherwise conflicts would never be settled. In order to stand on such a conflict, one must favor one value over another. Either freedom of religion or people's concept of morals prevails. This choice is not neutral. It implies subjective judgment

21 According to Clayton and Tomlinson, the right to privacy includes "respect for a person's moral and physical integrity, personal identity, personal information, personal sexuality and personal or private space." Clayton, R. & Tomlinson, H., *The Law of Human Rights*, Oxford, Oxford University Press, 2000, para. 12.85–12.94.

22 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others. European Convention on Human Rights, article 9.

on what values should be protected in society. Human rights cannot apply as the sole rule; other considerations always come into the picture. Positive human rights law is the result of a choice made by Western countries. It is only the recognition of a pattern of values, which 'allows you to be right about your value judgment, rather than just stating "preferences"'[23]. As soon as one realizes that the 'good' balancing between rights is only a matter of choice of priorities in one society at one moment, those rules lose their absolute character. Human rights can be manipulated. From this point forward, one does not blindly believe in the human rights system anymore. One can challenge them. In theory, the choice between values belongs to the national judge. Indeed, in order to remain adaptable to different factual situations and national singularities, human rights conventions leave room for the national judge to stand on important issues.

3.2 The Role of the National Judge

Article 66 of the French Constitution gives the judicial authority the mission of guardianship of individual freedoms. Relying on this disposition, the judicial judge is, in this case, the one in charge of deciding which of the rights claims is the most receivable and which value should prevail.

Other possibilities exist. In the 1960's, Herbert Wechsler commented on a case in the context of anti-racial discrimination claims in the United States. In the absence of a 'neutral principle' by which to favor one value over another, Wechsler suggested that the judge would defer to the legislature. The final decision in the balancing of values belongs to the society as a whole, represented by the legislature.[24] This process does not exist in French law. Nevertheless, between the first judgment and the appeal, a revision of the French Constitution occurred. New article 61-1 allows a judge to remand a law to the Constitutional Court if a party of the trial claims that this law infringes on rights and freedoms protected by the Constitution*. It would have been interesting to have the opinion of the Constitutional Court on

23 Kennedy, Duncan, *The Critique of Rights* in *Left Legalism / Left Critique*, Durham & London, Eds. Brown, Wendy & Halley, Janet. Duke University Press, 2002, p. 184–185.

24 Wechsler, Herbert: *Toward neutral principles of constitutional law,* 73 Harv. L. Rev. 1, 1959, p. 16, 25, and 31.

this conflict of rights. Though perhaps this case was controversial enough, and the use of this new constitutional tool would have been too audacious.

Consequently, the final decision belongs to the judge. This is confirmed by the European Court of Human Rights since the 1976 Handyside v. United Kingdom case. The State authorities keep a margin of interpretation regarding the 'legitimate aims in a democratic society'. They are in the best position to determine the requirement of morals, due to their 'direct and continuous contact with the vital forces of their countries'. In the appeal, the judge decided to favor morality, through the notion of public order.[25]

3.3 The Reference to Public Order, a Reintroduction of Moral Considerations

According to the Court of Appeal, in this case the preservation of public order was more important than the protection of freedom of religion. It stated that the appreciation of the essential quality comes under public order control and therefore cannot be let at the disposition of the parties*. The judge and the public prosecutor, a representative of the State, can decide which motivations for a marriage are acceptable or not. Public order is defined in administrative law as the union of security, public health, peace and public morality[26].

3.3.1 The Components of Public Order

Some observers invoked public order in the sense of public health[27]. They argued, justifiably, that accepting the annulment would be very dangerous; it could lead even more young women to visit the hospital in order to remodel their hymen. Rachida Dati also used the public order argument, but in support of the first judgment; according to her, this interpretation of the law protected the young woman and would prevent forced marriages to continue[28]. The advocate for the husband considered the judgment of the Court of Appeal as a 'judicial forced marriage'.*[29]

25 Handyside v. United Kingdom (5493/72), 4/11/1976.
26 Based on former Article 97 of the *Code of Communes.*
27 Elisabeth Badinter, philosopher, *Le nouvel observateur*, 25/06/2008.
28 *Le Figaro*, 30/05/2008.
29 AFP, 16/11/2008.

The main issue in consideration is morals. Allowing the claim is to risk opening a 'Pandora's Box'[30]; any subjective opinion on the content of the concept of essential quality could be the basis for the cancellation of marriage. This is precisely the aim of Article 180 of the Civil Code and the traditional interpretation of the 'essential quality of a person' as a subjective element. However, the Court of Appeal considers in the present case that we cannot let individual will regulate all aspects of a civil relationship. Public authorities should intervene when the individuals go too far. The request of the plaintiff went too far. It was not acceptable.

3.3.2 Public Order, a Shield against the Excesses of the Individuals in Their Private Lives

One can wonder if the competence of a judge should include the power to define what should people think 'essential' or not in their private life. The definition of morals encompasses one's conception of what is right or wrong. It is based on a subjective consideration about what all 'rational' persons should share. Morality is always at the frontier between social consensus and individual convictions. Rights exist precisely to avoid personal judgment and the reign of the arbitrary. The rule expresses a consensus over what ought to be. The judge has to apply it, without giving any weight to his personal opinions.

Accordingly, the judge of the first instance applied the rule, in compliance with the case law, without giving any judgment of value. The judge of the appeal had to take the almost unanimous popular reaction into account. Morality was the tool he used of to restore a social consensus, as a shield against what society considered unacceptable. The strength of the reaction against the first judgment evinced the fear existing against Islam in French society. According to the prevailing opinion, Islamic values are a threat to democracy and should remain outside French society. Granting a right to a Muslim on the ground of his religion would be the first step down a slippery slope. The need to protect society is important enough to go against an individual's will.

30 Catherine Bacon, president of a local branch of the association «Ni putes ni soumises», women's rights activist, *La voix du Nord*, 30/05/2008.

3.4 Liberal Rights against Individual Will

The transnational human rights system, which we can qualify as Western, is based on individual rights. Individual freedom and freedom of choice are key concepts of any human rights instrument. These rights can be exercised in any way provided they do not infringe the rights of others. Paradoxically in the ruling of the Court of Douai the use of human rights seems to go against the wills of the persons concerned. Indeed, both partners wanted the annulment. The woman acknowledged that her husband was within his right by making this request. She belonged to the same community as him. Therefore her conception of the rights and duties existing between spouses differed from Western ones.

The freedom to exercise one's religion can be exercised in any way not infringing the rights of others. In the Lille case, the woman did not consider that her rights were infringed because her values were not based on individualism, but based on her religion. From a Western point of view, she seemed 'oppressed by her own culture' and she needed protection[31]; she had to understand that under her vision of relationships, she was not free. However, she preferred to align herself with her religious precepts instead of the conception of freedom offered in a Western society, and might have accepted the situation with full knowledge of her legal rights. Nevertheless it seems that justice had to teach her what her rights are in a 'correct' system of values. This decision was to have the role of a model.

This same paternalistic attitude was adopted both by the judge and in the comments made by the objecting individuals. The judge had to impose the French version of equality. If individual free will is really at the basis of the human rights concept, Western countries should tolerate minority claims if they are freely consensual. The problem is again to determine whether the tradition is observed with well-informed consent. Laws banning headscarves worn in different contexts in France rely on the idea that it is a

31 Merry, Sally Engle, *Transnational human rights and local activism: mapping in the middle*, in 108 *American Anthropologists* 1. 2006, p. 43–44. The author recounts in those pages the case of a battered woman in Hawai´i who tells a support group that she had forced sexual relations. "She saw the act differently when it was called "rape"". The French media-relayed case seeks to have a similar educational role in the field of women´s rights.

symbol of women's oppression. However, a lot of women oppose these laws, claiming that it is their choice. Some insist on the fact that they are educated and therefore do not accept the argument that they took this decision in ignorance of their rights. Some argue that a headscarf helps them feel better, in accordance with their worship. The goal is to determine the value of the consent. Therefore, a State decision should not be based on the concept that the observance of a particular religion is, *per se*, dangerous and oppressive.

4 The Appropriation of Rights by the People

4.1 The Desecration of the Translator's Discourse

The success of the human rights phenomenon has brought the human rights discourse 'from the periphery to the center' of the public debate in contemporary France[32]. Even the judiciary must justify its interpretation of the law, which can be challenged by human rights based arguments. The public authority must defend its ruling in front of the society; the public opinion is the 'new judge' in respect to the people´s own rights. The 'spiral of expansion' reaches its maximum size regarding the actors involved[33]. The judges, politicians and legislators – and, to a certain extent, the medias and the activists, – traditional translators, are replaced by citizens offering their own interpretation of human rights in particular cases. Popular discourse becomes the new voice of the centre. The former translators are no longer as powerful, their language is no longer sacred and their opinions are subject to popular judgment. As an example, Elisabeth Polle, the Lille judge who returned the first judgment, had to lay charges for receiving threatening letters a few days after it was published[34].

32 Halme, Miia, *From the periphery to the centre: emergence of the Human Rights phenomenon in Finland* in *Finnish Yearbook of International Law*, Leiden, Ed. Creutz, Katja, Bril Academic Publishers, 2010, p. 257 and 281.
33 Ibid., p. 186.
34 *La voix du Nord*, 10/06/2008.

4.2 The People as Guardians of their Own Rights

Many observers claimed that if French civil law can lead to such an unacceptable ruling, it urgently has to be changed[35]. Human rights are a tool to challenge not only judgments but also the national law itself. Existing above the legal system, human rights as extra-legal embodiments of values constitute guidelines which the law should comply with. If people think that the legal system deviates from these guidelines – if it does not provide for the rights it owes them – the people can claim that these extra-legal human rights are to be applied. The public opinion can even struggle for the rights of others. If human rights are relative and can be manipulated, who is better placed to declare and interpret them than the majority of the population, to whom they belong? The majority acts as the guardian of its own rights. The meaning of human rights is still decided at the international level, but it is no longer a set of rules that comes only from above. The individual has made this tool theirs, and can even shape the content of the various rights.

In the traditional sense, as a product of the Age of Enlightenment, law is the basis of a democratic society in the sense that it expresses the general will of the people[36]. The law can therefore be challenged by an opposite general will. In the Lille case, the rejection of the first judgment seemed to represent such a consensus that it could be considered as that of the general will. This phenomenon can be regarded as a return to the original conception of human rights: an instrument of the individuals with which to defend themselves against the public authorities. In the present case, however, the society seemed to be defending itself against the threat represented by another culture more than from the arbitrariness of the State.

35 Martin Hirsch, High Commissioner for active solidarities and Bruno Le Roux, Member of Parliament, in *Le Post*, 01/06/2008. Valérie Liétard, secretary of State for women's rights, in *Web libre*, 30/05/2008. Marie-George Buffet, national secretary of the Communist Party, in *Le Figaro*, 30/05/2008. Caroline Fourest, feminist, Prochoix, 2/06/2008. Catherine Bacon, president of the local branch of the association "Ni putes ni soumises", women's rights activist, in *La Voix du Nord*, 31/05/2008. Forum discussion, *Le figaro.fr*, http://plus.lefigaro.fr/article/le-mariage-annule-de-lille-choque-73-des-francais-20080606-23543/commentaires.

36 Rousseau, *Le contrat social*, 1762; *Déclaration des droits de l'Homme et du Citoyen*, 1789.

4.3 The Balance between Rights: A Choice of Society

Human rights should not be used systematically by the majority against minorities. Rights exist precisely in order to avoid ill-considered judgments based on feelings such as fear or hatred. One cannot accept that the public opinion, through media, decides case-by-case how conflicts should be settled. The public authorities must find the right balance between the protection of individuals and the respect of individual will. Clear borders need to be established. Although human rights need flexibility in order to function in practice, there have to be some fixed principles resulting from a choice of society. 'Morals' is too vague a concept, leaving too much room for subjectivity. There needs to be a stable statement, clear and well-considered, on what value society generally decides to favor. It should avoid subjectivity and on-the-spot judgments. It is also a question of the predictability of the judgments. In order to reach this consensus, there needs to be a national discussion. The debate must not only be raised occasionally, directly after judicial cases or new laws are echoed in the media, but must be a continuous discussion, devoid of passions, on what values society ought to embody. What considerations do 'we' want the judge to protect and give priority to? What sense does France decide to give to 'secularity'? Has the society decided to accept different beliefs on the basis of freedom, or is religion – every religion – considered a threat which must remain outside all the aspects of public life and tribunals?

Observing the Lille case and the recent legislative reality, it seems that French society is heading toward a banning of religion in any act of public or civil life, at least regarding Islam[37]. It must be confined to the very private sphere. In the context of 'islamophobia', people tend to think that Islamic values and worship will never be compatible with democratic ideas, they confuse moderate and extremist Islam[38]. Consequently, Muslims have two alternatives: to occidentalize their worship or to struggle for the respect of their beliefs against the Western interpretation of human rights. This latter option can lead to a communitarian attitude. The Islamic community may be tempted to cut itself from the rest of "indivisible" French society[39].

37 Not exclusively French society (see the referendum on minarets in Switzerland for example).
38 See the Final report of the Commission on British Muslims and Islamophobia: *Islamophobia: A challenge for all*, Runnymede Trust, London, 1997.
39 French Constitution, Article 1.

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