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NEW TRENDS IN RELIGIOUS FREEDOM: THE BATTLE OF THE HEADSCARF

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Abstract

Freedom of religion has been described as the paradigm freedom of conscience and of the essence in a free society, but the re-emergence of religion in the public sphere has elicited great publicity. The wearing of the female Islamic dress, commonly the headscarf (*hijab*), is a complex and multi-faceted issue that is often raised in legal and political debates, particularly in the education and employment areas across Europe. This work examines the role of the European Union in the regulation of Member States' approaches to individuals wearing the Islamic headscarf. The European Convention of Human Rights and decisions of the European Court of Human Rights have set a strict and clear precedent: a State can limit the individual's right to manifest their religious belief in a number of circumstances with the margin of appreciation afforded to them. Most judgments from the Court have found in favour of the state, and this work will attempt to understand the reasoning behind these decisions, and offer critiques if necessary.

Keywords: Religion, Freedom of Expression, Headscarf, European Union, Human Rights, Education, Discrimination.

Introduction

The Right to freedom of thought, conscience and religion is probably the most precious of all human rights, and the imperative need today is to make it a reality for every single individual regardless of the religion or belief he possesses, regardless of his status and regardless of his condition in life. The desire to enjoy this right has already proved itself to be one of the most potent and contagious political forces that the world has ever known.²

The need to find a means of accommodating religious diversity has played a significant role in the shaping of not only modern Europe, but of the international

¹ Natalie Melmore,

² Krishanswami, A., 'Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities: Study of discrimination in the matter of religious rights and practices', (1960) E/CN. 4/Sub.2/200/Rev 1.

legal system itself.³ As Europe becomes increasingly religiously and culturally diverse, questions of identity, integration and accommodation of difference are at the forefront of political agendas.⁴ Despite a common European legal framework that protects the rights of individuals, there is little uniformity in the approaches of the member states in the European Union (EU) to these controversial issues. The issue of religious dress, specifically female Muslim religious dress, has been the subject of intense controversy within Europe over recent years.

France and Turkey have imposed bans on religious clothing, including the headscarf. They are concerned with, among other reasons, that young women are being compelled to wear the veil or other religious symbols and they should not be subjected to such religious compulsion. The French Government believe that such ostentatious religious symbols undermine the French principles of democratic civil order and secularism. Similarly, the Turkish Government is concerned that such manifestations of Islam will make it more difficult to achieve the separation of religion and state which is the basis of the Turkish Constitution.

The proponents and opponents of such bans have relied upon a diverse range of arguments for their positions and in doing so have frequently relied on the language of human rights. On the one hand, such laws and regulations have been justified on the grounds that they protect the dignity and equal rights of women, help preserve public security and reflect national values, such as official secularism. On the other hand, such laws have been attacked on the basis that they undermine women's rights to equal treatment, freedom of expression and religion and are counter-productive to their purported aims of promoting integration.⁵ This article will establish a discussion surrounding the national approaches above, as well as other European member States of the regulation of the Islamic headscarf (veil or *hijab*), within the education sector, and offer a critique of these approaches in relation to European Law and academic arguments.

1 The Headscarf Debate: Relevant European Authority

Although the EU pays incidental attention to issues related to religion, at the level of both its Commission and its Parliament, no centralized European policies related to

³ Evans, M., *Manual on the Wearing of Religious Symbols in Public Areas*, (2008), p.4.

⁴ Knights, S., 'Religious symbols in the school: Freedom of religion, minorities and education'. (2005) *European Human Rights Law Review*, p.499.

⁵ Article 19, 'Legal comment: Bans on the Full Face Veil and Human Rights – A Freedom of Expression Perspective', December 2010:
<http://www.article19.org/pdfs/publications/bans-on-the-full-face-veil-and-human-rights.pdf>.

the issue exist. However, within the last 15 years or so, the question of religious dress codes has been increasingly framed in terms of the European Convention of Human Rights (ECHR) in the EU and United Kingdom.⁶ The relevant European provisions which protect the right to manifest a religious belief through clothing are taken from the ECHR are Article 9,⁷ Article 14,⁸ and Article 2 of the first protocol.⁹ Article 9(1) states that 'everyone has the right to freedom of thought, conscience and religion... and freedom, either alone or in a community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.'

In addition, Article 9(2) states that '[f]reedom to manifest one's religion or beliefs shall be subject only to such limitations as are proscribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'. This is further supported by Article 14, which states, 'the enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as ... religion'. Finally, Article 2 of the first protocol sets out that 'in the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching to conformity with their own religious and philosophical convictions.' In this respect, at least on the wording of the ECHR, religious freedom is given very substantial protection.

However, actions which amount to a manifestation protected by the relevant legislation above may be subject to limitations from two sources. First, the ECHR permits States to derogate from their obligations under a number of Convention Articles, including Article 15, which allows this 'in times of war or other public emergencies threatening the life of a nation', but only 'to the extent strictly required by the exigencies of the situation'. However, no state has yet considered there to be a need to derogate, so it is unnecessary to do more than note this as just a theoretical possibility. As illustrated above, the second and most significant source of limitation is Article 9(2). In common with similar clauses in the Convention, it requires that limitations be both 'proscribed by law' and 'necessary in a democratic society', but with the State enjoying a certain margin of appreciation. This latter requirement

⁶ The ECHR was incorporated into UK law by the Human Rights Act 1998.

⁷ ECHR, Article 9: Freedom of Thought, Conscience and Religion.

⁸ ECHR, Article 14: Prohibition of Discrimination.

⁹ ECHR, Article 2 of the 1st protocol: Right to Education.

has been held by the Court to mean that any interference must, on the particular facts of the case before it, be proportionate to the aim pursued, be designed to meet a 'pressing social need', and the reasons given for the interference by the State must be 'relevant and sufficient'.¹⁰ It is at this point – when the Court assesses the proportionality of State interference with a right – that the 'margin of appreciation' has assumed importance as a major adjudicative tool in certain types of case.

2 Judicial Principles Relevant for Discussion

The Margin of Appreciation

The margin of appreciation is an international legal doctrine of judicial self-restraint or deference. The doctrine is entirely judge-made and it has no textual basis within the Convention itself. The Court's jurisdiction is of a supervisory nature and is subsidiary to the primary protection for rights provided by national authorities which are closer to the 'vital forces of their countries'.¹¹ The doctrine's purpose, therefore, is to allow a degree of latitude to States as to how they protect the individual rights set out in the Convention. The margin has been held to be especially important in areas where there is said to be an absence of consensus or common practice across Europe, for example in the fields of morals and religion, and features prominently in the Court's case law.¹² The width of the margin applied depends on various factors, including 'the existence or non-existence of common ground between the laws of the Contracting States'¹³ – whether there is clear European consensus on an 'issue'. In *Otto-Preminger-Institut* the Court noted:

It is not possible to discern throughout Europe a uniform conception of the significance of religion in society, even within a single country such conceptions may vary. For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference.

¹⁰ Lewis, T., 'What not to wear: Religious Rights, the European Court, and the Margin of Appreciation', (2007) 56 *International and Comparative Law Quarterly* 2, p.397.

¹¹ *Handyside v UK* (1976) 1 EHRR 737, para 48.

¹² *Leyla Şahin v Turkey* (Application No. 44774/98) Grand Chamber, 10/11/2005, para 109. See also, *Wingrove v UK* (1996) 24 EHRR 1, para. 58; *Kokkinakis v Greece* (1993) 17 EHRR 397, para 47. Cited in Lewis, 'What not to wear', p.397.

¹³ *Rasmussen v Denmark* (1985) 7 EHRR 352, para. 40.

However, Lewis¹⁴ argues that there is a fundamental problem with the granting of a margin of appreciation to States, on the basis of there being an absence of a pan-European consensus on religious issues. This argument tends to undercut the (albeit unsatisfactory) rationale for protecting the right to manifest religious belief in the first place. It is only because of diversity, and the pluralism that is so central to the whole scheme of the convention, that the right is necessary and important.¹⁵ Nowhere have the consequences of this been more evident than in several applications to the Court by Muslim women claiming their right to manifest their religious belief through dress. Some of the more important cases are discussed below.

3 The Islamic Headscarf Within Education

In December 2006, the Report of the European Monitoring Centre on Racism and Xenophobia (EUMC) stated, '[t]he wearing of the headscarf is a complex and multi-faceted issue that is often raised in public debate in most European countries during recent years, particularly in the area of education'¹⁶ The varying approaches of member states to the protection of religious freedom is well demonstrated in the diverse range of positions adopted throughout Europe regarding the right to wear religious clothing or symbols in State schools, the most salient issue being the female Islamic dress. There are few countries in Europe whose courts have not yet had the occasion to rule on the presence of headscarves in educational institutions and the conclusions they have reached differ widely. Partly owing to their divergent interpretations of the 'message' which the headscarf sends, partly because of differing views about the role and place of religious symbols in education and partly as a result of different conceptions and formulations of the 'freedom of religion' in their national constitutions.

Children, as autonomous individuals, enjoy the freedom of religion or belief in their own right, just as adults do. The right to education is guaranteed in several

¹⁴ Lewis, 'What not to wear', p.405

¹⁵ *Ibid.*; Lewis states, 'The predominant justification for the very existence of the right is to enable the right-holder to depart from the consensus, to pursue his or her path. If there was an international consensus on this question of religion, if there were a single European faith... to whose creed and liturgy everyone adhered, there would be no need for the religious right'.

¹⁶ EUMC, 'Muslims in the European Union: Discrimination and Islamophobia', (2006)

EUMC, p.40:

http://www.eumc.europa.eu/eumc/material/pub/muslim/Manifestations_EN.pdf.

international human rights instruments¹⁷ as an essential part of the contemporary human rights discourse, and considered as one of the ‘most complex human rights’ in international law.¹⁸ One of the most important of these instruments is Article 14 of the Convention on the Rights of the Child, which requires the following:

State parties shall respect the right of the child to freedom of thought, conscience and religion... Freedom to manifest over ones religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedom of others.

The ban or limitation of any feature of the female Islamic dress in state schools raises the important issue of whether this interferes with a right to education. As already noted, the majority of high profile cases concerning the Islamic headscarf concern the education sector of Member States; therefore it will be useful to concentrate on this area of national and European case law and legislation. France, Turkey and the UK will be dealt with in detail as their approaches are the most relevant for discussion.

France

On 17 March 2004, Law 2004-228 was published in the Official Journal of France to regulate, in educational establishments, the wearing of symbols that express religious adherence. The law prohibits symbols that ‘ostensibly’ manifest a particular religious belief.¹⁹ This was one recommendation of the report of the Stasi Commission (published in December 2003), after the question of headscarves in French public schools became a point of controversy for the third time in 15 years. The report described the difficulties of accommodating different races, cultures and religions while maintaining the principle of secularism. It acknowledged that it was necessary to find a balance between national unity and respect for diversity.

Case law in France (beginning in 1989) has brought into focus a latent conflict between the individual expression of religious belief (through symbols) – which rests on the principles of freedom of expression and freedom of religion – and the collective value placed on the principle of *laïcité*, that is, the clear separation of

¹⁷ See, for example, UDHR, Article 26; Convention on the Rights of the Child (CRC), GA Res 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, UN Doc A/44/49 (1989), Article 28. The CRC entered into force 2 September 1990.

¹⁸ For example, Gomez del Prado, J., ‘Right to Education’, UN Doc E/C.12/1998/23.

¹⁹ Further to the legislation, a circular was adopted on 18 May 2004 by the Ministry of Education regarding the more detailed terms of application of the Act: *Journal Officiel* no. 118.

religion and the state.²⁰ *Laïcité* is a principle protecting children from any form of religious proselytism or political indoctrination, overriding Human Rights and the freedom of religious expression, which was used as early as 1871 in the context of debates on the neutrality of public schools.²¹ It is also a principle that should remain indifferent towards ethnic, cultural and religious differences in the classroom.²² In French Parliamentary debates in 1994, the then Minister of Education, François Bayrou, said, 'French national identity is inseparable from its schools'.²³ Bunting commented that school is considered to be the forum for the building of 'an integrated, cohesive nation',²⁴ while Anna Galeotti stated that '[t]he public school is... meant to produce French citizens and not the citizens of a multiethnic policy'.²⁵ This is arguably quite a controversial viewpoint, but is fitting with the French principles of the separation of the Church and the state, as illustrated in the Law of Separation 1905.²⁶

The 2004 law invoked enormous controversy when it was adopted, but it took until July 2009 for a series of direct challenges by pupils expelled from schools for wearing religious symbols to reach the EctHR;²⁷ however, they were declared inadmissible by the Court. In *Dogru v France*,²⁸ the expulsion of a secondary school pupil who refused to remove her headscarf during her PE classes was found not to violate Article 9 of the ECHR. The Court found that the decision of the school authorities that wearing a headscarf was incompatible with sports classes for reasons of health or safety was not unreasonable, and exclusion was a justified and proportionate response. Applying its earlier jurisprudence, the Court found that 'the State may limit the freedom to manifest a religion, for example by wearing an Islamic headscarf, if the exercise of that freedom clashes with the aim of protecting the rights

²⁰ Lyon, D., Spini, D., 'Unveiling the headscarf debate', (2004) *Feminist Legal Studies*, p. 334.

²¹ See Glenn, C., 'Historical Backgrounds to Conflicts Over Religion in Schools' *Pro Rege*, September 2004, p.4:

<http://www.dordt.edu/publications/prorege>.

²² Molokotos Liederman, L., 'Religious Diversity in Schools: The headscarf debate' (2000) *Social Compass*, p.372-3.

²³ 'La France et l'islam,' *Le Monde*, 13 October 1994.

²⁴ Bunting, M., 'Secularism Gone Mad', *The Guardian*, 18 December 2003.

²⁵ Galeotti, A., 'Citizenship and Equality: The Place for Toleration' (1993) *Political Theory*, p.352.

²⁶ Article 2 – 'The Republic does not recognize, renumerate, or subsidize any religious domination'.

²⁷ *Aktas v France* (Appl. No. 43563/08); *Bayrak v France* (Appl. No. 14308/08); *Gamaleddyn v France* (Appl. No. 18527/08); *Ghazal v France*, (Appl. No. 29134/08), 17 July 2009; *J Singh v France*, (Appl. No. 25463/08); and *R Singh v France*, (Appl. No. 27561/08), 17 July 2009.

²⁸ *Dogru v France* (Appl. No. 27058/05), 4 December 2008.

and freedoms of others, public order and public safety'.²⁹ The Strasbourg Court paid particular attention (as had the French authorities and Courts) to the constitutional principle of secularism applicable in France. Protection of this principle, and to a lesser extent protection of health and safety, was a legitimate aim for restricting the right to manifest one's religion through the wearing of a religious symbol or clothing.

Having regard to the margin of appreciation which must be left to the member States with regard to the establishment of the delicate relations between Churches and the State, religious freedom thus recognised and restricted by the requirements of secularism appears legitimate in the light of the values underpinning the convention.³⁰

Leigh argues that the court does not really explain why, given the background of secularism, a prohibition on restrictions of symbols is necessary – in effect, the question of proportionality is not really dealt with rigorously at all.³¹ The United Nations Human Rights Commission's Special Rapporteur on Freedom of Religion, Asma Jahangir, visited France in September 2005. He expressed concern at the indirect effects of the 2004 law and the manner of its application in particular cases:

I am concerned that, in some circumstances, the selective interpretation and rigid application of the law has operated at the expense of the right to freedom of religion or belief...It is my impression that the direct, and indirect consequences of this law have not been properly considered...[T]he stigmatisation of the so called Islamic headscarf has triggered a wave of religious intolerance when women wear it outside school, at university or at their workplace.³²

In a relatively recent development (13 July 2010), the National Assembly voted to approve a ban on the wearing of *voiles intégrales* – veils that cover the face, in public places, making France the first European country to do so.³³ The Senate approved the legislation on 14 September in an almost unanimous vote.³⁴ The legislation

²⁹ *Ibid.*, para. 64, citing especially *Leyla Sahin v Turkey*, (Appl. No. 44774/98), 10 November 2005.

³⁰ *Ibid.*, para. 72. See also para. 71 – 'it was for the national authorities, in the exercise of their margin of appreciation, to take great care to ensure that, in keeping with the principle of respect for pluralism and the freedom of others, the manifestation by pupils of their religious beliefs on school premises did not take on the nature of an ostentatious act that would constitute a source of pressure and exclusion ... In the Court's view, that concern does indeed appear to have been answered by the French secular model.'

³¹ Leigh, I., 'New trends in religious liberty and the European Court of Human Rights', (2010) *Ecclesiastical Law Journal*, p.271.

³² 'Special Rapporteur on Freedom of Religion Ends Visit to France', UN Press Release, 30 September 2005.

³³ The bill was adopted by 335 votes to 1 in the 557 seat National Assembly, with most abstentions from the main opposition Socialist Party. Erlanger, S., 'Parliament moves France closer to a ban on face veils', *New York Times*, 13 July 2010: http://www.nytimes.com/2010/07/14/world/europe/14burqa.html?_r=1#.

³⁴ The French Senate voted on 14 September, 261-1 votes in favour of the ban. The legislation envisages fines of 150 euros (£119) for women who break the law and 30,000

makes it illegal to wear garments such as the *niqab* or *burqa* anywhere in public. On 7 October, France's Constitutional Court ruled that the ban on veils did not impinge upon civil liberties.³⁵ However, the Court made a change to the law, in that it would not apply to public places of worship where it may violate religious freedom.³⁶ The ban came into force on 11 April 2011; as such, it is too early to see the effect it will have on the French-Muslim population, and whether any legal ramifications will occur in relation to the ECHR.

Turkey

Turkey is one of the most fascinating case studies in the headscarf debate. Its population of around 70 million is overwhelmingly Muslim (some 99 per cent) but after its war of independence, the Republic of Turkey was established in 1923 as a secular state. In 1937, a constitutional amendment was adopted according constitutional status to the principle of secularism, provided in Article 2 of the current Turkish Constitution of 1982. In the 1930s, the Islamic veil was banned which was:

Inspired by the evolution of society in the nineteenth century and sought first and foremost to create a religion-free zone in which all citizens were guaranteed equality, without distinction on the grounds of religion or denomination.³⁷

The Dress (Regulations) Act of 3 December 1934 (Law No 2596) imposed a ban on wearing religious attire other than in places of worship or at religious ceremonies, irrespective of the religion or belief concerned. Turkey has had an increasingly divisive debate on wearing the headscarf to school and university since it emerged as a phenomenon in the 1980s. The first piece of legislation in institutions of higher education was a set of regulations issued by the Cabinet on 22 July 1981 prohibiting female members of staff and students from wearing veils in educational institutions.

On 20 December 1982, the Higher-Education Authority issued a circular on the wearing of headscarves in institutions of higher education, declaring that the Islamic headscarf was banned in lecture theatres. In a judgment of 13 December 1984, the

euros and a one-year jail term for men who force their wives to wear the *burqa*. 'French Senate votes to ban Islamic Veil in public', *BBC News*, 14 September 2010: <http://www.bbc.co.uk/news/world-europe-11305033>.

³⁵ The French Constitutional Council ruled that the bill making it illegal to wear the Islamic *burqa*, *niqab* or other full face veils in public, conforms with the Constitution. See decision of 7 October 2010:

<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/cc-2010613dc.pdf>.

³⁶ 'French ban clears last legal battle', *BBC News*, 7 October 2010:

<http://www.bbc.co.uk/news/world-europe-11496459>.

³⁷ *Leyla Şahin v Turkey* (App. No. 44774/98) (2005) 41 EHRR 8, para 29.

Supreme Administrative Court held that the regulations were lawful, noting that beyond being a mere innocent practice, wearing the headscarf is in the process of becoming the symbol of a vision that is contrary to the freedoms of women and the fundamental principles of the Republic. The UN Special Rapporteur on the elimination of all forms of religious intolerance visited Turkey in 1999, and in 2000 published a report that strongly questioned the Turkish Republic's representation of itself as a secular state.³⁸ The report additionally recommended that concerns over the political exploitation of religion should be reconciled and delineated by laws that allow for the free expression of dress within legitimate limitations. However, the report did not elaborate on the legitimate limits to free expression or dress.³⁹

These various reforms raise contentious issues, which put Islam in opposition with the secular government. However, on 9 February 2008, the Turkish government lifted the headscarf ban. Restrictions do however remain for 'more rigidly Islamic attire - veils that cover all of the hair and neck, the face, or cloaks that cover the body (such as the *burqa*) – in public offices', as the government only allows scarves tied under the chin, being traditionally Turkish and not Islamic.⁴⁰ Notwithstanding this reform, it is still necessary to discuss *Karaduman v Turkey*⁴¹ and *Leyla Şahin v Turkey*⁴² (which is the leading ECtHR precedent on the regulation of the headscarf). The applicant in *Karaduman*, a Muslim, had successfully completed her studies at Ankara University and had requested a degree certificate. She supplied a photograph of herself wearing an Islamic headscarf, but her certificate was withheld because she did not supply a photograph of herself bareheaded as required by University regulation.

The applicant alleged that the refusal to provide a degree certificate was a violation of her right to freedom of religion (Article 9, ECHR) because covering her head with an Islamic headscarf was an observance and practice prescribed by her religion. She also alleged discrimination contrary to Article 14 ECHR on the basis that foreign female students attending Turkish Universities had total freedom to dress however

³⁸ 'Elimination of all forms of religious intolerance - Situation in Turkey', General Assembly 55th, 10/09/2000, A/55/280/Add.2., para. 129:
<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/604/96/PDF/N0060496.pdf?OpenElement>.

³⁹ *Ibid.*, p.29, para. 165(a).

⁴⁰ Ayman, Z., Knickmeyer, E., 'Ban on Head Scarves Voted Out in Turkey', *The Washington Post*, 10 February 2008.

⁴¹ (App. No. 16278/90) (1993) 74 DR 93.

⁴² *Leyla Şahin*.

they wished. Turkey submitted, first, that the refusal did not interfere with her freedom of religion and secondly, that the obligation to respect the principle of secularity imposed on university students was a permissible restriction under Article 9(2) ECHR. The Commission, when interpreting Article 9 in relation to *Karaduman*, expressed the view that by choosing to enter into higher education in a secular university:

A student submits to those university rules, which may make the freedom of students to manifest their religion subject to restrictions as to place and manner, intended to ensure harmonious coexistence between students of different beliefs.⁴³

Therefore, there had been no violation of Article 9. With respect to the alleged discrimination contrary to Article 14 ECHR, the Commission found that part of the application inadmissible because the applicant had not raised the issue in domestic proceedings.⁴⁴ It is important to note that while foreign female students at Turkish universities had freedom to dress as they wished, if they were Muslim, they could not wear the Islamic headscarf.⁴⁵

In *Leyla Şahin* the applicant came from a traditional family of practising Muslims and considered it her religious duty to wear the Islamic headscarf. She wore the headscarf during her four years of study at the University of Bursa, but in her fifth year she transferred to the University of Istanbul where she was denied access by invigilators into a written examination because she was wearing the headscarf. The applicant submitted that the Istanbul University circular regulating students' admission to the university campus – which prohibited the wearing of headscarves and resulted in her exclusion from Istanbul University – was a violation of her right of freedom to manifest her religion (Article 9). *Şahin* also alleged that a ban on wearing the headscarf violated her rights under Articles 8 (private life), 10 (expression) and 14 (non-discrimination) of the Convention, and Article 2 of Protocol No. 1 (right to education).

The Grand Chamber (GC) of the ECtHR held that Article 9 and Article 2 of Protocol No. 1 were dispositive of the case and focused on those Articles in its opinions. The GC found that a ban on Islamic headscarves in a Turkish State university interfered with the *Leyla Şahin's* right to manifest her religion under Article 9(1), but found the interference was justified under Article 9(2) of the ECHR. In justifying the ban on the

⁴³ *Karaduman*, para. 108.

⁴⁴ *Ibid.*, paras. 109-10

⁴⁵ In October 2003, Istanbul University prevented a visiting foreign professor from entering the campus to attend a conference because she was wearing a headscarf.

headscarf, the majority in that case relied exclusively on the reasons cited by the national authorities and Courts; they put forward, in general and abstract terms, two main arguments – secularism and equality.⁴⁶ The margin of appreciation is particularly appropriate when it comes to the regulation of the wearing of religious symbols in teaching institutions, since laws on the subject vary from one country to another. The Court's task was to determine whether the measures taken at national level were defensible. The GC held that the interference of Article 9(1) was justified in principle and proportionate to the aims pursued and could therefore be regarded as having been 'necessary in a democratic society'.⁴⁷

However, in her dissenting judgement, Judge Tulkens expressed dislike for the majority's wide margin of appreciation accorded to Contracting States in discharging their obligations under the Convention. Judge Tulkens doubted that a lack of consensus among European States should cause the Court to eschew its duty to supervise Contracting States efforts to conform to Convention standards.⁴⁸ The 'protection of the rights of others', a legitimate aim in both Articles 9 and 10 of the ECHR, was one of the two interests Turkey argued it sought to promote by implementing the headscarf ban. Yet, it has been suggested that the European Court engaged in virtually no discussion of exactly what 'rights and freedoms' Turkey sought to protect.⁴⁹ It may be assumed 'that the Court feared that headscarf-wearing students might pressure, render uncomfortable, or even coerce other students into wearing the headscarf – although no evidence that pressure or coercion actually existed among students was ever provided.'⁵⁰ Thus, according to its own standards on the right to freedom of expression, the Court should not have allowed Turkey to suppress the headscarf under Article 9 on this basis.⁵¹

⁴⁶ *Ibid.*, para. 112–114. The GC recalled the judgment of 7 March 1989 of the Turkish Constitutional Court, which stated: 'The principle [of secularism] prevented the State from manifesting a preference for a particular religion or belief; it thereby guided the State in its role of impartial arbiter, and necessarily entailed freedom of religion and conscience. It also served to protect the individual not only against arbitrary interference by the State but from external pressure from extremist movements'.

⁴⁷ *Ibid.*, Chamber Judgment, paras. 66–116.

⁴⁸ *Ibid.*, para. 3.

⁴⁹ Article 19, 'Bans on the Full Face Veil', p.18.

⁵⁰ Westerfield, J., 'Behind the Veil: An American Legal Perspective of the European Headscarf Debate', (2006) 54 *American Journal of Comparative Law* 637, p.672.

⁵¹ Judge Tulkens emphasised that 'in the sphere of freedom of expression (Article 10), the Court has never accepted that interference with the exercise of the right to freedom of expression can be justified by the fact that the ideas or views concerned are not shared by everyone and may not even offend some people.' Dissenting judgment of Judge Tulkens in *Leyla Şahin*. Cited in Article 19, 'Bans on the Full Face Veil', p.18.

With respect to the necessity of the interference in a democratic society, the GC observed that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of various groups and ensure that everyone's beliefs are respected.⁵² However, as Judge Tulkens suggests, 'it is ironic that a young women should be deprived of that education on account of the headscarf'.⁵³ Yet, it is striking to note that the ECtHR avoided to make a specific 'finding' that the restrictions on the Islamic headscarf on the facts in *Şahin* interfered with the applicant's right to manifest her religion. Instead, it preferred to proceed on the basis of the 'assumption' that the regulations constituted interference. Therefore, no clear test was set out for later cases. This means that in the future there is a possibility that the Court may not accept that wearing a headscarf is a religious duty.⁵⁴ As Carolyn Evans noted, the fact that the court was willing to state this explicitly in its judgment demonstrates its general reluctance to acknowledge the value and religious importance of many key religious practices outside of Christianity.⁵⁵

As aptly put by Cartner, the ECtHR has been a powerful force in extending basic freedoms in Turkey, but it missed an important opportunity in this case to stand firmly behind principles of freedom of religion, expression, and non-discrimination.⁵⁶ On the basis of the foregoing case-law of the ECtHR, it may be stated that 'the Court is trying, increasingly, to impose its own conception of secularism at an acknowledged cost to religious freedom',⁵⁷ as well as the right to education of female Muslim students who wish to wear the headscarf at universities in Turkey. It is interesting to speculate whether the Human Rights Committee (HRC) would find the Turkish prohibition to be a violation of Article 18 of the International Covenant on Civil and Political Rights (ICCPR). Boyle has argued that the HRC 'would be likely to take a different view if it was possible to take a complaint to it'.⁵⁸ In support of this argument

⁵² *Ibid.*, GC judgment, para. 106.

⁵³ *Ibid.*, see para. 15.

⁵⁴ Ssenyonjo, M., 'The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases', (2007) 6(3) *Chinese Journal of International Law*, para. 18.

⁵⁵ See Evans, C., 'The "Islamic Scarf" in the European Court of Human Rights', (2006) 4 *Melbourne Journal of International Law* 4:
<http://www.austlii.edu.au/au/journals/MelbJIL/2006/4.html#fnB3>.

⁵⁶ Cited in Ssenyonjo, 'The Islamic Veil', para. 42.

⁵⁷ See Langlaude, S., 'Indoctrination, Secularism, Religious Liberty, and the ECHR', (2006) 56 (1) *International and Comparative Law Quarterly*, p.944.

⁵⁸ See 'Interview with Professor Boyle' in *Leyla Şahin*:
<http://www.strasbourgconference.org>. Cited in McGoldrick, D., *Human Rights and Religion – The Islamic Headscarf Debate in Europe*, (2006), p.168-169.

he cited the HRC's decision in *Hudoyberganova v Uzbekistan*,⁵⁹ in which it was held that a ban on a headscarf in university violated Article 18(2) ICCPR. Turkey's secular approach has led to some interesting political challenges, and the restrictions on the headscarf have been a constant source of political tension since the 1980s.⁶⁰ As shown in various examples above, Parliamentary legislation to lift restrictions has been passed but they have been declared unconstitutional by the Constitutional Court. In spite of this, it will be interesting to see what effect the Turkish government's lifting of the headscarf ban will have on Muslim females and in particular, those in education.

The United Kingdom

The UK, unlike Turkey, portrays itself as a successful multicultural society that has positively embraced respect for cultural diversity through a policy of equal opportunity in an atmosphere of mutual tolerance and anti-racism.⁶¹ It is therefore necessary to discuss the UK's legal stance on the Islamic veil in some detail to distinguish the differences in relation to the more secular states, such as Turkey and France. In October 2006, the then leader of the House of Commons, Jack Straw, sparked controversy in the UK by commenting that he found speaking to a woman who is wearing a veil uncomfortable, describing the garment as 'a visible sign of separation and of difference'.⁶² The ensuing public debate was further fuelled by the news of an employment tribunal's finding of no religious discrimination in the case of a teaching assistant from West Yorkshire who had been suspended and subsequently dismissed from her job for wearing the veil, as this allegedly interfered with the quality of her teaching.⁶³ A few months later, it was reported that schools in Britain would be 'able to ban pupils from wearing the full-face veils on security, safety or learning grounds under new uniform guidance'.⁶⁴

Unlike other European Countries, such as France, Britain had not experienced a widespread debate on veiling until 2006, which received international coverage. Nonetheless, what is intriguing and unique about British responses to Muslim

⁵⁹ Communication No 931/2000, UN Doc. CCPR/C/82/D/931/2000 (18 January 2005).

⁶⁰ Kinzer, S., 'Headscarf Puts Turkish Assembly into Uproar', *New York Times*, 3 May 1999.

⁶¹ McGoldrick, *Human Rights and Religion*, p.173.

⁶² The text of Jack Straw's column, originally published in the *Lancashire Telegraph*, is available at:

<http://politics.guardian.co.uk/homeaffairs/story/0,,1889231,00.html>.

⁶³ BBC News Website, "No discrimination" in veil row', *BBC News*, 19 October 2006: <http://news.bbc.co.uk/1/hi/england/bradford/6066726.stm>. Aishah Azmi lost her appeal in the Employment Appeal Tribunal in March 2007, Appeal no. UKEAT/0009/07/MAA.

⁶⁴ BBC News Website, 'Should the veil be banned in schools?', *BBC News*, 20 March 2007: <http://newsforums.bbc.co.uk/>.

religious claims to wear the headscarf is the relative pluralism that exists in British institutions to accommodate the wearing of religious apparel,⁶⁵ something which will be explored below. The British government established statutory protection against racial discrimination with the introduction of the Race Relations Act 1976 (RRA 1976). This Act made it illegal to discriminate on the basis of racial or ethnic status; however, it did not provide protection against religious discrimination. It can be observed that Jewish men's *yarmulkes* (skullcap) and Sikh men's *dastar* (turban) are not considered religious clothing, but are constituted as aspects of ethnic identity by the RRA 1976, and are consequently protected.

Despite this exclusion, British Muslims' claims for statutory protection have been reinforced by the Runnymede Trust in 1997, which stated that Muslims in Britain experienced significant discrimination and resentment, and described this phenomenon as Islamophobia. This report recommended that the RRA 1976 be amended to make religious discrimination illegal. The UK has not laid down national rules on school uniforms but as a result of the 'Straw veil debate', the Department for Children, Schools and Families (DCSF) issued guidance on school uniform policy, which it had not done previously. This guidance is underpinned by two considerations: first, school uniform policy should take serious consideration of its obligations under the HRA 1998 and anti-discrimination legislation. Thus, schools are obliged to ensure that their uniform policy does not interfere with the right to manifest a religion or belief and they 'should act reasonably in accommodating religious requirements'.⁶⁶

The second consideration concerned the limits on the exercise of religious liberties at school. This could be exercised if schools could demonstrate that it is justified on grounds specified in the HRA 1998.⁶⁷ These include health, safety, and the protection of the rights and freedoms of other.⁶⁸ On these grounds, the freedom to manifest a religion or belief does not imply that a person has the right to manifest their religion or belief at any time, in any place or in any particular manner. In relation to Islamic dress for girls in schools in the UK, this principle has been established in the case of *R (Shabina Begum) v Governors of Denbigh High School*.⁶⁹ Shabina Begum, a Muslim female, was a pupil at Denbigh High school, Luton, and was almost 14 years

⁶⁵ Kilic, S., 'The British Veil wars' (2008) *Social Politics*, para. 2.

⁶⁶ DCSF Guidance School Uniform, October 2007: http://www.warrington.gov.uk/Images/School%20Uniform%20_2_tcm31-21445.pdf.

⁶⁷ Human Rights Act 1998, Article 13, which encompasses Article 9 of the ECHR.

⁶⁸ Kilic, 'The British Veil Wars', para. 38.

⁶⁹ [2006] UKHL 15.

old when the issue first arose. The school uniform for Muslim, Sikh and Hindu female pupils was the *shalwar kameez* (a loose fitting, long sleeve shirt and trousers) and, if they wished, a headscarf in school colours. Shabina happily wore her *shalwar kameez* from September 2000 (when she joined the school) to September 2002; however, in September 2002 Shabina and her brother informed the school that she wanted to wear the *jilbab* (a long cloak covering the whole body, except the hands and face). Shabina did not want to compromise on this as she believed that only the *jilbab* complied with the strict requirements of Islam. The school refused to accommodate Shabina's request, and informed her that she could not return to school unless she wore the standard school uniform. The school maintained that it was not required to make any alteration to its uniform policy, or do any more than adopt a policy that was suitable for a secular school in England.

Shabina then began judicial review proceedings against the school seeking a declaration that it had: (1) unlawfully excluded her contrary to ss. 64-68 of the School Standards and Framework Act 1998; (2) unlawfully denied her access to suitable and appropriate education in breach of Article 2 of the Protocol No. 1 of the ECHR; and (3) unlawfully denied her the right to manifest her religion in breach of Article 9(1) of the convention. The case reached the House of Lords, and their decision formed part of the wider debate surrounding whether religious clothing should be accommodated in state schools and the place of Islam in western democracy. Within the context of the current social climate, the war on terror, the need to curb radical Islam, and allegations of Islamophobia, the House of Lords were fully aware they had a difficult task ahead of them.⁷⁰

Their Lordships unanimously held that Shabina's right to religious freedom had not been violated under Article 9(1) of the Convention because she freely chose the school with knowledge of the uniform policy and because she was free to attend alternative institutions, which allowed the *shalwar kameez*. The main question for their Lordships were whether Shabina's freedom to manifest her belief was subject to interference within the meaning of Article 9(2) and, if so, whether such interference was justified.⁷¹ It was pointed out in *R (Williamson) v Secretary of State for Education and Employment*⁷² that what 'constitutes interference depends on all the circumstances of the case, including the extent to which, in the circumstances, an

⁷⁰ Idriss, M., 'Dress codes, the right to manifest religion and the Human Rights Act 1998: the defeat of Shabina Begum in the House of Lords', (2006) *Coventry Law Journal*, pp.60-61.

⁷¹ *Ibid.*, para. 21, *per* Lord Bingham.

⁷² [2005] 2 AC 246, para. 38, *per* Lord Nicholls.

individual can reasonably expect to be at liberty to manifest his beliefs in practice'. Of relevance was the following declaration by the European Court in *Kalac v Turkey*.⁷³

Article 9 does not protect every act motivated or inspired by a religious belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account.⁷⁴

When considering the interference of the Article 9 right, the House of Lords took into consideration the lengths made by Denbigh High School and its governors to create an acceptable and cohesive uniform policy.⁷⁵ Lord Hoffman concurred, opining that Shabina's right was not infringed because there was nothing to stop her from going to a local school whose rules permitted the *jilbab*. Arrangements could have been made to transfer Shabina to one of these schools but she did not take up the chance of doing so,⁷⁶ therefore her right to education under Article 2 of the First Protocol had not been interfered with. However, one of the chief criticisms of the House of Lord's decision is that it clearly favours a non-individualised view of religious dress and that school authorities can now select between religious beliefs – for example, adopt the views considered acceptable by mainstream Muslim opinion, but ignore the views of stricter Muslims.⁷⁷

When considering the proportionality of Denbigh High's interference with Shabina's right to manifest her religious belief, the House drew valuable guidance from the European Court's decision in *Şahin*,⁷⁸ where the Court recognised the high importance of the rights protected by Article 9, but also the need in some situations to restrict the freedom to manifest religious belief. This ruling effectively maintains the current right of each school to decide its policy on school uniforms. Denbigh High School did not reject Shabina's request to wear the *jilbab* out of hand, rather, it took advice, and was told that its existing policy conformed to the requirements of mainstream Muslim opinion.⁷⁹ However, it must be noted that at the outset of the case, Lord Bingham stated:

This case concerns a particular pupil and a particular school in a particular place and at a particular time. It must be resolved on facts which are now, for purposes of the appeal, agreed. The House is not, and could not be, invited to

⁷³ (1997) 27 EHRR 552.

⁷⁴ *Ibid.*, para. 27.

⁷⁵ For example, in 1993, the school appointed a working party to re-examine its dress code in response to requests by several Muslim girls.

⁷⁶ *Kalac*, para. 89.

⁷⁷ Idriss, 'Dress Codes', p.67.

⁷⁸ *Leyla Şahin*, paras. 104-111.

⁷⁹ *Ibid.*, para. 33, *per* Lord Bingham.

rule whether Islamic dress, or any feature of Islamic dress, should or should not be permitted in the schools of this country. That would be a most inappropriate question for the House in its judicial capacity.⁸⁰

This statement would suggest that when public institutions take decisions in a thoughtful, sensitive and participatory manner that seek to balance the relevant considerations, their decisions will not be interfered with lightly by the courts on human rights grounds.⁸¹

The UK immigration minister, Damian Green, has said that trying to pass a law banning women wearing the Islamic veil would be 'un-British' and at odds with the UK's tolerant and mutually respectful society.⁸² However, it is interesting to note that British MP Philip Hollobone introduced a Private Members' Bill entitled the 'Face Coverings Regulations Bill', which would make it illegal for people to cover their faces in public.⁸³ The same Parliamentarian has also indicated that he would refuse to meet constituents wearing the veil. This has reignited a national debate on banning the wearing of veils in the UK, even though there is less popular support for such a ban in the country than in other European states.⁸⁴ The bill received its second reading in the House of Commons on 3 December 2010.

Conclusion

In this highly contentious debate, some member states have adopted an assimilationist approach to religious and cultural diversity, in that they require conformity to a set of rules (such as France and Turkey), while others have taken steps of varying degrees towards accommodation of difference (for example, the UK). However, from the case law discussed above, it can be argued that these European States predominantly have a negative approach to the regulation of the Islamic headscarf (hijab), and especially of the full face veil (burqa). The leading study of the views of young French Muslim women by Gaspard and Khosrokhavar found that they perceived the headscarf-*hijab* as an autonomous

⁸⁰ *Ibid.*, para. 2.

⁸¹ McGoldrick, *Human Rights and Religion*, p. 204

⁸² Stratton, A., 'Copying French ban on burqa would be un-British, says minister', *The Guardian*, Sunday 18 July 2010: <http://www.guardian.co.uk/uk/2010/jul/18/burqa-ban-unbritish-immigration-minister>.

⁸³ Article 19, 'Bans on the Full Face Veil', p.9.

⁸⁴ See Pidd, H., 'Niqab-ban Tory MP told he is breaking the law', *The Guardian*, 25 July 2010: <http://www.guardian.co.uk/global/2010/jul/25/niqab-ban-mp-philip-hollobone>; Grice, A., 'Champion of UK burka ban declares war on veil-wearing constituents', *The Independent*, 17 July 2010: <http://www.independent.co.uk/news/uk/politics/champion-of-uk-burka-ban-declares-war-on-veilwearing-constituents-2028669.html>.

expression of their identity and not as a form of domination. As McGoldrick explains, for some women the headscarf is a sign of deep personal and religious conviction and it signifies purity and their good status as a Muslim. It preserves their modesty and inconspicuous nature and is thus a central part of their personal identity and autonomy. It also serves as a protection from sexual harassment and interaction with men. The wearing of the headscarf is sometimes regarded as a statement of opposition to western and secular society. This is particularly illustrated in the depiction of women as sexual objects. However, western states and courts do not seem to have a detailed understanding of why a woman would wear the headscarf. From analysing the reasoning behind the ECtHR's decisions illustrated above, there does not seem to be any examples of the courts actively trying to understand their motives.

It can be argued that women wearing the Islamic headscarf could be protected under other international laws. The Human Rights Committee indicated that rules on clothing could potentially violate human rights guaranteed in General Comment No. 28 (2000) on the equality of rights between men and women:⁸⁵

The Committee stresses that such regulations [on clothing to be worn by women in public] may involve a violation of a number of rights guaranteed by the Covenant, such as: article 26, on non-discrimination; article 7, if corporal punishment is imposed in order to enforce such a regulation; article 9, when failure to comply with the regulation is punished by arrest; article 12, if liberty of movement is subject to such a constraint; article 17, which guarantees all persons the right to privacy without arbitrary or unlawful interference; articles 18 and 19, when women are subjected to clothing requirements that are not in keeping with their religion or their right of self-expression; and, lastly, article 27, when the clothing requirements conflict with the culture to which the woman can lay a claim.

As well as this, as mentioned above, it would be intriguing to observe if any of the applicants would be successful with their claims if they had argued a breach of at least one of the criteria in Article 18(2) of the ICCPR. In the case of *Hudoyberganova v Uzbekistan*, the Human Rights Committee considered the case of an author who refused to remove her headscarf at a university in the face of a ban. The Committee expressly stated that 'the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion', and that 'to prevent a person from wearing religious clothing in public or

⁸⁵ Human Rights Committee, 'General Comment No 28: Equality of rights between men and women (Article 3)', CCPR/C/21/Rev.1/Add.10, 29 March 2000, para. 13.

private may constitute a violation of Article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion'.⁸⁶

It has been suggested that the headscarf has a negative effect on the integration of minority religions into a society. In a recent resolution and recommendation, the Parliamentary Assembly of the Council of Europe (PACE) recognised that religious traditions of full-veiling, which may leave women feeling that they ought to wear the full-veil, are not compatible with the equality and dignity of women. In line with this resolution, PACE Recommendation 1927 (2010) on *Islam, Islamism and Islamophobia in Europe* asks the Committee of Ministers to:

Call on member states not to establish a general ban of the full veiling or other religious or special clothing, but to protect women from all physical and psychological duress as well as their free choice to wear religious or special clothing and to ensure equal opportunities for Muslim women to participate in public life and pursue education and professional activities; legal restrictions on this freedom may be justified where necessary in a democratic society, in particular for security purposes or where public or professional functions of individuals require their religious neutrality or that their face can be seen.⁸⁷

These recommendations recognise that there is a 'huge gulf of toleration between respect and banning'; although full face veils should not be banned, that does not mean that they are a good thing or should be supported.⁸⁸ The Parliamentary Assembly of the Council of Europe have suggested that general prohibitions on wearing the *burqa* and the *niqab* – such as those adopted or proposed across a number of states, notably France – are incompatible with states' human rights obligations in relation to freedom of expression and also freedom of religion and the right to equal treatment and non-discrimination.⁸⁹ Therefore, it will be very interesting to see whether future claims on this basis are successful from applicants from the noted countries.

It would seem appropriate that States considering adopting restrictions on full face veils should ensure that they are provided by law, are based on a specific legitimate aim (such as the protection of national security) and are necessary and proportionate

⁸⁶ *Hudoyberganova v Uzbekistan*, Communication No 931/2000, CCPR/C/82/D/931/2000, final views of 18 January 2005, para. 6.2.

⁸⁷ (2010), 90 Recommendation 1927, para. 3.13.

⁸⁸ Mitchell, D., 'If Britain decides to ban the burqa I might just start wearing one', *The Observer*, 25 July 2010:

<http://www.guardian.co.uk/commentisfree/2010/jul/25/david-mitchell-burqa-ban-tattoos>.

⁸⁹ (2010) 117 Resolution 1743, the Parliamentary Assembly of the Council of Europe, para. 16.

to achieve that aim. Furthermore, restrictions should not be discriminatory in their purposes or their implementation. As shown by the decision in *Şahin*, the Court found in favour of Turkey by not allowing the headscarf in universities; however, France's recent decision to ban the full face veil in public may raise some human rights debates under Article 9 of the ECHR.

A uniform solution throughout Europe might neither be achievable nor desirable. Each Member State has an individual approach to regulating religious manifestation in public, and a 'blanket law' would be very difficult to implement. What is arising from the current case law of the ECtHR, however, is a significant tension between the principles put forward and the way they are applied.⁹⁰ So far, referring to the national margin of appreciation is the only explanation the ECtHR has been offering when the issue of banning the headscarf is at stake. However, because of the power afforded to the Member States it is important that they do not abuse the position given to them. Nonetheless, it can be argued that secular states such as France and Turkey have, by banning the headscarf or veil, infringed upon the individual's basic right to manifest their religious belief.

⁹⁰ Rorive, I., 'Religious Symbols in the Public Space: In Search of a European Answer', (2009) 30(6) *Cardozo Law Review*, p.2696.