# RELIGIOUS SYMBOLS IN THE PUBLIC SPACE: IN SEARCH OF A EUROPEAN ANSWER

*Isabelle Rorive*[*]

## INTRODUCTION

The issue of religious symbols in the public space has given rise to widespread debate on the scope of freedom of religion and of the State's neutrality in various countries around the world.[1] Over the years, it has become a source of vigorous legal and political controversy. In Europe in particular, this question chiefly concerns the wearing of clothing linked to the religion of immigrants, namely the Islamic headscarf and the Sikh turban in various places such as schools, workplaces and courtrooms, or on pictures stamped on official documents. There are also cases relating to the kippa but these are quite rare and remain largely confidential. Besides the issue of wearing religious symbols, some European countries, like Germany, Italy, Spain, and Switzerland, have also faced litigation challenging the presence of crucifixes in schools, courtrooms, and other public buildings.[2]

[*] Isabelle Rorive is Professor at the Law Faculty of the University of Brussels (ULB). She studied law at the ULB and the University of Oxford. She is presently teaching comparative law, anti-discrimination law, and legal methodology at the ULB. Isabelle Rorive is the scientific coordinator for religion, as a discrimination ground, in the European Network of Legal Experts in the Non-Discrimination Field. She is currently involved in two main research projects: *JURISTRAS*, which comparatively explores processes of human rights litigation in the European Court of Human Rights and the effects of its judgments on national laws, judicial attitudes and policy making (2006-2009, EU Sixth Framework Program); and *Outsiders in Europe: The Foreigner and the 'Other' in the Process of Changing Rules and Identities*, which is a collective research combining diverse disciplinary fields (anthropology, law, social psychology, social and political sciences) carried on by the trans-disciplinary Centre "Migrations, Asylum and Multiculturalism" (MAM) of the ULB (2006-2011, Belgium, ARC project). She would like to thank the French Community of Belgium for its financial contribution to this research paper.

[1] DOMINIC MCGOLDRICK, HUMAN RIGHTS AND RELIGION: THE ISLAMIC HEADSCARF DEBATE IN EUROPE (2006). The author also addresses the practices of non-European States. *Id*. ch. 9.

[2] EMMANUELLE BRIBOSIA, ISABELLE CHOPIN & ISABELLE RORIVE, RAPPORT DE SYNTHÈSE RELATIF AUX SIGNES D'APPARTENANCE RELIGIEUSE DANS QUINZE PAYS DE L'UNION EUROPÉENNE (2004); *see also* Susanna Mancini, *The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence*, 30 CARDOZO L. REV. 2629 (2009). For a recent application in Italy, see the decision of the Court of Cassation on February 17, 2009, in the *Tosti* case.

The acceptance of religious symbols in the public sphere greatly varies from State to State. National political cultures and social histories weight heavily on the construction of concepts framing the scope of freedom of religion, such as secularism or public order. In Europe, one traditionally opposes the French situation with the British one. While France has been characterized by a general legislative ban on any conspicuous religious signs in public schools since 2004,[3] Islamic headscarves and Sikh turbans traditionally have been allowed in British classrooms.[4] The United Kingdom's famous *Shabina Begum* case,[5] where the House of Lords took a different view than the Court of Appeal of England and Wales, concerned a teenage Muslim schoolgirl who wanted to wear a more extensive covering (*jilbab*) than was permitted under one of the school uniform alternatives that allowed the Islamic headscarf (*hidjab*).[6] Such a debate is unthinkable in France where the Supreme administrative Court has even considered the *keski* (i.e., the under-turban of the Sikhs, "which is like an invisible hair net"[7]) to be a conspicuous religious sign *per se*, because the wearing of the under-turban made the schoolboys immediately recognizable as Sikhs.[8] The strict attitude of the French authorities is also illustrated by their refusal to enter into the debate on the meaning of the keski and the turban, which, according to some, are more cultural symbols rather than religious ones.[9] Between the two emblematic extremes of France and the United Kingdom, there is, however, a full range of national regulations and practices. To take an example still related to the educational institutions, one cannot lump together the German headscarf debate, which only concerns schoolteachers[10] with the Belgian one,

3 Law No. 2004-228 of Mar. 15, 2004, regulating, by virtue of the principle of *laïcité*, the wearing of signs or attire manifesting a religious belonging in public schools, Journal Officiel de la République Francaise [J.O.][Official Gazette of France], Mar. 17, 2004, p. 5190. The relevant provision is enshrined in C. EDUC. L. 141-5-1, Mar. 15, 2004 (consol. Feb. 12, 2009).

4 See the seminal case Mandla (Sewa Singh) v. Dowell Lee, [1983] 2 A.C. 548 (H.L.), where the House of Lords ruled that a school regulation requiring all school boys to wear a cap as part of the uniform indirectly discriminates against the Sikhs and violates the Race Relations Act, 1976, c. 74, § 1 (U.K.).

5 R. (On the Application of Begum (By Her Litigation Friend, Rahman)) v. Headteacher, Governors of Denbigh High Sch., [2006] UKHL 15, [2007] 1 A.C. 100 (appeal taken from EWCA (Civ.)).

6 For a thorough discussion of the *Shabina Begum* case, see MALEIHA MALIK, *Chapter 13—Religious Discrimination*, *in* DISCRIMINATION LAW: THEORY AND CONTEXT 921-34 (N. Bamforth, M. Malik & C. O'Cinneide eds., 2008).

7 MCGOLDRICK, *supra* note 1, at 94.

8 Conseil d'Etat [CE] [highest administrative court], Dec. 5, 2007, Nos. 285394, 285395 & 285396, Rec. Lebon 2008, 35 (Fr.), *available at* http://www.legifrance.gouv.fr/rechJuriAdmin.do?reprise=true&page=1 (database search form).

9 Oliver Dord, *Laïcité à l'école: l'obscure clarté de la circulaire "Fillon" du 28 mai 2004*, 60 ACTUALITE JURIDIQUE, DROIT ADMINISTRATIF 1523, 1525 (2004).

10 The German Federal Constitutional Court stated in the *Ludin* case, on September 24, 2003, that the wearing of headscarves by schoolteachers did not, in principle, impede the value of the

which relates to pupils,[11] although Germany and Belgium are bound by comparable constitutional principles of secular neutrality.

In the search for a more comprehensive approach in Europe, many hopes could legitimately rely on the jurisprudence developed by the European Court of Human Rights (ECtHR). Is it not sometimes described, not without any controversy, as the "Constitutional Court of Europe?"[12] Established to supervise the European Convention on Human Rights and Fundamental Freedoms (ECHR),[13] the European Court of Human Rights receives complaints from individuals alleging to be the victims of a violation, by a contracting State, of one of the rights set forth in the Convention or its Additional Protocols. Among them are the freedom of thought, conscience and religion,[14] the general protection of rights enshrined in the Convention without discrimination on the basis of religion (or any other grounds),[15] as well as the obligation for member States to respect the religious convictions and philosophical convictions of parents in the exercise of any functions which member States assume in relation to education and teaching.[16]

Part I of this paper offers background information on the scope of the freedom of religion under the European Convention on Human Rights and Fundamental Freedoms. It then gives an account of the sixteen lawsuits decided in Strasbourg[17] which have been filed by individuals banned from wearing religious symbols in various circumstances, most of them after 2000. Part II argues that the rulings

German Constitution. Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Sept. 24, 2003, 2 Entscheidungen des Bundesverfassungsgerichts [BVferGE] 1436/02 (F.R.G.). On this decision, see Matthias Mahlmann, *Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case*, 4 GERMAN L.J. 1099 n.1, 1099-1116 (2003). The States (*Länder*) are, however, entitled to restrict public schoolteachers from wearing religious symbols as they see fit within their own borders, but only through *ad hoc* legislation. On the discriminatory scope of this legislation, see MCGOLDRICK, *supra* note 1, at 115-18.

11 In Belgium, public school teachers (except for teachers of Islamic religion) have to comply with the principle of neutrality, which is usually understood so as to prevent civil servants from wearing religious symbols. *See* Sébastien Van Drooghenbroeck, *La neutralité des services publics: outil d'égalité ou loi à part entière? Réflexions inabouties en marge d'une récente proposition de loi*, *in* LE SERVICE PUBLIC: ENTRE MENACES ET RENOUVEAU (P. Jadoul, F. Tulkens, B. Lombaert & H. Dumont eds., forthcoming 2009).

12 *See, e.g.*, STEVEN GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS 173 (2006).

13 The European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force Sept. 3, 1953, 213 U.N.T.S. 222, Europ. T.S. No. 5, [hereinafter ECHR], was opened for signature in 1950 within the Council of Europe (which at the time included 10 member States). By February 2009, it has been ratified by 47 States.

14 ECHR, *supra* note 13, art. 9.

15 ECHR, *supra* note 13, art. 14.

16 ECHR, *supra* note 13, Protocol No. 1, art 2 (as signed in Paris, Mar. 20, 1952).

17 To my knowledge, Strasbourg institutions have, up to February 2009, decided sixteen cases linked to a restraint on freely wearing a religious sign, involving claims based on breaches of Article Nine of the Convention.

of the Court have been largely disappointing, not only because of their internal legal deficiency and weak reasoning, but also because they fail to construct a consistent vision of religious freedom alongside the core value of pluralism that the Court has endeavoured to articulate over the last decade. In search of a more comprehensive approach in Europe, this paper finally suggests in Part III that the framework of anti-discrimination law is, to a certain extent and chiefly in the employment field, better suited to address this problem than the one of freedom of religion. In this line, the European Union (EU) law appears more articulated than the legal principles developed within the Council of Europe.

## I. RELIGION IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Article Nine of the European Convention on Human Rights is the key provision guaranteeing the freedom of thought, conscience, and religion in the member States of the Council of Europe:[18]

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. 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 for the protection of the rights and freedoms of others.

Embracing a religion or a philosophical belief is a salient aspect of one's identity and is intrinsically linked to one's belonging to a particular community. At the same time, religious freedom is part of the promotion of democratic pluralism in a society. The ECtHR has stressed that freedom of religion and belief is a right of paramount importance in these two respects. In the landmark case *Kokkinakis v. Greece*,[19] it stated:

> As enshrined in Article 9 . . . freedom of thought, conscience and religion is one of the foundations of a "democratic society" within

[18] ECHR, *supra* note 13, art. 9. The right to education is enshrined in Article 2 of Protocol No. 1 to the ECHR, according to which member States "shall respect the right of parents to ensure . . . education and teaching in conformity with their own religious and philosophical convictions." For a thorough overview of all the provisions of the ECHR that could be used to protect aspects of freedom of religion or belief, see CAROLYN EVANS, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 5 (2001).

[19] Kokkinakis v. Greece, App. No. 14307/88, 17 Eur. H.R. Rep. 397 (1993), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form).

> the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.[20]

Since 1993, the Court has repeated this statement many times.[21] It is, however, worth keeping in mind that until 1992 and despite numerous complaints based on Article Nine, the Court did not issue a single judgment where the right to religious freedom was given a full and proper consideration. For more than thirty years, these applications were deemed inadmissible as "manifestly ill-founded." Since then, and as Julie Ringelheim remarkably pointed out, a substantial evolution has occurred in the case law of the European Court of Human Rights that indicates "an increasing attempt at going beyond casuistry and building a consistent vision of religious freedom and of its implications for the relations between state and religions in a democratic society, valid across Europe."[22] She further suggests that "alongside the core value of pluralism, three major principles have progressively emerged in the ECtHR's jurisprudence: the right to autonomy of religious communities *vis-à-vis* the state; an obligation of neutrality for the state; and the necessity of the secularity of the legal order."[23]

One feature of Article Nine that is traditionally highlighted is the distinction drawn between two aspects of religious freedom. On the one hand, the internal dimension of the right to freedom of religion, "which is sometimes called the *forum internum*,"[24] is absolute in the sense that the right to have or not to have a religion as well as the right to change religion cannot be subject to any restriction whatsoever. Nobody should be forced to subscribe to a vision of the world or to have to give it up. To make it obligatory for elected parliamentary representatives to take an oath swearing on the Gospels to perform their duties properly is contrary to this principle.[25] On the other hand, the external dimension

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[20] *Id.* ¶ 31.

[21] *See, e.g.*, Sahin v. Turkey, App. No. 44774/98, 44 Eur. H.R. Rep. 5, ¶ 104 (2005), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form).

[22] Julie Ringejheim, *Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory? in* IS THERE A CONFLICT BETWEEN RELIGION AND THE SECULAR STATE? (L. Zucca & C. Ungureanu eds., forthcoming 2009).

[23] *Id.*

[24] C. v. United Kingdom, App. No. 10358/83, 37 Eur. Comm'n H.R. Dec. & Rep. 142, 147 (1983), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form) (emphasis added). This expression was used in a number of other instances; for a recent inadmissibility decision, see Blumberg v. Germany, App. No. 14618/03 (Eur. Ct. H.R. 2008), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form).

[25] Buscarini v. San Marino, App. No. 24645/95, 30 Eur. H.R. Rep. 208 (1999), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form). Note that the court considered the case under Article 9(2) and ruled that such a requirement was not

of this fundamental freedom, which concerns the manifestation of one's religion may be subject to limitation in accordance with the standard test set forth in paragraph 2 of Article 9 ECHR. Despite the apparent clear-cut line between the respective areas of the *forum internum* and the *forum externum*, Strasbourg institutions have been struggling to apply the distinction in a consistent manner.[26] The point at which an action by the State is so intrusive that it does not merely interfere with the right to manifest a religious creed, but is in breach of the right to have a religion is uneasy to define. In addition, "[t]he emphasis given in the case law to the primacy of internal or belief-based systems as the core meaning of religion is also not necessarily consonant with the way in which many religions would define themselves."[27]

Unlike the wording of the US Constitution, the European Convention on Human Rights makes it clear that religious freedom extends to manifestations of beliefs (i.e., actions) and is not limited to beliefs.[28] However, as repeated in a long line of cases, the term "practice" in Article 9(1) ECHR does not "cover each act which is motivated or influenced by a religion or belief."[29] The criteria provided by Strasbourg case law have swung from "normal and recognised manifestations" of the religion or belief [30] to manifestations required by the religion or belief without any strong consistency.[31] As to the issue of religious symbols, the current approach of the European Court of Human Rights is either to assume altogether an interference with the religious freedom without any further discussion[32] or to adopt a subjective approach, taking into account the applicant's belief to obey a strict religious injunction while wearing a specific garment (Islamic headscarf or Sikh turban). In this line, the Grand Chamber endorsed the findings of the Chamber in the *Leyla Sahin* case according to which "[t]he applicant said that, by wearing the headscarf, she was obeying a religious precept and thereby manifesting her desire to comply strictly with the duties imposed by the Islamic faith. Accordingly, her decision to wear the headscarf *may be regarded* as motivated or inspired by a

necessary in a democratic society. *Id. at* ¶¶ 34-40.

26 EVANS, *supra* note 18, at 67-102.

27 *Id.* at 75.

28 In the United States, a similar division between belief and action has been developed through First Amendment case law. KENT GREENAWALT, RELIGION AND THE CONSTITUTION (2006); *see also* BETTE NOVIT EVANS, INTERPRETING THE FREE EXERCISE OF RELIGION: THE CONSTITUTION AND AMERICAN PLURALISM ch. 2 (1997).

29 Arrowsmith v. United Kingdom, App. No. 7050/75, 19 Eur. Comm'n H.R. Dec. & Rep. 5 (1978).

30 *Id.*

31 EVANS, *supra* note 18, at 115-23.

32 Dahlab v. Switzerland, App. No. 42393/98, 2001-V Eur. Ct. H.R. (2001), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form) (non admissibility).

religion or belief and, without deciding whether such decisions are in every case taken to fulfill a religious duty, the Court proceeds on the assumption that the regulations in issue, which placed restrictions of place and manner on the right to wear the Islamic headscarf in universities, constituted an interference with the applicant's right to manifest her religion."[33] In a subsequent instance, relying on its finding in the *Leyla Sahin* case, the Court reiterated that "wearing the headscarf *may be* regarded as 'motivated or inspired by a religion or religious belief.'"[34] On this point, the UN Human Rights Committee has promoted a more assertive position. In a case involving a student whose wearing the headscarf in a state university of Uzbekistan led to her expulsion, it 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."[35]

The fact that it seems established today[36] that banning religious headgear amounts to interference with religious freedom does not obviously imply that it is outlawed *per se*. The right to manifest a religion can be subject to limitations providing the respect of the conditions set forth in Article 9(2) ECHR: legal prescription, pursuance of a legitimate aim (the interests of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others) and necessity in a democratic society. Such a limitation clause is similar to those used with respect to other European Convention on Human Rights provisions such as freedom of speech,[37] freedom of assembly[38] or the right to privacy.[39] In the large majority of cases, the issue actually depends on whether the interference with the fundamental freedom is necessary in a democratic society. According to the Court in a landmark case concerned with free speech, necessity is "not

33 Sahin v. Turkey, App. No. 44774/98, 44 Eur. H.R. Rep. 5, ¶ 78 (Grand Chamber 2005), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form) (emphasis added).

34 Dogru v. France, App. No. 27058/05, ¶ 47 (Eur. Ct. H.R. 2008), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form) (emphasis added); *see also* Kervanci v. France, App. No. 31645/04, ¶ 47 (Eur. Ct. H.R. 2008), *available in French at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form).

35 Hudoyberganova v. Uzbekistan, Communication No. 931/2000, U.N. GAOR, Hum. Rts. Comm., 82d Sess., ¶ 6.2, U.N. Doc. CCPR/C/82/D/931/2000 (2004). This case was brought under a breach of International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 18 (1966). *See* MCGOLDRICK, *supra* note 1, at 226-30.

36 This was not the case in two early instances reviewed by the European Commission of Human Rights on May 3, 1993. *See* Karaduman v. Turkey, App. No. 8810/03, 74 Eur. Comm'n H.R. Dec. & Rep. 93 (1993), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form); Bulut v. Turkey, App. No. 18783/91, 74 Eur. Comm'n H.R. Dec. & Rep. 93 (1993), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form)); *see also infra* Part II.

37 ECHR, *supra* note 13, art. 10.

38 ECHR, *supra* note 13, art. 11.

39 ECHR, *supra* note 13, art. 8.

synonymous with 'indispensable' . . . neither has it the flexibility of such expressions as 'admissible' . . . 'ordinary' . . . 'useful' . . . 'reasonable' . . . or 'desirable'. Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context." [40] This last statement is of tremendous importance to understand the nature of the Court's control: it is subsidiary and allows for a national margin of appreciation whose application makes it difficult to develop a coherent model of State-religions relations.

## II. THE EUROPEAN COURT OF HUMAN RIGHTS, THE HEADSCARF AND THE TURBAN

Article 9 ECHR is the main provision against which the European Court of Human Rights has been reviewing cases related to the banning of religious symbols from some areas of the public sphere. Among the sixteen cases that have already been decided by Strasbourg institutions, twelve are related to the ban of Islamic headscarves in public education (six concern students[41] and six relate to teachers).[42] Three cases involve safety regulations in the name of which Sikh men were asked to remove their turbans (in one instance for the sake of wearing a helmet while

[40] Handyside v. United Kingdom, App. No. 5493/72, 1 Eur. H.R. Rep. 737, ¶ 48 (1976), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form).

[41] Karaduman v. Turkey, App. No. 8810/03, 74 Eur. Comm'n H.R. Dec. & Rep. 93 (1993), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form); Bulut v. Turkey, App. No. 18783/91, 74 Eur. Comm'n H.R. Dec. & Rep. 93 (1993), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form); Sahin v. Turkey, App. No. 44774/98, 44 Eur. H.R. Rep. 5 (Grand Chamber 2005), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form); Köse v. Turkey, App. No. 26625/02, 2006-II Eur. Ct. H.R. (2006), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form) (non admissibility); Dogru v. France, App. No. 27058/05 (Eur. Ct. H.R. 2008), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form); Kervanci v. France, App. No. 31645/04, (Eur. Ct. H.R. 2008) *available in French at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form).

[42] Dahlab v. Switzerland, App. No. 42393/98, 2001-V Eur. Ct. H.R. (2001), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form) (non admissibility), Kurtulmus v. Turkey, App. No. 65500/01, 2006-II. Eur. Ct. H.R., *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form) (non admissibility); Çaglayan v. Turkey, App. No. 1638/04 (Eur. Ct. H.R. 2007), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form) (non admissibility); Yilmaz v. Turkey, App. No. 37829/05 (Eur. Ct. H.R. 2007), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form) (non admissibility); Karaduman v. Turkey, App. No. 41296/04 and Tandogan v. Turk., App. No. 41298/04 (Eur. Ct. H.R. 2008), *available at* http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionSimilar=24554034&skin=hudoc-en&action=similar&portal=hbkm&Item=2&similar=frenchjudgement (database search form) (non admissibility).

driving a motorcycle[43] and, more recently, to go through security in a French airport)[44] and a Muslim woman was precluded access from the French general consulate in Marrakech.[45] The remaining case concerns the official refusal to deliver a duplicate of a driving licence to a Sikh who did not accept the production of a picture where he would appear bare-headed.[46]

Strikingly enough, thirteen out of sixteen cases concern the Islamic headscarf and three the Sikh turban.[47] It is also worth noting that, apart from one case relating to the United Kingdom[48] and another to Switzerland,[49] five cases concern France[50] and the remaining nine cases involve Turkey.[51] Finally, one should bear in mind that, except for the famous *Leyla Sahin* case decided in Grand Chamber[52] on 10 November 2005 (which still constitutes the cornerstone of the Court's

43 X. v. United Kingdom, App. No. 7992/77, 14 Eur. Comm'n H.R. Dec & Rep. 234 (1978), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form).

44 Phull v. France, App. No. 35753/03, 2005-I Eur. Ct. H.R. (2005), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form) (non admissibility).

45 El Morsli v. France, App. No. 15585/06 (Eur. Ct. H.R. 2008), *available in French at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form) (non admissibility).

46 Mann Singh v. France, App. No. 24479/07 (Eur. Ct. H.R. 2008), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form) (non admissibility).

47 *X v. United Kingdom*, 14 Eur. Comm'n H.R. Dec & Rep. 234; *Phull*, 2005-I Eur. Ct. H.R.; *Mann Singh*.

48 *X v. United Kingdom*, 14 Eur. Comm'n H.R. Dec & Rep. 234.

49 Dahlab v. Switzerland, App. No. 42393/98, 2001-V Eur. Ct. H.R. (2001), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form) (non admissibility).

50 *Phull*, 2005-I Eur. Ct. H.R.; *El Morsli*; *Mann Singh*; Dogru v. France, App. No. 27058/05 (Eur. Ct. H.R. 2008), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form); Kervanci v. France, App. No. 31645/04 (Eur. Ct. H.R. 2008), *available in French at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form).

51 Karaduman v. Turkey, App. No. 8810/03, 74 Eur. Comm'n H.R. Dec. & Rep. 93 (1993), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form); Bulut v. Turkey, App. No. 18783/91 (Eur. Ct. H.R. 1993), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form); Sahin v. Turkey, App. No. 44774/98, 44 Eur. H.R. Rep. 5, ¶ 78 (Grand Chamber, 2005), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form); Köse v. Turkey, App. No. 26625/02, 2006-II Eur. Ct. H.R. (2006), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form); Kurtulmus v. Turkey, App. No. 65500/01, 2006-II. Eur. Ct. H.R., *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form); Tandogan v. Turkey, App. No. 41298/04 (Eur. Ct. H.R. 2007), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form); Çaglayan v. Turkey, App. No. 1638/04 (Eur. Ct. H.R. 2007), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form); Yilmaz v. Turkey, App. No. 37829/05 (Eur. Ct. H.R. 2009), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form).

52 The case was decided in Grand Chamber following proceedings commenced by Leyla Sahin on the basis of ECHR art. 43 (case raising a serious question of interpretation or a serious issue of general importance).

jurisprudence) and two cases decided in December 2008,[53] all the other rulings discuss the issue of admissibility and do not, therefore, deal with the merits of the case.

### A. *Very Scarce Case Law Before 2005*

Before the *Leyla Sahin* case, the Strasbourg institutions only reviewed three cases involving a restraint on the wearing of the Islamic headscarf in public education.

In *Senay Karaduman v. Turkey* and in *Lamiye Bulut v. Turkey*, the former European Commission of Human Rights[54] decided, on 3 May 1993, that a University regulation prohibiting Muslim students from wearing a headscarf on identity pictures *does not reveal any interference* with the right to manifest one's religion. Such a stance is quite surprising, but the Commission considered that the students who chose to study in a secular university have to abide with university regulations.[55] In other words, in the Commission's opinion, they agreed to circumscribe their religious freedom to a certain extent in deciding to register in a public university. Accordingly, their freedom of religion was not infringed when they were denied the right to obtain a graduation diploma because they had failed to provide a suitable picture. This approach was later abandoned by the European Court of Human Rights. In *Dogru v. France*, for instance, the Court pointed out that by signing the internal rules when Belgin Dogru (aged 11) enrolled at the secondary school, she, as well as her parents, were made aware of the headscarf ban during physical education and sports classes. The Court relied on this fact, not to reject any interference with Miss Dogru's freedom of religion, but to rule, among other considerations, that the interference can be regarded as having been prescribed by law.[56] As to the *Karaduman* and the *Bulut* cases of 1993, the position of the Commission also largely relied on the secular nature of the university and the specific situation of Turkey. In a line of reasoning which has

53 *Dogru*; *Kervanci*.

54 Until the reform of the European Convention's supervisory mechanism in the 1990s, the European Commission of Human Rights was tasked with reviewing the admissibility of applications lodged with the European Court of Human Rights.

55 The European Commission of Human Rights applies here the "contracting-out" approach that it used to favor in religious freedom cases. *See, e.g.*, X v. United Kingdom, App. No. 8160/78, 22 Eur. Comm'n H.R. Dec & Rep. 27 (1981), *available at* http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=24568790&skin=hudoc-en&action=request (database search form); Konttinen v. Finland, App. No. 24949/94 (Eur. Comm'n. H.R. 1996), *available at* http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=24568941&skin=hudoc-en&action=request (database search form). Such a position has been strongly criticised in a decision of the Court of Appeals of England and Wales: Copsey v. WWB Devon Clays Ltd, [2005] EWCA (Civ) 932 (Eng.).

56 *Dogru*, at ¶ 59; *see also Kervanci*, at ¶ 59.

been reiterated in subsequent cases, the Commission stressed that in order to ensure pluralism, especially "in countries where the great majority of the population belong to a particular religion," institutions of higher education may regulate the manifestation of the rites and symbols of a religion to prevent "certain fundamentalist religious movements" from disturbing public order or exerting pressure on students who do not practice their religion or who belong to another religion.

*Dahlab v. Switzerland*, which was decided eight years later, concerns another situation. The applicant was a primary school teacher who complained of being prohibited from wearing a headscarf in the classroom. After her appointment as a civil servant in the public education service, she converted to Islam following a period of spiritual soul-searching. For several years, she actually used to wear the *hidjab* in the classroom without the head teacher or district schools inspector taking any action or parents making any complaints. As she contended, her teaching was secular in nature and "religious harmony had never been disturbed within the school, because [she] had always shown tolerance towards her pupils, all the more so as they encompassed a wide range of nationalities and were therefore particularly accustomed to diversity and tolerance."[57] However, an inspector reported that Ms. Dahlab was wearing the *hidjab* and the Director of Public Education became involved. After an attempt at mediation, she was asked to remove her veil while at school and was finally sacked without finding any remedy in the Swiss courts.

Before the European Court of Human Rights, Switzerland successfully argued that the case was "manifestly ill-founded." Some academic writers heavily criticized this position. As Carolyn Evans put it, "[a] woman with an otherwise spotless employment record who had spent years wearing Islamic clothing to which no-one objected had been effectively sacked because of her religion. But the issue was so clear that it did not even deserve a full and proper consideration by the Court."[58] In the European Court of Human Rights' view, "it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a

[57] Dahlab v. Switzerland, App. No. 42393/98, 2001-V Eur. Ct. H.R. (2001), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form) (non admissibility).

[58] Carolyn Evans, *The "Islamic Scarf" in the European Court of Human Rights*, 7 MELB. J. INT'L. L. 52 (2006).

headscarf might have some kind of proselytizing effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils."[59] In consequence, when "weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony," the Court considered that "having regard, above all, to the tender age of the children for whom the applicant was responsible as a representative of the State, the Geneva authorities did not exceed their margin of appreciation and that the measure they took was therefore not unreasonable."[60] The reasons for deciding in *Dahlab* are intrinsically linked to the circumstances of the case and a large margin of appreciation was conferred to the national authorities without any strong justification. What comes out from this decision is a distrust of the European Court of Human Rights towards the Islamic headscarf itself. As to the gender equality issue, the Court quoted the national federal Court statement without any qualification. Considering the paramount importance of the issue at stake, more could also have been said on the scope of State's neutrality and on its articulation with the right to freedom of religion.

### B. *Leyla Sahin: An Emblematic Case*[61]

The *Leyla Sahin case* is the first one where the European Court of Human Rights took the opportunity to assess an instance concerning the ban of religious symbols on its merits. The circumstances were very different than in *Dahlab*, but close to *Karaduman* and *Bulut*. Very

59 *Dahlab*, 2001-V Eur. Ct. H.R..

60 *Id*.

61 The *Sahin* case gave rise to numerous comments. In addition to the contributions referred to in the following footnotes, see, among many others, Kerem Altiparmak & Onur Karahanogullari, *After Sahin: The Debate on Headscarves is Not Over*, 2 EUR. CONST. L. REV. 268 (2006); Christopher D. Beledieu, *The Headscarf as a Symbolic Enemy of the European Court of Human Rights' Democratic Jurisprudence: Viewing Islam Through a European Legal Prism in Light of the Sahin Judgment*, 12 COLUM. J. EUR. L. 573 (2006); Laurence Burgorgue-Larsen and Edouard Dubout, *Le port du voile à l'université. Libres propos sur l'arrêt de la Grande Chambre Leyla Sahin c. Turquie du 10 novembre 2005*, REVUE TRIMESTRIELLE DES DROITS DE L'HOMME, Apr. 2006, at 183; Sylvie Langlaude, *Indoctrination, Secularism, Religious Liberty and the ECHR*, 55 INT'L & COMP. L.Q. 929 (2006); Tom Lewis, *What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation*, 56 INT'L & COMP. L.Q. 395 (2007); Niraj Nathwani, *Islamic Headscarves and Human Rights: A Critical Analysis of the Relevant Case Law of the European Court of Human Rights*, 25 NETH. Q. OF HUMAN RIGHTS 221 (2007).

simply, the issue of *Sahin* was whether a Muslim student at a State university could be prevented from wearing the Islamic veil on university premises during the course of her studies. At the time of the alleged violation, Leyla Sahin was a fifth year medical student. She had studied for four years at the Faculty of Medicine at Bursa University before enrolling at the Cerrahpasa Faculty of Medicine at Istanbul University. She claimed to have worn the Islamic headscarf at Bursa University and for a few months at the University of Istanbul before the Vice-Chancellor issued a circular forbidding access to lectures, tutorials and examinations to students "with a beard or wearing the Islamic headscarf."[62] Because she always refused to comply with the circular and was therefore barred from carrying on her studies, she left Istanbul and completed her medical degree in Vienna.

In its Chamber's ruling[63] as well as in the Grand Chamber,[64] the European Court of Human Rights decided that although the university regulation amounted to an interference with the right of Leyla Sahin to manifest her religion, the conditions set forth in Article 9(2) of the Convention were met.[65] The reasoning of the Court focused on the proportionality test, i.e., whether the interference was "necessary in a democratic society." In short, the proportionality rule that States have to comply with to interfere with religious freedom traditionally entails three requirements that are assessed *in concreto*:[66] (1) the interference has to be appropriate in the sense that it should be proper to protect the legitimate interest it pursues; (2) there should be no other means to achieve that legitimate aim which would be less restrictive of the freedom of religion; (3) the interference has to pass the strict proportionality test which entails balancing the competing interests at stake. On account of the principle of subsidiarity, the European Court of Human Rights, however, does not apply the second requirement to instances where member States are given a wide margin of appreciation. The underlying idea is that State parties "are 'better placed' to decide how best to discharge their Convention obligations in what is a sensitive area."[67] This was how the Court tackled the *Leyla Sahin* case but, eventually, it has not even applied the third requirement. Relying on the lack of any European consensus on the issue of regulating the wearing

[62] Sahin v. Turkey, App. No. 44774/98, 44 Eur. H.R. Rep. 5, ¶ 16 (Grand Chamber 2005), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form).

[63] Sahin v. Turkey, App. No. 44774/98, 41 Eur. H.R. Rep. 8 (2004), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form).

[64] *Sahin*, 44 Eur. H.R. Rep. 5.

[65] The Court followed a similar reasoning with respect to the right to education enshrined in Article 2 of the First Additional Protocol.

[66] *See, e.g.*, SEBASTIEN VAN DROOGHENBROECK, LA PROPORTIONNALITE DANS LE DROIT DE LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME. PRENDRE L'IDEE SIMPLE AU SERIEUX ¶ 793 (2001).

[67] *See Sahin*, 44 Eur. H.R. Rep. 5, ¶ 2 (Tulkens, J., dissenting).

of religious symbols in educational institutions, the European Court of Human Rights granted Turkey a large margin of appreciation.[68] The comparative-law materials on which the Chamber of the Court based its reasoning in 2004 were patchy and riddled with inaccuracies.[69] Although the comparative analysis was much more detailed in the Grand Chamber's ruling,[70] it was ill-founded to allow such a conclusion, as it chiefly concerned the ban on wearing religious symbols in secondary school. With respect to university education, which is intended for young adults who are deemed to be more difficult to influence than school pupils, amongst the 46 parties to the Convention at the time,[71] only three States (Albania, Azerbaijan and Turkey) had introduced regulations on the wearing of headscarf in universities, according to information provided in the ruling itself.[72]

In favor of the Court's position, one could plead that a wide margin of appreciation might rely on its classical credo: "Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance."[73] Then again, this wide margin of appreciation does not give member States carte blanche. As Judge Tulkens puts it in her dissenting opinion,[74] "other than in connection with Turkey's specific historical background, European supervision seems quite simply to be absent from the judgment. However, the issue raised in the application, whose significance to the right to freedom of religion guaranteed by the Convention is evident, is not merely a 'local' issue, but one of importance to all the member States. European supervision cannot, therefore, be escaped simply by invoking the margin of appreciation."[75]

The standard of the Court's supervision is not convincing, but neither are the reasons put forward to decide the case. The majority of the Court relies entirely on two main arguments, i.e., secularism and equality, and discusses them in general terms. The principle of secularism, as elucidated by the Turkish Constitutional Court, is

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[68] *Cf.* Hirst v. United Kingdom (No. 2), App. No. 74025/01 (Eur. Ct. H.R. 2005), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form) (finding that the lack of a consensus on the issue of depriving detainees of the right to vote was not dispositive).

[69] *Sahin*, 41 Eur. H.R. Rep. 8, ¶¶ 53-7 (2004); *see also* Emmanuelle Bribosia & Isabelle Rorive, *Le voile à l'école: une Europe divisée*, 60 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 951, 963 (2004).

[70] *Sahin*, 44 Eur. H.R. Rep. 5, ¶¶ 55-65.

[71] In 2007, Montenegro joined the Council of Europe, and there are now 47 member States.

[72] *Sahin*, 44 Eur. H.R. Rep. 5, ¶ 109.

[73] *Id.*

[74] Judge Tulkens was the only one dissenting among 17 judges in the Grand Chamber ruling of the *Sahin* case.

[75] *Sahin*, 44 Eur. H.R. Rep. 5, ¶ 3 (Tulkens, J., dissenting).

identified as the paramount consideration underlying the ban on the wearing of religious symbols in universities.[76] Referring to the *Karduman* case (1993), but mainly and more extensively to the influential *Refah Partisi* case,[77] the majority of the Grand Chamber, in line with the Chamber's decision, stressed that the Islamic headscarf "has taken on political significance in Turkey in recent years" and that "there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts."[78] Surprisingly enough, the specific circumstances of *Leyla Sahin* seem to vanish behind a general defence of secularism in Turkey. At no stage of its ruling did the Court balance, on the one hand, the loss suffered by the applicant as she had been compelled to carry on her medical studies outside Turkey with, on the other hand, the advantage for Turkish society to prevent her from wearing the *hidjab* at university. No answer was given to her arguments according to which she had no intention of challenging the principle of secularism and that none of her acts or attitudes were manifesting such an intention. Leyla Sahin's personal interest to manifest her religion seems to be wholly absorbed by the public interest in fighting extremism.[79] And last but not least, the Court made no distinction between teachers and students, whereas, in the *Dalhab* case, it focused on the role-model aspect of the veiled primary school teacher.

As to equality, the Court reiterated the statement made in *Dahlab* on the symbolic meaning of the headscarf, "which . . . .[was] hard to square with the principle of gender equality."[80] This time the Court omitted to mention that the argument was borrowed from the decision of the Swiss federal Court. As Judge Tulkens put it "[w]earing the headscarf is considered . . . to be synonymous with the alienation of women. The ban on wearing the headscarf is therefore seen as promoting equality between men and women. However, what, in fact, is the connection between the ban and sexual equality? The judgment does

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[76] *Sahin*, 44 Eur. H.R. Rep. 5, ¶ 116.

[77] Refah Partisi (The Welfare Party) v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98 & 41344/98, 37 Eur. H.R. Rep. 1 (Grand Chamber 2003), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form). The case relates to the dissolution of an influential political party whose leaders were accused of planning to establish a theocratic regime based on Islamic law in Turkey. For a critical assessment, see Kevin Boyle, *Human Rights, Religion and Democracy: The Refah Party Case*, 1 ESSEX HUM. RTS. REV. 1 (2004).

[78] *Sahin*, 44 Eur. H.R. Rep. 5, ¶ 115.

[79] *Cf.* Gündüz v. Turkey, App. No. 35071/97, 41 Eur. H.R. Rep. 5 (2003), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form) (holding that the freedom of expression of a Muslim religious leader had been violated because of his conviction for violently criticizing the secular regime in Turkey, calling for the introduction of the Sharia and referring to children born of marriages celebrated solely before the secular authorities as "bastards").

[80] *Sahin*, 44 Eur. H.R. Rep. 5, ¶ 111.

not say. Indeed, what is the signification of wearing the headscarf?"[81] One could only wonder how the Court could entirely disregard current sociological studies highlighting the ambiguous and plural meanings of the headscarf in contemporary democratic society.[82] It seems necessary to speak of the different interpretations that the *hidjab* is given in different Muslim societies and by different Muslim scholars.[83] Ultimately, if wearing the headscarf was really contrary to the principle of equality between men and women in any event, would democratic States not have a positive obligation to prohibit it in all places?[84] In the case of Leyla Sahin, one could only be astonished that the majority of the Court did not even consider that excluding an adult woman from university was a peculiar path to achieve gender equality.

These different points weaken the general principles restated in the judgment according to which "freedom of thought, conscience and religion is one of the foundations of a 'democratic society'" as it is "one of the most vital elements that go to make up the identity of believers and their conception of life."[85] In this light, the court's subsequent statement that a "State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed" rings hollow.[86] Above all, the Court's judgment seems driven by the fear of Islamic fundamentalism and as a result, "the notion of pluralism is devoid of its significance."[87] Commenting on the *Dahlab* and the *Leyla Sahin* cases, Carolyn Evans has convincingly argued that the "Court uses both stereotypes of Muslim women without any recognition of the inherent contradiction between the two and with minimal evidence to demonstrate that either stereotype is accurate with respect either to the applicants or to Muslim women more generally."[88] On the one hand, the Muslim woman appears as "the victim of a gender oppressive religion, needing protection from abusive, violent male relatives, and passive, unable to help herself in the face of a culture of male dominance."[89] On the other hand, the Muslim woman is also linked to the figure of the aggressor as she is "inherently and

81 *Sahin*, 44 Eur. H.R. Rep. 5, ¶ 11 (Tulkens, J., dissenting).

82 For a much more subtle approach, see *supra* note 10 and the approach of the German Federal Constitutional Court in the *Ludin* case (2003).

83 Evans, *supra* note 58, at 52.

84 Bribosia and Rorive, *supra* note 69, at 962.

85 *Sahin*, 44 Eur. H.R. Rep. 5, ¶ 104.

86 *Id*. ¶ 107.

87 *See supra* note 22 and accompanying legal references. *But see* Jean-François Flauss, *Le port de signes religieux distinctifs par les usagers dans les établissements publics d'enseignement*, *in* LAÏCITE, LIBERTE DE RELIGION ET CONVENTION EUROPEENNE DES DROITS DE L'HOMME 201 (G. Gonzalez ed., 2006) .

88 Evans, *supra* note 58, at 52.

89 *Id.*

unavoidably engaged in ruthlessly propagating her views."[90] Is the Court not sufficiently equipped with rigorous legal reasoning to have to rely on populist images, already deeply entrenched in the political debate of many European States?

### C. *After Leyla Sahin, the Issue of Religious Symbols is Still on the European Court's Agenda*

After 2005, the decisions of the European Court of Human Rights concerning the wearing of religious signs by students or teachers in public schools involved, at first, only Turkey. Each time, the Court followed Leyla Sahin's jurisprudence even, surprisingly but consistently with the national margin of appreciation credo, in cases concerning "Imam-Hatip" high schools, i.e., public secondary schools with a religious calling.[91] Furthermore, in December 2008, the Court issued two rulings concerning the expulsion of Muslim girls from public French schools because they refused to remove their headscarves during education and sports classes despite several requests to do so.[92] Both instances were judged on their merits and concern facts preceding the legislative banning of conspicuous religious symbols in public French schools. At the time, the legal reference was an opinion of the *Conseil d'Etat*, the supreme administrative Court in France, according to which:

> pupils wearing signs in schools by which they manifest their affiliation to a particular religion is not in itself incompatible with the principle of secularism . . ., but that this freedom should not allow pupils to display signs of religious affiliation, which, inherently, in the circumstances in which they are worn, individually or collectively, or conspicuously or as a means of protest, might constitute a form of pressure, provocation, proselytism or propaganda, undermine the dignity or freedom of the pupil or other members of the educational community, compromise their health or safety, disrupt the conduct of teaching activities and the educational role of the teachers, or, lastly, interfere with order in the school or the normal functioning of the public service.[93]

The Court held, in both cases, that there had been no violation of Article Nine of the Convention. A large margin of appreciation was

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[90] *Id.*

[91] *See* Köse v. Turkey, App. No. 26625/02, ¶¶ 7-8 (Eur. Ct. H.R. 2006), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form).

[92] Dogru v. France, App. No. 27058/05 (Eur. Ct. H.R. 2008), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form); Kervanci v. France, App. No. 31645/04, ¶ 47 (Eur. Ct. H.R. 2008), *available in French at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form).

[93] Conseil d'Etat [CE] [highest administrative court], Nov. 27, 1989, No. 346.893 (Fr.), *available at* http://www.conseil-etat.fr/ce/rappor/index_ra_cg03_01.shtml.

granted to France and the Court was satisfied "that the domestic authorities justified the ban on wearing the headscarf during physical education classes on grounds of compliance with the school rules on health, safety and assiduity which were applicable to all pupils without distinction."[94] As in previous case law, the arguments of secularism and, more marginally, gender equality were put forward. In keeping with the principle of respect for pluralism and the freedom of others, the Court stressed that it was for the national authorities to ensure that "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."[95] In its view, that concern appears to have been answered by the French secular model. It is striking to note the borrowing from the French debate of the term "ostentatious" (*signes ostentatoires*),[96] which was largely used during the 1990s by the Administrative Supreme Court (*Conseil d'Etat*) and which was replaced by "conspicuous" (*signes religieux ostensibles*) in official documents subsequent to the work of the Stasi Commission (named after the former Republic Mediator) on the question of the *laïcité*.[97]

Hence, one is eager to see whether the Court will change its line of reasoning in the recent action brought by two Sikhs against France. On May 30, 2008, Jasvir Singh and Ranjit Singh filed a legal challenge against their expulsion from Michel High School in Bobigny (Paris region) for wearing a *keski*. They were respectively 14 and 17 years old at the time and, after being out of school for one year, they were admitted to the Fenelon high school, a Catholic school. The eldest applicant is a law and economics student at the prestigious Sorbonne in Paris. Supported by the association United Sikhs,[98] the cases before the European Court on Human Rights are the first against France since it passed legislation in March 2004, often referred as the anti-Islamic veil

94 *Dogru*; *Kervanci*, at ¶ 68.

95 *Dogru*; *Kervanci*, at ¶ 71 (emphasis added). Note that the same statement was made by the European Court of Human Rights in *Köse*.

96 To my knowledge, the Court has never used the wording "ostentatious" in its appreciation of a case related to religious symbols.

97 See Point IV of the Ministerial Order of May 18, 2004, concerning the implementation of the Law No. 2004-228 of Mar. 15, 2004, regulating, by virtue of the principle of *laïcité*, the wearing of signs or attire manifesting a religious belonging in public schools, Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 22, 2004, p. 9033, which repeals the Ministerial Order of September 20, 1994, concerning the wearing of ostentatious signs in public schools.

98 With the collaboration of a leading British human rights law firm, the association United Sikhs is developing strategic litigation before the ECtHR, a path which is rarely explored in the French legal culture. *See* Emmanuelle Bribosia, Isabelle Rorive & Amaya Úbeda de Torres, *Protecting Individuals from Minorities and Vulnerable Groups in the European Court of Human Rights: Litigation and Jurisprudence in France*, *in* PROTECTING INDIVIDUALS FROM MINORITIES AND VULNERABLE GROUPS IN THE EUROPEAN COURT OF HUMAN RIGHTS (D. Anagnostou & E. Psychogiopoulou eds., forthcoming 2009).

Act, but which bans the wearing of any conspicuous religious signs, including the Sikh turban, in public schools.[99] The time has come to test the statement of French Judge Jean-Paul Costa, the active president of the European Court on Human Rights (vice-president at the time), about the compliance of a piece of legislation proscribing religious signs at school. In October 2003, before the French Stasi Commission on *laïcité*, Judge Costa stated that "in the event that such a statute was reviewed by our Court, it would be considered as complying with the French model of secularism, and consequently not in breach of the European Convention on Human Rights."[100]

While it is sure that France, like Turkey, embraces, in its Constitution, the political doctrine of strict secularism (or *laïcité*) which precludes any manifestation of religious belonging in public institutions as challenging the State's neutrality,[101] the place of Sikhism in France cannot be compared with the place of Islam in Turkey. Even if it is very doubtful that France will be condemned (it would otherwise be its first condemnation for violating the freedom of religion), the Court will not have the opportunity to entrench behind fear of fundamentalism to justify a pressing social need to allow a State's interference with the right to freedom of religion. Its recent ruling in *Mann Singh v. France*[102] seems, however, to indicate that the Court is not inclined to substantially engage in the issue. Mr. Mann Singh, a practicing Sikh, claimed that he was entitled to wear his turban in his driver's license photograph (as he did in previous license photographs), but the Court rejected his claim, relying heavily on previous case law[103] to allow a large margin of appreciation to France.

Turning to the European Court of Human Rights' decisions

99 *See supra* note 3.

100 In French, "*Si une telle loi était soumise à notre Cour, elle serait jugée conforme au modèle français de laïcité, et donc pas contraire à la Convention européenne des droits de l'Homme*." *See* FRANÇOISE LORCERIE, LA POLITISATION DU VOILE: L'AFFAIRE EN FRANCE, EN EUROPE ET DANS LE MONDE ARABE 17 (2005). The question remains open whether Judge Costa will be entitled to hear the case given the requirement of fair hearing and impartiality.

101 As the concept of *laïcité* has very different histories in France and Turkey, it is neither construed nor implemented in the same way. *See, e.g.*, Constance Grewe & Christian Rumpf, *La Cour constitutionnelle turque et sa décision relative au 'foulard islamique,'* 3 REVUE UNIVERSELLE DES DROITS DE L'HOMME 113 (1991).

102 App. No. 24479/07 (Eur. Ct. H.R. 2008), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form) (non admissibility).

103 *See* X v. United Kingdom, App. No. 7992/77, 14 Eur. Comm'n H.R. Dec. & Rep. 234 (1978), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form); Karaduman v. Turkey, App. No. 16278/90, 74 Eur. Comm'n H.R. Dec. & Rep. 93 (1993), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form); Phull v. France, App. No. 35753/03, 2005-I Eur. Ct. H.R. (2005), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form) (non admissibility); El Morsli v. France, App. No. 15585/06 (Eur. Ct. H.R. 2008), *available in French at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form) (non admissibility).

involving safety regulations to restrict the wearing of religious signs,[104] one can only be puzzled by the headlong rush of the Court. In the last case it decided in March 2008, Mrs. El Morsli was denied access to the French general consulate in Marrakesh (Morocco) because she refused to take off her headscarf while going through the identity check. Although she was ready to remove it in front of a woman, such a course was refused. For that reason, she unsuccessfully requested a visa entry into France by registered mail. The reason for the refusal was that she had to follow the procedures to get the visa, i.e., going in person to the consulate. According to the European Court, the French authorities did not infringe her freedom of religion. The Court considered the case to be similar to the *Phull* case (2005), where security staff at Entzheim Airport (located in the East of France) compelled a Sikh man to remove his turban for inspection as he made his way through the security checkpoint prior to entering the departure lounge. In the Court's opinion, these security checks are necessary in the interests of public safety and the arrangements for implementing them fell within the State's margin of appreciation, particularly as the measure was only resorted to occasionally.[105]

What is striking in the case law of the European Court of Human Rights concerning religious symbols is that the issue of discrimination, when brought to the review of the Court, is usually undermined as the Court considers that "no separate question" arose in this respect. This strongly calls for an appreciation of the issue under EU anti-discrimination law which has known tremendous developments over the past decade.

## III. EUROPEAN UNION ANTI-DISCRIMINATION LAW AND RELIGIOUS SYMBOLS

Besides the Council of Europe, which was organised after World War II to strengthen democratic values and fundamental freedoms in Europe,[106] stands the European Union (initially the European Economic

[104] *X. v. United Kingdom*, 14 Eur. Comm'n H.R. Dec. & Rep. 234; *Phull*, 2005-I Eur. Ct. H.R.; *El Morsli.*

[105] In a similar case involving security directives applying to enter into the Bank of France, the latter had to review its policy following a deliberation of the French High Authority against Discrimination and for Equality (HALDE - *Haute Autorité de Lutte contre les Discriminations et pour l'Égalité*): Sept. 19, 2005, deliberation no. 2005-26, *available at* http://www.halde.fr/-Deliberations-.html (database search form).

[106] The Treaty establishing the Council of Europe was signed in London on May 5, 1949, by Belgium, Denmark, France, Ireland, Italy, Luxemburg, Norway, the Netherlands, Sweden and the United Kingdom. Treaty Establishing the Council of Europe, May 5, 1949, *available at* http://conventions.coe.int/Treaty/EN/Treaties/Html/001.htm (last visited Apr. 24, 2009).

Community, or EEC) with a market-oriented purpose.[107] Whereas the Council of Europe has gathered all countries of the continent (except for Belarus) since its enlargement to the East in the 1990s, the European Union covers a smaller territory (twenty-seven countries since its 2007 enlargement) and reaches less far East. Implementing the principle of equal treatment between persons irrespective of religion or belief is a very recent concern in EU law. In other respects, anti-discrimination has, however, been a key element of European integration.[108] The first EEC Treaty included a number of provisions prohibiting discrimination against EU nationals living or working in another member State.[109] Furthermore, the principle that men and women should receive equal pay for equal work was, from the outset, considered necessary to avoid distortions of competition between member States.[110] Over the years discrimination in payment, and more generally discrimination against women, was also recognized as a social problem and as a breach of fundamental human rights.[111] Accordingly, a body of EC law on gender equality has progressively grown with an important input of the European Court of Justice (ECJ). The concept of indirect discrimination was originally built by this Court in equal payment cases[112] as well as the system of the shift of the burden of proof.[113] In both instances, US jurisprudence was a key source of inspiration.[114]

The emergence of EU citizenship and the need for more popular legitimacy of the EU called for broader equal opportunities policies. The result of years of civil society campaigning was the inclusion of Article 13 in the EC Treaty, following the entry into force of the 1997 Amsterdam Treaty. This provision is the cornerstone of potentially wide-ranging European anti-discrimination laws, as it empowers the

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107 The Treaty establishing the European Economic Community was signed in Rome on March 25, 1957, by Belgium, France, Germany, Italy, Luxemburg and the Netherlands. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

108 *See, e.g.*, MARK BELL, ANTI-DISCRIMINATION LAW & THE EUROPEAN UNION (2002).

109 *See* EEC Treaty pt. I, art. 7 (now EC Treaty art. 12).

110 Article 119, paragraph 1 of the EEC Treaty (now EC treaty art. 141.1, ¶ 1) states that "'Each Member State shall . . . ensure . . . the application of the principle that men and women should receive equal pay for equal work."

111 See the landmark decisions of the European Court of Justice: Case 43/75, Defrenne II, 1976 E.C.R. 455; Case 149/77, Defrenne III, 1978 E.C.R. 1365, *available at* http://curia.europa.eu/jcms/jcms/j_6/accueil (database search form).

112 See the following landmark decisions: Case 96/80, Jenkins v. Kingsgate (Clothing Prods.) Ltd., 1981 E.C.R. 911; Case 170/84, Bilka-Kaufhaus GmbH v. Weber von Hartz, 1986 E.C.R. 1607, *available at* http://curia.europa.eu/jcms/jcms/j_6/accueil (database search form).

113 See the following landmark decisions: Case C-127/92, Enderby v Frenchay Health Auth., 1993 E.C.R. I-05535; Case 109/88, Handels-og Kontorfunktionærernes Forbund I Danmark v. Dansk Arbejdsgiverforening ('Danfoss'), 1989 E.C.R. 3199; Case C-400/93, Specialarbejderforbundet i Danmark v. Dansk Industri ('Royal Copenhagen'), 1995 E.C.R. I-01275, *available at http://curia.europa.eu/jcms/jcms/j_6/accueil* (database search form).

114 *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Community "to take appropriate action to combat discrimination based on sex, racial or ethnic origin, *religion or belief*, disability, age or sexual orientation."[115]

Although Article 13 represents a fundamental step forward in the implementation of the principle of equal treatment within Europe, this provision lacks direct effect and, as such, does not oblige the European institutions to act.[116] Furthermore, the approval of appropriate legal measures to combat discrimination requires unanimity within the Council on a proposal from the Commission, after consultation with the Parliament. Because of the unanimity requirement, many shared the view that nothing was likely to happen within years, if ever.

Two Directives were, however, adopted in 2000, the year following the entry into force of the Amsterdam Treaty: Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Racial Equality Directive),[117] and Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation with respect to religion or belief, disability, age and sexual orientation (the Employment Equality Directive).[118] Such a speedy achievement was the result of years of civil society campaigning which prepared the ground for broad support for legislative measures. Exceptional political circumstances also played a decisive role. Oddly enough, Jörg Haider, the leader of the FPÖ (an Austrian extremist right wing political party), boosted the process. His participation in the Government Schüssel in 2000 caused deep concern in other EU member States at the time. Implementing concrete measures against racial discrimination was considered to be a priority in Europe, and Austria, facing political confinement, could not afford to vote against the adoption of anti-discrimination legislation.

The Racial Equality Directive and the Employment Equality Directive are built on the gender experience and the case law of the European Court of Justice. They significantly raise the level of legal protection against discrimination across the EU and pay particular attention to issues related to remedies and enforcement, mainly defense of rights, burden of proof and sanctions. Both Directives prohibit four forms of unlawful discrimination: direct discrimination, indirect discrimination, harassment, and instructions to discriminate. The Employment Equality Directive also provides for reasonable

115 EC Treaty art. 13 (emphasis added).

116 *See, e.g.*, EDOUARD DUBOUT, L'ARTICLE 13 DU TRAITE CE. LA CLAUSE COMMUNAUTAIRE DE LUTTE CONTRE LES DISCRIMINATIONS (2006).

117 2000 O.J. (L180) 22.

118 2000 O.J. (L303) 16.

accommodation for people with disabilities.[119] In this respect, it was significantly influenced by the Americans with Disabilities Act of 1990.[120] The concept of reasonable accommodation is very new in Europe as it was only part of British, Irish and Swedish laws[121] before the implementation of the Employment Equality Directive in national legal systems.

EU anti-discrimination law encompasses interesting legal developments to address some forms of restrictions to wear religious symbols in the public space. In the field of employment and occupation, as well as vocational training,[122] direct discrimination based on religion or belief is forbidden altogether. In other words, a person cannot be "treated less favorably than another is, has been or would be treated in a comparable situation" because of her/his religion or belief.[123] Difference of treatment based on religious grounds can never be justified except when it constitutes "a genuine and determining occupational requirement."[124] This exception should be construed restrictively and be assessed in light of the legitimate objective it pursues and the proportionality requirement.[125] An employer should not, therefore, be entitled to hide behind his clients' prejudices to refuse to hire a veiled woman in his shop.[126] More difficult to grasp is the second exception related to direct discrimination, which concerns the "occupational activities within churches and other public or private organizations the ethos of which is based on religion or belief."[127] In this case, the Employment Equality Directive provides that "a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organization's ethos."[128] Churches and ethos-based organizations are enabled "to require

119 *Id.* art. 5.

120 42 U.S.C. § 12111(9) (2006) (defining "reasonable accommodation").

121 Disability Discrimination Act, 1995, c. 50, § 6 (Eng.); Employment Equality Act, 1998 (Act. No. 21/1998) § 16(3) (Ir.), *available at* http://www.irishstatutebook.ie/1998/en/act/pub/0021/index.html; Prohibition of Discrimination in Working Life of People with Disability Act 6 § (1999: 132) (Swed.).

122 Article 3 defines the material scope of application of the Employment Equality Directive.

123 Council Directive 2000/78/EC, art. 2(2)(a), 2000 O.J. (L303) 16.

124 Council Directive 2000/78/EC, art. 4, 2000 O.J. (L303) 16.

125 Council Directive 2000/78/EC, pmbl. ¶ 23, 2000 O.J. (L303) 16.

126 Along the same lines, see *Smith & Grady v. United Kingdom*, App. Nos. 33985/96 & 33986/96, 29 Eur. H.R. Rep. 493 (1999), ¶ 97(2), *available at* http://www.unhcr.org/refworld/publisher,COECOMMHR,,47fdfac80,0.html. The ECtHR ruled that discrimination based on sexual orientation could not be justified in light of the prejudices of the members of the army forces.

127 Council Directive 2000/78/EC, art. 4, 2000 O.J. (L303) 16.

128 *Id.*

individuals working for them to act in good faith and with loyalty to the organization's ethos."[129] This provision owes its clumsy wording to amendments required by Germany in the last phase of the Employment Equality Directive's negotiations. Its scope is still controversial and has not yet been elucidated by the European Court of Justice.[130] Whereas it is clear that the ethos-based organizations exception is wider than the determining occupational requirement exception, there are controversies as to whether it could justify direct discrimination based on the corporate image of a company.[131] In this line, a decision of the Labor Court of Brussels has been much debated.[132] The case concerned the firing of a saleswoman with no compensation and no advanced warning for heavy infringement (*motif grave*) by her employer, a well established book shop, after she started to wear the Islamic headscarf. The Court held that freedom of religion was not really at stake because the company did not blame its employee for her belonging to the Islamic faith but to her coming to work while wearing an ostentatious religious symbol despite the fact that the company guidelines require workers not only to wear a uniform with the brand of the company, but also to refrain themselves from wearing any symbols or clothes likely to undermine the corporate image (described as an "open, available, sober, family-based and neutral" image).[133] In the Netherlands, the Equal Treatment Commission[134] considered discriminatory the job denial as an Arabic teacher in a Muslim school, which had been opposed to an applicant on the ground that she refused to wear the headscarf.[135] According to the Commission, the Muslim school did not succeed in proving that wearing the headscarf was a necessary condition for the

129 *Id.*

130 Mark Bell, *Direct Discrimination*, *in* CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL NON-DISCRIMINATION LAW ch. 2 ¶ 2.6.4.B (D. Schiek, L. Waddington & M. Bell eds., 2007). For a discussion of the scope of Article 4(2) of the Employment Equality Directive in a European and comparative law perspective, see Emmanuelle Bribosia & Isabelle Rorive, *Balancing Equality of Treatment and Other Fundamental Rights* (Brussels: European Commission, 2009, accepted for publication).

131 Note that the very controversial decision of the United States Supreme Court, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), is referred to in the European academic debate. *See* OLIVIER DE SCHUTTER, DISCRIMINATIONS ET MARCHE DU TRAVAIL: LIBERTE ET EGALITE DANS LES RAPPORTS D'EMPLOI 64 (2001).

132 Labour Court of Brussels (*Cour du travail de Bruxelles*), Jan. 15, 2008 (the *Club* case), *reported in* J. DES TRIBUNAUX DU TRAVAIL 140 (2008).

133 With respect to uniform policy designed to achieve brand uniformity, see the very debated ruling of the Employment Appeals Tribunal in *Eweida v. British Airways plc*, (2008) UKEAT 0123 08 2011.

134 For an overview of the missions of the Dutch Equal Treatment Commission in comparison with other national equality bodies in Europe, see Isabelle Rorive, *A Comparative and European Examination of National Institutions in the Field of Discrimination and Racism*, *in* NEW INSTITUTIONS FOR HUMAN RIGHTS PROTECTION 139 (K. Boyle ed., 2009).

135 Dutch Equal Treatment Commission (*Commissie Gelijke Behandeling*), opinion of Nov. 15, 2005 (Case 2005-222), *reported in* 3 EUR. ANTI-DISCRIMINATION L.R. 78-9 (2006).

realization of the founding principles of the school.

In relation to the EU anti-discrimination law framework, the concept of indirect discrimination is particularly meaningful as restrictions to wear religious symbols often occur in the form of dress code requirements. Independent of any discriminatory intent, an indirect discrimination occurs where "an apparently neutral provision, criterion or practice" would put persons of a particular religion or belief at a particular disadvantage, unless it can be "objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."[136] A company dress code could amount to indirect discrimination based on religion when it is incompatible with the wearing of the headscarf, the *kippa*, or the turban without proper justification, i.e., safety for jobs requiring the wearing of a helmet, public health for jobs in the food industry, etc. Against this background, the question is nowadays whether an indirect discrimination could be justified in cases where reasonable accommodation is conceivable. The issue is all the more important because the requirement of reasonable accommodation is only provided for with respect to persons with disabilities in EU law,[137] contrary to US law[138] or Canadian law.[139] Take the example of a chemistry laboratory whose safety regulation requires the workers to wear a proper white coat and a hair net, to knot any long hair and not to wear any scarf or hat. This regulation, neutral on its face, discriminates against Muslim women, but undoubtedly pursues a legitimate aim (safety of the workers). Would it pass the proportionality test if a Muslim worker offers to wear a suitably designed fire-proof headscarf? In our opinion with Emmanuelle Bribosia and Julie Ringelheim, it is doubtful considering the way the European Court of Justice has developed anti-discrimination law so far[140] and the influence of North America in this respect.[141]

This leads us to revisit some rulings of the European Court of Human Rights and to call for a more consistent development of its jurisprudence. As a matter of fact, the issue of indirect discrimination

136 Council Directive 2000/78/EC, art. 2(2)(b), 2000 O.J. (L303) 16.

137 Council Directive 2000/78/EC, art. 5, 2000 O.J. (L303) 16.

138 Civil Rights Act, 42 U.S.C. § 2000e (2006) (as modified in 1972).

139 In Canada, the concept of reasonable accommodation is chiefly case law based. *Commission ontarienne des droits de la personne (O'Malley) v. Simpsons-Sears*, [1985] 2 S.C.R. 536 (Can.), is the first precedent of the Supreme Court in this respect.

140 As to the issue of reasonable accommodation on religious ground, see the *Vivien Prais* case concerning litigation in the European public sector, Case C-130/75, Vivien Prais v. Council of Eur. Communities, 1976 E.C.R. 1589, Oct. 27 1976, *available at* http://curia.europa.eu/jcms/jcms/j_6/accueil (database search form).

141 Emmanuelle Bribosia, Julie Ringelheim & Isabelle Rorive, *Aménager la diversité: le droit de l'égalité face à la pluralité religieuse*, 78 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 319-373 (2009).

and of reasonable accommodation has been completely overlooked in the *El Morsli* case.[142] According to the Court, "the fact that [the consular authorities] did not task a female agent to proceed to the identification of the applicant does not exceed the margin of appreciation of the State."[143] The same stance was adopted in the *Dogru* and *Kervanci* cases.[144] When considering the applicants' proposal to replace the headscarf with a hat or a balaclava during sport classes, the Court again relied on the national margin of appreciation without any further supervision. It ruled in both cases that:

> the question whether the pupil expressed a willingness to compromise, as she maintains, or whether—on the contrary—she overstepped the limits of the right to express and manifest her religious beliefs on the school premises, as the Government maintains and appears to conflict with the principle of secularism, falls squarely within the margin of appreciation of the State.[145]

Similarly, in the *Mann Singh* case,[146] the Court did not discuss the issue from the anti-discrimination angle. No consideration was made that the Ministerial order of the Minister of Transport of December 6, 2005 requiring, for the issuance or renewal of a driver's license, that the photograph identifying the driver be taken "*de face et tête nue*" (photograph of the face and without a head garment or any exterior element covering the driver's head, whether a scarf, turban or hat), indirectly discriminated against Mr. Mann Singh. And the Court ignored its jurisprudence holding that a failure to introduce "appropriate exceptions" to a general norm that unfairly disadvantages religious minorities may amount to a violation of the right not to be discriminated against based on one's religion.[147]

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[142] Fatima El Morsli v. France, App. No. 15585/06 (Eur. Ct. H.R. 2008), *available in French at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form) (non admissibility). The applicant alleged a breach of ECHR art. 9 (freedom of religion), Article 14 coupled with ECHR art. 9 (discrimination based on religion) and ECHR art. 8 (right to family life).

[143] *Id*. (my translation as no official translation is available).

[144] Dogru v. France, App. No. 27058/05 (Eur. Ct. H.R. 2008), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form) and Kervanci v. France, App. No. 31645/04 (Eur. Ct. H.R. 2008), *available in French at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form). Note that the applicants alleged a breach of ECHR art. 9 (freedom of religion) and of Protocol No. 1 to the ECHR art. 2 (right to education), but not coupled with ECHR art. 14 (anti-discrimination clause).

[145] *Dogru*, ¶ 75.

[146] Mann Singh v. France, App. No. 24479/07 (Eur. Ct. H.R. 2008), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form) (non admissibility). The applicant alleged a breach of ECHR art. 9 (freedom of religion), ECHR art. 14 coupled with ECHR art. 9 (discrimination based on religion) and ECHR art. 8 (right to privacy) alone and coupled with ECHR art. 14 .

[147] *See* Thlimmenos v. Greece, App. No. 34369/97, 31 Eur. H.R. Rep. 15, ¶¶ 44, 48 (Grand Chamber 2000), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en

In all these cases, the Court entirely neglected the notion of indirect discrimination, which has gained acceptance in its jurisprudence since 2000.[148] Such a stance does not seem tenable in light of the development of EU anti-discrimination law and the emergence of the concept of reasonable accommodation to test whether an indirect discrimination is objectively and reasonably justified.[149] Then again, the place of religious symbols in the public space remains a very sensitive issue in EU law and the material scope of the Employment Equality Directive is somehow limited as it is confined to employment and occupation, as well as vocational training.[150] Three paths provide a means to overcome this shortcoming. First, while EU law lays down minimum standards, member States are given the option of introducing or maintaining more favorable provisions.[151] This has been the case in a number of member States where provisions are beyond the requirements of the Employment Equality Directive.[152] Second, some religious discrimination may fall under the protection of the Racial Equality Directive, which, besides employment, covers education, social security, healthcare, housing and access to goods and services. In this line, British law provides a precedent where indirect discrimination against Sikhs due to a dress code requirement was found to violate the Race Relations Act of 1976.[153] Third and alternatively, a

(database search form). Consider also the follow up to *X. v. United Kingdom*, App. No. 7215/75, 3 Eur. H.R. Rep. 63 (1978), a decision adopted by the European Commission on Human Rights on October 12, 1978. In this regard, *see* SEBASTIAN POULTER, ETHNICITY, LAW AND HUMAN RIGHTS: THE ENGLISH EXPERIENCE 292-301 (1998) .

148 The concept of indirect discrimination has emerged in recent ECtHR judgments. For the leading case, *see* D.H. v. Czech Republic, App. No. 57325/00, 47 Eur. H.R. Rep. 3 (Grand Chamber 2007); *see also* Chapman v. United Kingdom, App. No. 27238/94, 33 Eur. H.R. Rep. 18 (2001); Hoogendijk v. Netherlands, App. No. 58641/00, 40 Eur. H.R. Rep. SE22 (2005) (non admissibility); Jordan v. United Kingdom, App. No. 24746/94, 37 Eur. H.R. Rep. 2 (2001); Thlimmenos v. Greece, App. No. 34369/97, 31 Eur. H.R. Rep. 15 (Grand Chamber 2000); Zarb Adami v. Malta, App. No. 17209/02, 44 Eur. H.R. Rep. 3 (2006). *But see* Orsus v. Croatia, App. No. 15766/03, Eur. Ct. H.R. (2008, currently under Grand Chamber review), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (database search form).

149 On this new development, see Bribosia, Ringheleim & Rorive, *supra* note 141.

150 *See* AILEEN MCCOLGAN ET AL., HUMAN EUROPEAN CONSULTANCY, MIGRATION POLICY GROUP, COMPARATIVE ANALYSES ON NATIONAL MEASURES TO COMBAT DISCRIMINATION OUTSIDE EMPLOYMENT AND OCCUPATION (2006) (mapping study prepared for the use of the European Commission).

151 *See* Council Directive 2000/43/EC, pmbl. ¶ 25, 2000 O.J. (L 180) 22, 23; Council Directive 2000/78/EC, pmbl. ¶ 28, 2000 O.J. (L 303) 16, 18.

152 *See* MARK BELL ET AL, EUROPEAN NETWORK OF INDEPENDENT EXPERTS IN THE NON-DISCRIMINATION FIELD, DEVELOPING ANTI-DISCRIMINATION LAW IN EUROPE 38 (2007) (report prepared for the European Commission).

153 *See* Mandla v. Dowell Lee, [1983] 2 A.C. 548 (H.L.) (appeal taken from Eng.) (discussing discrimination of Sikhs with respect to the Race Relations Act of 1976) (U.K.); *cf.* Seide v. Gillette Indus. Ltd., [1980] I.R.L.R. 427 (Employment App. Trib.) (U.K.) (discussing discrimination of Jews as potentially violative of the Race Relations Act of 1976). In the Netherlands, Muslims have, in very specific circumstances, been considered an ethnic group. *See* Equal Treatment Commission (*Commissie Gelijke Behandeling*), opinion of 20 May 1998 (Case

proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation aims to put the Employment Equality Directive into line with the material scope of the Racial Equality Directive.[154] To be adopted, unanimity within the Council is required,[155] and the current political situation in Europe is much less favorable to strengthening anti-discrimination law than it was in 2000. For this reason, the Commission is eager to reassure member States, in general, and France, in particular, that their sovereignty over the relationship between State and religions is not at stake. In this line, the explanatory memorandum of the proposal specifies that it "does not cover national laws relating to the secular nature of the State and its institutions" and that "[m]ember States may thus allow or prohibit the wearing of religious symbols in schools."[156] Such a peremptory statement is highly questionable and likely to raise many controversies.

## CONCLUSION

Opinions may reasonably differ in a democratic society, when questions concerning the relationship between State and religions are at stake, when the place of religions in the public space is discussed. A uniform solution throughout Europe might neither be achievable nor desirable. What is coming out of the current case law of the European Court of Human Rights, however, is a significant tension between the principles put forward and the way they are applied. In the *Leyla Sahin* case, the Court emphasized once again:

> the State's role as the neutral and impartial organizer of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State's duty of neutrality and impartiality is *incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed* and that it requires the State to ensure mutual tolerance between opposing groups.[157]

1998/57).

154 *See Commission Proposal for a Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation*, COM (2008) 426 final (July 2, 2008) [hereinafter Commission Proposal].

155 *See* Consolidated Version of the Treaty Establishing the European Community, art. 13, 2002 O.J. (C 325) 33, 43.

156 Commission Proposal, *supra* note 154, explanatory memorandum, art. 3.

157 Sahin v. Turkey, App. No. 44774/98, 44 Eur. H.R. Rep. 5, ¶ 107 (Grand Chamber 2005) (footnote omitted) (emphasis added).

How does this fit with the Court's position that the Islamic headscarf is a "powerful external symbol" which is not easily reconcilable "with the message of tolerance, respect for others and, above all, equality and non-discrimination?"[158] Is this stance part of the "[p]luralism, tolerance and broadmindedness" which are described as "hallmarks of a democratic society."[159] In the name of gender equality, can the Court give its support to the expulsion of an adult woman from a university?

So far, referring to the national margin of appreciation is the only answer that the European Court of Human Rights has been giving when the issue of banning religious symbols from the public space is at stake. This is not the lack of positioning but rather a highly political one, and it could well be the only tenable position in the Court's opinion. But it can not be made explicit today as the Court has double standards and is hiding the truth from itself when it buys into prejudices. The pending cases related to the expulsion of Sikh schoolboys, which are challenging the French Act of 2004's prohibition of contentious religious signs in public schools might be an opportunity for the Court to deepen its reasoning of the *Leyla Sahin* case and to let go of the stereotypes it has perpetuated with respect to the Islamic headscarf cases.

Some answers could also come from the European Union through anti-discrimination law. For the last decade EU law has certainly been the driving force toward a more effective implementation of the principle of equal treatment in Europe.[160] In comparison, the system of the Convention on Human Rights looks like a poor bargain. When considering the European Court of Human Rights' approach towards the anti-discrimination provision of the Convention, it is striking to note that there are very few cases in which the Court of Strasbourg has declared that a member State was in breach of its obligations in this respect.[161] The Court has practiced a "contempt" approach in the case

158 *Id*. ¶ 111 (internal quotation marks omitted).

159 *Id*. ¶ 108.

160 In this respect it is striking to note that the European Court of Human Rights explicitly referred to EU anti-discrimination law in the leading case D.H. v. Czech Republic, App. No. 57325/00, 47 Eur. H.R. Rep. 3, ¶¶ 81-91 & 136 (Grand Chamber 2007).

161 According to the statistics published by the ECHR, since the new Court was set in place after Protocol No. 11, ECHR art. 14 has been declared violated in only sixty-six cases. This means that a breach of Article 14 has been found in less than 1% of the rulings issued by the Court between 1999 and 2007. *See* COUNCIL OF EUROPE, ANNUAL REPORT 2007 OF THE EUROPEAN COURT OF HUMAN RIGHTS 142-45 (2008). However, it is not possible to establish accurately in how many cases the principle of non-discrimination has been raised by applicants. One can only stress that applicants often rely on this provision. These figures come from EMMANUELLE BRIBOSIA, ISABELLE RORIVE & AMAYA UBEDA DE TORRES, DO DISCRIMINATION VICTIMS FIND REDRESS IN THE ECTHR? THE ECTHR AND THE PRINCIPLE OF NON DISCRIMINATION IN NINE COUNTRIES, a report written within the framework of JURISTRAS, a European research project (6th Framework Program) related to *The Strasbourg Court, Democracy and the Human Rights of Individuals and Communities: Patterns of Litigation, State Implementation and Domestic Reform 2006-2009*, Dec. 2008, *available at* http://

law concerning discrimination cases, an approach which is slightly open to further developments with the influence of the EU. The time has certainly come for the Court to get down to developing a consistent and strategic approach in this respect.

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