‘Taking religion seriously’? Human Rights and *Hijab* in Europe − some problems of adjudication

Peter Cumper* and Tom Lewis**

* Senior Lecturer in Law, University of Leicester.
** Senior Lecturer in Law, Nottingham Trent University

Introduction

It is a widely held view amongst psychologists that human beings have a basic need to create a positive social identity for themselves, either as individuals or as members of a group.[1] In this regard, choice of dress is likely to be particularly important.[2] A person’s clothes can reveal much about their identity, in relation to their gender,[3] class,[4] sexual orientation,[5] and religious beliefs.[6] But what an individual wears can also attract great controversy, as evidenced by the fact that, in Europe of late, there have been few issues more controversial than that of religious dress.[7]

Today in towns and cities across Europe a significant proportion of Muslims − in particular Muslim females[8] − have eschewed conventional western clothes in favour of garments (such as veils and headscarves) traditionally associated with Islam.[9] With a new generation of ‘European Muslims’ keen to cultivate a distinct identity for themselves as members of the continent’s second largest religion,[10] Islamic dress often has an “emblematic status”,[11] in that it is a “powerful and overdetermined marker of difference”.[12] Yet the right to wear religious dress varies significantly in

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[1]. For example, see Henri Tajfel and John C. Turner, “An Integrative Theory of Intergroup Conflict”, in W. Austin and S. Worchel (eds.) *The Social Psychology of Intergroup Relations* (Brooks-Cole, 1979) pp.33-48.
[2]. See Fred Davis, *Fashion, Culture, and Identity* (University of Chicago Press, 1994).
[3]. See Kimberly Huisman and Pierrette Hondagneu-Sotelo, “Dress Matters. Change and Continuity in the Dress Practices of Bosnian Muslim Refugee Women” (2005) 19(1) *Gender & Society*, 44-65.
[4]. See Diana Crane, *Fashion and Its Social Agendas: Class, Gender, and Identity in Clothing* (University of Chicago Press, 2001).
[5]. See Kate Schofield and Ruth Schmidt, “Fashion and clothing: the construction and communication of gay identities” (2005) 33(4) *International Journal of Retail & Distribution Management*, 310-323.
[6]. See Stephen Bigger, “Muslim women’s views on dress code and the hijaab: some issues for education”, (2006) 27(2) *Journal of Beliefs and Values*, 215-226.
[7]. See Dominic McGoldrick, *Human Rights and Religion: the Islamic Headscarf Debate in Europe* (Hart, 2006).
[8]. Whilst religious dress is most commonly associated with female Islamic identity, it should not be forgotten that dress also influences the lives of young Muslim men. See Peter Hopkins, “Young Muslim Men in Scotland: Inclusions and Exclusions” (2004) 2(2) *Children’s Geographies*, 262.
[9]. Whilst Islamic dress clearly conveys a woman’s religious identity, it can also convey her cultural and ethnic identity. See Claire Dwyer, “Contradictions of Community: questions of identity for British Muslim women” (1999) 31 *Environment and Planning A*, 53-68.
[10]. See Tariq Ramadan, *To Be a European Muslim: A Study of Islamic Sources in the European Context* (Islamic Foundation, 1999) and Tariq Modood, Anna Triandafyllidou and Ricard Zapata-Barrero, *Multiculturalism, Muslims and citizenship: a European approach* (Routledge, 2006).
[11]. Myfanwy Franks, “Crossing the borders of whiteness? White Muslim women who wear the hijab in Britain today” (2000) 23(5) *Ethnic and Racial Studies,* 920.
[12]. Claire Dwyer, “Veiled Meanings: Young British Muslim Women and the Negotiation of Difference” (1999) 6(1) *Gender, Place and Culture*, 5.

Europe.[13] In some countries there are clear restrictions on what can (or cannot) be worn in public (eg., France and Turkey) whereas in other parts of the continent (eg., the UK) young people are relatively free to wear the religious dress of their choice.[14] Mindful of this state of affairs, the European Court of Human Rights has chosen to tread warily, letting governments retain considerable discretion in the field of religious dress. As a consequence, states enjoy a wide 'margin of appreciation' when it comes to determining whether their curbs on religious symbols or related garments are compatible with Article 9 of the European Convention on Human Rights (ECHR).[15]

The UN Special Rapporteur on Freedom of Religion and Belief (Asma Jahangir) has distinguished between situations where people are *compelled* by the state to adhere to certain dress codes (eg., Jews forced to wear the star of David under the Nazis) and those where the state *forbids* certain forms of religious dress.[16] Instances of the former have, at least in Europe, been confined to the dustbin of history, so for the purposes of this article we focus on the latter – the extent to which the state is permitted under the ECHR to impose restrictions on garments associated with religious beliefs.[17]

We suggest that the guiding principle in such matters ought to be personal autonomy,[18] although we accept that the interests of the state may justify the imposition of curbs on religious dress in certain (albeit limited) occasions.[19] Our main concern is that, in relation to its jurisprudence on religious dress under Article 9 of the ECHR, the European Court has failed to subject the actions of states to sufficient scrutiny. As a consequence groups such as Muslims, for whom certain garments are often of great symbolic importance, tend to be greatly disadvantaged, especially so in European nations with a secular tradition. It is thus our central contention that, with an increasing number of Europe's Muslims' evidently choosing to demonstrate a commitment to their faith by the clothes they wear, the European Court should be more sensitive to this particular form of manifesting religion or belief.

The article is divided into four parts. We begin by discussing some of the reasons why Islamic dress tends to be so controversial. We then examine the approach of the European Court (and Commission) of Human Rights to garments and symbols associated with religion and belief under Article 9 of the ECHR. We proceed to consider some of the challenges of accommodating Islamic dress under the European Convention. And finally, we explore the relationship between freedom to wear religious dress and certain liberal values related to democracy.

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[13]. See W. Shadid and P. S. van Koningsveld, *Muslim Dress in Europe: Debates on the Headscarf* (2005) 16(1) *Journal of Islamic Studies*, 35-61.

[14]. See Sebastian Poulter, "Muslim Headscarves in School: Contrasting legal approaches in England and France" (1997) 17 *Oxford Journal of Legal Studies* 43-74.

[15]. European Convention on Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, Art. 9(2), 213 U.N.T.S. 222 (entered into force Sept. 3 1953) [hereinafter ECHR].

[16]. See UN Doc E/CN.4/2006/5/Add.4. March 8, 2006, para.36.

[17]. The Special Rapporteur refers to this as 'positive freedom of religion or belief': Asma Jahangir, E/CN.4/2006/5, 9 January 2006, para.36.

[18]. It should, however, not be forgotten a person's freedom to wear the garments of their choice may be constrained by cultural or social pressures (eg., notions of modesty, honour and shame). See Claire Alexander, *The Asian Gang: Ethnicity, Identity, Masculinity* (Berg, 2000).

[19]. See Art. 9(2) of the ECHR (1950); Art. 18(3) of the International Covenant on Civil and Political Rights (1966); and Art. 14(3) of the UN Convention on the Rights of the Child (1989).

1. Controversy and Islamic dress

There are few things more capable of generating controversy in contemporary Europe than the Islamic headscarf.[20] What for some is just a piece of cloth worn as a positive declaration of faith is, for others, a sinister public statement that may even (in certain places) constitute a threat to the very organs of the state.[21] It is suggested that there are at least three reasons why Islamic dress tends to attract controversy in contemporary Europe.

First, Islamic dress has been commonly perceived (at least in the west) as being associated with the subordination of young girls and women.[22] That said, many commentators reject any such a characterisation,[23] and argue that the choice of Muslim women in the west to wear what has been termed the 'new veil' is now the 'most conspicuous sign of Islamic feminism'.[24] International human rights law clearly forbids discrimination or unfavourable treatment on the ground of one's sex,[25] yet such considerations aside, there is little consensus as to whether forms of Islamic dress embolden or disempower Muslim women.[26]

A second reason why Muslim dress often generates controversy is because of a perceived link between certain items of clothing and what is commonly termed "Islamic fundamentalism".[27] For example, garments such as the burka (which typically conceals the wearer's entire body) are associated with the excesses of totalitarian theocracies,[28] and senior UN office holders continue to criticise the actions of governments that impose strict religious dress codes on women in some Muslim nations.[29] In contrast, the state has placed restrictions on religious dress in Turkey, the home of Europe's largest Muslim population, in an effort to counter a perceived threat

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[20]. We use the term "headscarf" in this article to mean the Islamic headscarf which covers the hair and neck. The term *hijab* is often used as a synonym for Islamic headscarf, but we use it here to denote Islamic dress more generally. In the Qur'an "*hijab*" is used to refer to the "spatial curtain that divides or provides privacy": see G. Anwar and L. McKay, "Veiling" in Richard Martin (ed) *Encyclopedia Of Islam and the Muslim World* (Macmillan, 2004) p.721.

[21]. See Alev Çinar, *Modernity, Islam, and Secularism in Turkey: Bodies, Places, and Time* (University of Minnesota, 2005) pp.53-98.

[22]. See, generally, Leila Ahmed, *Women and Gender in Islam* (Yale University Press, 1992).

[23]. See Lama Abu-Odeh, "Post-Colonial Feminism and the Veil: Considering the Differences" (1992) *New Eng. L. Rev*. 1527, and Riffat Hassan, "Rights of Women within Islamic Communities", in Johan van der Vyver and John Witte Jr. (eds), *Religious Rights in Global Perspective* (Martinus Nijhoff, 1996) p.361.

[24]. Dawn Lyon and Deborah Spini, "Unveiling the Headscarf debate" (2004) 12 *Feminist Legal Studies* 344.

[25]. See The Convention on the Elimination of All Forms of Discrimination against Women, adopted Dec.18, 1979, G.A. Res. 34/180, U.N. Doc A/34/46, 19 I.L.M. 33 (entered into force 3 Sept 1981)].

[26]. On claims that 'fundamentalist' religions seek to control women more generally see Nira Yuval-Davis, "Fundamentalism, Multiculturalism and Women in Britain", in James Donald and Ali Rattansi (eds) *'Race', Culture and Difference* (Sage, 1992) pp.278-291.

[27]. See Youssef Choueiri, *Islamic Fundamentalism* (Continuum International, 2002).

[28]. See Rosemarie Skaine, *The Women of Afghanistan under the Taliban* (McFarland, 2002) pp. 61-85.

[29]. See *Report of the Special Rapporteur on freedom of religion or belief* (Asma Jahangir) E/CN.4/2006/5, 9 January 2006, para.38.

of radical Islamism.[30] As will be seen in more detail (below), the European Court of Human Rights − in response to claims that the headscarf is a "symbol of a political Islam [that] threatens to cause civil unrest"[31] − has been prepared to acknowledge a link between the Islamic headscarf and 'extremist political movements' in Turkey.[32]

Thirdly, Muslim dress is often controversial because it highlights an important difference between the Islamic and secular liberal traditions − the role of faith in public life. In Islam there is no clear distinction between the public and private aspects of a person's existence,[33] whereas in western 'secular' nations, religion is typically confined to the 'private' rather than the 'public' sphere.[34] The significance of this difference is illustrated by the opposition from Muslims to the introduction of a French law in 2004, banning the display of 'conspicuous' religious symbols from the classrooms of all public schools.[35] The law was an important reaffirmation of the French nation's commitment to 'laïcité − the principle that religion is fundamentally incompatible with the institutions of the secular French Republic, and that the public manifestation of one's beliefs should be confined to the private rather than public sphere.[36] Yet such private/public distinctions are anathema to many young Muslims − and their rejection of the view that displays of faith in the form of the headscarf should be confined to the private arena lies at the very heart of their opposition to the French law.[37]

Although the French law on 'conspicuous' religious symbols continues to remain in force, it has attracted widespread international criticism.[38] Indeed, the UN Special Rapporteur on Religion or Belief (Asma Jahangir) has claimed that the French law not merely sends "a demoralizing message to religious minorities in France", but that it also "appears to target girls from a Muslim background wearing the headscarf".[39] The right to manifest one's religion or belief in the clothes of one's choice is clearly not an absolute right,[40] but the Special Rapporteur has said that any such restriction must be:

> "based on the grounds of public safety, order, health, or morals, or the fundamental rights and freedoms of others, it must respond to pressing public

[30]. See Özlem Denli, "Between laicist state ideology and modern public religion: the head-cover controversy in contemporary Turkey", in Tore Lindholm, W. Cole Durham Jr, Bahia G. Tahzib-Lie (eds) *Facilitating Freedom of Religion or Belief: A Desktop* (Martinus Nijhoff, 2004) p.498.
[31]. *Şahin v. Turkey* 44 Eur.H.R.Rep. 5, para.115 (G.C.) (2007).
[32]. *Şahin v. Turkey*, *supra*, n 31.
[33]. See Aezular Rahman, *Islam, Ideology and The Way of Life* (Muslim Schools Trust, 1980).
[34]. See Roger Trigg, *Religion in Public Life. Must Faith Be Privatised?* (OUP, 2007).
[35]. Law No. 2004-228, of 15th March 2004.
[36]. For example see Jane Freeman, "Secularism as a barrier to integration − the French dilemma", (2004) 42(3) *International Migration* 5.
[37]. See Dominique Malliard, "The Muslims in France and the French Model of Integration" (2005) 16(1) *Mediterranean Quarterly*, 62.
[38]. For example, see European Parliament, *Written Declaration*, February 20, 2004, DC\524428EN.doc, and Committee on the Rights of the Child, *Concluding Observations on the Second Periodic Report of France*, 4 June 2004, 36th session, CRC/C/15/Add.240, paras 25 and 26.
[39]. *Report of the Special Rapporteur on freedom of religion or belief (Asma Jahangir*), Mission to France, E /CN.4/2006/5/Add.4, 8 March 2006, paras 98-100.
[40]. See *supra*, n 19.

> or social need, it must be pursue a legitimate aim and it must be proportionate to that aim."[41]

It is perhaps no great coincidence that these criteria are very similar to those governing religious dress under Article 9 of the ECHR, and it is to this provision of the Convention that we now turn.

2. Article 9 of the ECHR: religious dress and related symbols

Article 9 of the ECHR provides that:

> (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."[42]

There are two elements to Article 9(1). First, it has an 'internal' dimension (*forum internum*) which guarantees 'freedom of thought, conscience and religion', and these are rights (eg., one's private thoughts) that must not be restricted.[43] And secondly, Article 9(1) has an 'external' element (*forum externum*) whereby it recognises that everyone has the right to manifest a "religion or belief" in "worship, teaching, practice and observance". Under Article 9(2), the state may (however) impose restrictions on such *manifestations* of religion or belief, as long as they are: "prescribed by law"; in pursuance of a legitimate aim (ie., public safety, public order, health, morals, and protection of the rights and freedom of others); and "necessary in a democratic society". This last phrase has been interpreted as meaning that any limitation on religious freedom must be proportionate to the aim which the state wishes to achieve.[44] In assessing the proportionality of a state's restriction on the manifestation of religion or belief, the Court has tended to grant states considerable latitude (a wide margin of appreciation) in politically sensitive areas where there is little pan-European consensus, such as the protection of morals[45] and freedom of religion.[46] On such matters the European Court has tended to acknowledge that the

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[41]. *Report of the Special Rapporteur on freedom of religion or belief (Asma Jahangir)*, E/CN.4/2006/5, 9 January 2006, para.53.
[42]. On Article 9 of the ECHR generally see Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP, 2001).
[43]. *Darby v Sweden* A 187 (1991) Com Rep, para.44.
[44]. See, for example, *Larissis v. Greece*, 27 Eur.H.R.Rep. 329, para.46 (1999).
[45]. See, for example, *Handyside v. U.K.* 1 Eur.H.R.Rep. 737 (1979-80).
[46]. See, for example, *Wingrove v. U.K.* 24 Eur.H.R.Rep. 1 para.58 (1996) and *Murphy v. Ireland* 38 Eur.H.R.Rep. 13, para.67 (2004).

state is better placed than an international tribunal to assess whether restrictions are "necessary in a democratic society".[47]

In common with many other rights in the ECHR, Article 9 allows for a balance to be struck between the rights of the individual and competing societal aims.[48] However, it could be argued that, in respect of Article 9 and the issue of religious dress, a fair balance has rarely been struck. There are at least two reasons for this: (i) the fact that certain religions may be disadvantaged by the structure of Article 9, particularly in relation to distinctions between the manifestation of faith in the public and private spheres; and (ii) the narrow interpretation of Article 9 by the European Court (and Commission) of Human Rights as regards the issue of religious dress.

(i) The structure of Article 9: public and private spheres

As noted above, under Article 9 of the ECHR, the *forum internum* (the internal sphere) of freedom of thought, conscience and religion, has absolute protection, whereas the *manifestation* of one's religion or belief may be restricted under Article 9(2). Accordingly, privately held beliefs are untouchable, but once they emerge into the open (ie., once they are made manifest), the state is entitled to impose restrictions, subject to the "legitimate aim", "prescribed by law" and "necessary in a democratic society" criteria. This distinction has obvious consequences for the devotee of a particular religion who considers him/herself duty bound by the tenets of their faith to manifest their faith by wearing a particular form of dress, since it is only at this point that the limitations permitted by Article 9(2) come into play.

It has been argued by some commentators that this split between the *forum internum* and the *forum externum* has the effect of favouring post-Reformation Protestant Christianity, which places more emphasis on the internal holding of faith than the outward display of it.[49] Indeed, one of the central debates of the European Reformation in the sixteenth century was over whether the soul could be saved purely by virtue of a person's (internally held) belief, or whether it was also necessary to *perform* good works:

> "[Martin] Luther held that man was justified (saved) by faith alone: the words *sola fide* came to be the watchword and touchstone of the Reformation. Man could do nothing by his own works – whether works of edification like prayer, fasting, mortification, or works of charity – to compel justification. But if he believed, God of His grace would give him the gifts of the Holy Spirit – salvation and eternal life."[50]

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47. See Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002).

48. The other ECHR articles which follow this two paragraph structure are Article 8 (respect for private and family life, home and correspondence, Article 10 (freedom of expression) and Article 11 (peaceful assembly and association).

49. See Peter Edge and Graham Harvey, "Introduction", in Peter Edge and Graham Harvey (eds) *Law and Religion in Contemporary Society*, (Ashgate, 2000) pp.7-8.

50. Geoffrey Elton, *Reformation Europe 1517–1559* (Fontana 1963), p.16. See also Patrick Collinson, *The Reformation*, (Phoenix 2005) pp.47-9.

Luther's influence meant that the emphasis on outward symbolism and ritual was significantly reduced in post-Reformation Protestant Christianity.[51] Moreover, it is also important not to ignore the impact of the Enlightenment in this regard.

One of the themes within the European Enlightenment in the eighteenth century − especially in Immanuel Kant's *Religion within the Limits of Reason Alone* − was an attempt to reformulate religion on a more rational basis, placing less emphasis on the literal meaning of texts and the practices that those texts apparently required.[52] As Saba Mahmood puts it, Kant argued that:

> "[P]henomenal forms of religion are a left over from the infancy of the human race, when man needed such aids, and should be discarded when the human species has reached the appropriate level of maturity. For [him] the value of scripture lay not in its temporal narrative but in the rational structure it symbolized."[53]

It is thus perhaps no surprise that human rights law, with its origins in Enlightenment thought, should place less value on the outward manifestations of religious belief than the internal holding of such belief.[54]

Contemporary human rights norms may have been heavily influenced by post-Reformation Protestant Christianity,[55] but one cannot ignore the fact that, in contrast to Protestant Christianity, many other faiths place great emphasis on external forms of observance, symbols and ritual. From Jewish yarmulkes and Sikh turbans to Muslim veils and Catholic crosses, the distinctive personality of each group is often maintained by what is worn or displayed in public. On the global level, there is thus a close association between the physical manifestation of a person's faith and his/her dress.[56] In contrast, however, it would appear the European Court of Human Rights has yet to take full cognisance of this fact, given the conservative way in which Article 9 has been interpreted in relation to state imposed curbs on religious dress.

(ii) Article 9, ECHR jurisprudence, and religious dress

In view of the European Court's acknowledgment that freedom of thought, conscience and religion is "one of the most vital elements that go to make up the identity of

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[51]. Collinson, *supra*, n 50, at pp.155-171.

[52]. Theodore M. Greene and Hoyt H. Hudson (eds. & trans, Harper and Row, 1960), Immanuel Kant, *Religion Within the Limits of Reason Alone* (1793), pp.100–105. See also Paul Hyland, Olga Gomez and Francesca Greensides (eds) *The Enlightenment* (Routledge, 2003).

[53]. Saba Mahmood, "Secularism, Hermeneutics and Empire: the politics of the Islamic Reformation", 18(2) *Public Culture* at 342.

[54]. On the contribution of the Enlightenment to contemporary human rights norms generally see M. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press, 2004) pp.63-66.

[55] See Michael Perry, *The Morality of Human Rights: A Non-Religious Ground?* (2005) 27 *Dublin University Law Journal* 28, 50.

[56]. For example, see General Comment 22, on Article 18 of the ICCPR Human Rights Committee, UN Doc.CCPR/C/21/Rev.1/Add.4, 48th session, July 20, 1993, para.4; *Hudoyberganova v Uzbekistan* (931/00) CCPR/C/82/D/931/2000; and *Report of the Special Rapporteur on freedom of religion or belief (Asma Jahangir)*, E/CN.4/2006/5, 9 January 2006, para.36.

believers and their conception of life,"[57] it is perhaps unsurprising that Article 9 has often been invoked in respect of limitations on religious dress. From challenges to prison dress codes,[58] to Sikh motorcyclists objecting to laws requiring them to replace their turbans with crash-helmets,[59] such cases were traditionally disposed of quickly and unsympathetically by the (now defunct) European Commission of Human Rights.[60]

The Commission also interpreted Article 9 narrowly in relation to state sanctioned curbs on the Islamic headscarf in Turkey. For example, in *Karaduman v. Turkey*, a student who had successfully completed her studies at Ankara University was refused a degree certificate because of her unwillingness to provide a photograph of herself in which she was not wearing an Islamic headscarf. [61] Her claim of a breach of Article 9 was rejected on the basis that there had been no interference with Article 9. The Commission considered it relevant that the applicant had "chosen" to attend a secular university, and that this "naturally" implied her acquiescence in certain rules established to preserve the secular nature of the institution and the peaceful coexistence between students of different beliefs.[62] Moreover, the Commission held that "having regard to the requirements of secular university system [the regulation of a student's dress did] not as such constitute an interference with [their] freedom of religion and conscience".[63] Thus, the University's refusal to award the applicant a degree certificate had not contravened Article 9(1) and, because of this narrow interpretation, it was unnecessary to consider the permissibility of the state's dress restrictions under Article 9(2).

The issue of religious dress was again considered in *Dahlab v. Switzerland,*[64] where a Swiss primary school teacher, who had converted to Islam, was prevented from wearing a Muslim headscarf in class. The applicant (Dahlab) challenged the ban as being an unlawful restriction on her religious freedom. The European Court accepted that there had been an *interference* with Article 9(1) of the ECHR, but ruled that the state's actions were justified under Article 9(2). In reaching this conclusion the Strasbourg judges reasoned that, in view of the denominational neutrality of the Swiss education system, the "tender age" of the pupils concerned, and the margin of appreciation in matters of religion, the ban on Dahlab wearing a Muslim headscarf was proportionate and thereby "necessary in [Switzerland's] democratic society".

It was the European Court's more general comments about the headscarf in this case which perhaps betray its latent suspicion of Islamic dress. The Court suggested that the applicant's decision to wear the headscarf in the classroom "might have some kind of proselytising effect" and added that it was "difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all,

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[57]. *Kokkinakis v Greece* (1994) 17 EHRR 397, para.31.
[58]. See *X v Austria*, App. No. 1753/63, 15 February 1965, Yearbook 8, 174.
[59]. See *X v UK*, App. No. 7992/77 (1978), 14 D+R 234.
[60]. The Commission was abolished by Protocol 11, which came into force in 1998 and allowed individuals to take cases directly to a newly reformed European Court of Human Rights. See Robin White and Clare Ovey, *Jacobs and White, European Convention on Human Rights (*OUP, 2006) pp.8-11.
[61]. *Karaduman v. Turkey*, App. No. 16278/90, 74 DR 93 (1993).
[62]. *Id*, at para.108.
[63]. *Id* at para.109.
[64]. *Dahlab v. Switzerland*, App. No. 42393/98, 15 February 2001, 2001-V.

equality and non-discrimination that all teachers in a democratic society must convey to their pupils."[65] The Court's ruling in *Dahlab* has, perhaps unsurprisingly, provoked widespread unfavourable comment.[66] At the very least it can be criticised on at least four grounds. First, the Court placed considerable emphasis on the danger that the headscarf might have a "proselytising effect" yet, on the facts of the case, the school's inspector admitted to having received no complaints from parents about Dahlab's decision to wear Islamic dress in the classroom. Secondly, although there is an implicit suggestion in the European Court's judgment of an association between the Islamic headscarf and militant forms of Islam, there was no evidence of the applicant having a political agenda, and even the Swiss Federal Court accepted that she only wished to wear the headscarf "in order to obey a religious precept". Thirdly, it is perhaps surprising that, in contemporary multi-faith Europe, the Court failed to consider the possibility that, for children in Dahlab's school, the experience of being taught by a woman in Islamic dress might have transmitted "positive messages about the equality of different religious and cultural groups".[67] And a final criticism of *Dahlab* is that the Court attached little significance to the idea that a rational autonomous adult, such as the applicant, should (as a general rule) be free to wear the clothes of her choice.

The principle of personal autonomy is considered in more detail below, but notwithstanding these criticisms of *Dahlab*, the Court has continued to cite it with approval – most notably in the important case of *Şahin v. Turkey.*[68] In *Şahin v. Turkey,* the applicant (Leyla Şahin) was a medical student at Istanbul University who objected to a circular, issued by the University's Vice Chancellor, prohibiting the wearing of the Islamic headscarf (and beards) on campus. Following the introduction of the circular, Şahin was denied access to classes and exams on account of her insistence on wearing the scarf. Disciplinary proceedings were brought against her for participating in an unauthorised demonstration against the ban, and she was temporarily suspended from the University. When Şahin's attempts to challenge the circular failed in the Turkish courts, she applied to the European Court, claiming that the state's actions had unlawfully prevented her from manifesting her faith, contrary to Article 9 of the ECHR.[69]

The Turkish government responded to Şahin's claims by arguing that the headscarf ban in universities was necessary to protect the constitutional precept of secularism.[70] The government pointed to the case-law of the Turkish Constitutional Court, which had held that the principle of secularism was, inter alia: the guarantor of democratic values; the meeting point of liberty and equality; a check on the state according preference to a particular religion; and a safeguard which protected the individual

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[65]. *Id.*
[66]. See D. Lyon and D. Spini, *supra,* n 24, 333-345.
[67]. Robin and Ovey, *supra,* note 60, p.310.
[68]. *Şahin v. Turkey*, *supra,* n 31.
[69]. She also claimed that her right to education under Article 2 Protocol 1 ECHR had been breached as well as her rights under Articles 8, 10 and 14 of the ECHR. The case was initially considered by the Chamber of the Court which found there to be no violations: see *Şahin v. Turkey* 41 Eur.H.R.Rep. 5 (2005). The applicant then requested, successfully, that the case be referred to Grand Chamber (under Article 43 of the ECHR). *Supra,* n 31.
[70]. Article 2 of the Constitution of the Republic of Turkey (1992) states: "the Republic of Turkey is a democratic, secular (*laik*) and social state based on the rule of law, respectful of human rights in a spirit of social peace ... .".

from arbitrary interference from the state or extremist movements.[71] Furthermore, and perhaps most critically, the government stressed that:

> "[T]he principle of secularism was a *preliminary requisite for a liberal pluralist democracy* and that there were factors peculiar to Turkey that meant that the principle of secularism had assumed particular importance there compared to other democracies . . . [T]he fact that Turkey was the only Muslim country to have adopted a liberal democracy . . . was explained by the fact that it had strictly applied the principle of secularism [and that] … *protection of the secular State was an essential prerequisite to the application of the [European] Convention in Turkey*."[72] (emphasis added).

The Turkish government thus raised a sinister prospect for the Court to contemplate: that democracy itself, and the human rights protection for which it was a prerequisite, would be seriously eroded if the constitutional principle of secularism were not to be assiduously guarded.[73]

Faced with such a threat, the Grand Chamber was not inclined to second guess the state. The Court observed that this notion of secularism − which was one of the fundamental principles of the Turkish state − was consistent with the values underpinning the Convention, as well as being in harmony with the rule of law, crucial for the respect of human rights, and necessary to protect democracy. Indeed, the Court noted that:

> "[T]here must be borne in mind the impact wearing [the headscarf], presented as a compulsory religious duty, may have on those who choose not to wear it . . . the issues at stake include the protection of the 'rights and freedoms of others' and the 'maintenance of public order'."[74]

The European Court therefore held that because the headscarf had taken on a "political significance" in recent years, the restrictions imposed on those wishing to wear it were justified by "a pressing social need".[75] The Strasbourg judges were concerned about the threat of "extremist political movements" that might seek "to impose on society as a whole their religious symbols and conception of society founded on religious precepts."[76] Accordingly, it was legitimate for the state to adopt a stance against such movements, and the headscarf regulations had to be viewed in this context as a measure intended to achieve the legitimate aim of preserving pluralism in the University.[77] It was also understandable that the University

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[71]. Judgment of 7 March 1989, quoted at para.113, *supra*, n 31.
[72]. *Şahin v. Turkey* 41 Eur.H.R.Rep. 5, para.91 (2005) (Chamber). The Turkish government reiterated the arguments that it had put before the Chamber at the Grand Chamber hearing.
[73]. See McGoldrick, *supra*, n 7, p.149.
[74]. *Şahin v. Turkey*, *supra*, n 31, para.115, quoting paras 107-9 of the Chamber judgment.
[75]. *Id*.
[76]. *Id*.
[77]. *Id*, quoting paras 108-9 of the Chamber judgment. The Court referred to its earlier decision in *Refah Partisi (Welfare Party) v. Turkey* 37 Eur.H.R.Rep.1 (G.C.) (2003), where a ban on a political party elected to government, whose members had criticised democracy and called for the introduction of *sharia* law, did not breach Art.11 of the ECHR. In *Refah Partisi*, the Court stated (para.92) that the

authorities should wish to maintain the secular nature of the institution and thus "consider it contrary to such values to allow religious attire, including the Islamic headscarf, to be worn".[78] Crucially, in matters of religion, the state was entitled to a margin of appreciation. The Court thus held that:

> "By reason of their direct and continuous contact with the education community the university authorities [were] in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course . . . [and that] Article 9 [did] not always confer a right to behave in a manner governed by religious belief and [did] not confer on people who [did] so the right to disregard rules that have proved to be justified."[79]

It should be noted that in *Şahin* there was no suggestion that the applicant *herself* posed a threat to the values of secularism, nor was there any evidence that the Islamic headscarf had provoked disorderly conduct or caused disruption to the everyday life of the University.[80] Nonetheless, by a majority of sixteen votes to one, the Grand Chamber concluded that the measures were a proportionate interference with Şahin's Article 9 rights.[81] The Court therefore accepted the state's claim that this fact-insensitive law was, in essence, necessary to protect the nation's secular values, as well as being crucial for the survival of Turkish democracy.[82]

In *Şahin* the Court implicitly recognised that secular values lie at the heart of contemporary human rights norms. However, suggestions of such a link may create particular problems for Muslims, who tend to be wary of the influence of secularism, particularly in areas of public life.[83] In examining the challenge of accommodating Islamic dress under the ECHR, it will be argued that those responsible for the interpretation of Article 9 of the ECHR face significant challenges in at least two areas. First, they have the invidious task of balancing the seemingly incompatible principles of secularism and freedom of religion within the parameters of contemporary human rights norms. And secondly, they must reconcile the principle of personal autonomy with state sanctioned curbs on religious dress.

3. The 'challenge' of Islamic dress and the ECHR

(i) Secularism, religion and contemporary human rights norms

prohibition of the headscarf may be legitimate if necessary for the protection of public order, or for the rights and freedoms of others.

[78]. *Şahin v. Turkey*, *supra*, n 31, para.116.

[79]. *Id*, at para.121.

[80]. *Id*, at para.8 of Judge Tulkens's dissent.

[81]. There was found to be no breach of her right to education under Article 2 of Protocol 1, at paras 152-162, or of Articles 8, 10 or 14, at paras 163-166: *supra*, n 31.

[82]. See McGoldrick, *supra*, n 7, at pp.250-251.

[83]. See Jocelyne Cesari and Seán McLoughlin, *European Muslims and the secular state* (Ashgate, 2005).

Although human rights norms have been doubtlessly influenced by various religious traditions,[84] few would deny that contemporary principles of human rights are "essentially 'secular' in nature".[85] Modern human rights are, at root, a product of the "shift from a religious to a secular culture at the time of the Enlightenment in eighteenth-century Europe".[86] As the historian, Yehoshua Ariell has observed:

> "The secular character of the normative system embodied in human rights doctrine is essential to its comprehension. All its premises, values, concepts and purposes relate to the *homocentric world* and to *ways of thought freed from transcendentalist* premises *and from the jurisdiction of religious authority*. And so, the *development of the doctrine of human rights is inseverably connected to the process of secularisation* of Western society."[87] (emphasis added).

The concept of secularism is itself far from straightforward but, in very broad terms, it can be seen as an attempt to separate religion and state, so that the former becomes a private matter and the latter refrains from coercion in the field of belief or conscience.[88] Ahdar and Leigh regard secularism as "a philosophy obliging the state to refrain from adopting and imposing any established beliefs", and they maintain it rests on the assumption that the foundation of the state is "a non-established secular order [which is] equally respectful of religionists and non-religionists alike".[89] The European Court of Human Rights has endorsed this view of the state's role as:

> "[T]he neutral and impartial organiser of the exercise of various religions, faiths and beliefs [and it has also emphasised 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 those beliefs are expressed."[90]

The shift of focus embodied in secularism, from the transcendental and divine to the human centred and rational, is a characteristic of contemporary human rights norms. Ironically, however, the religious beliefs and practices that find themselves protected in such instruments *do* invest authority in the divine and the transcendental − and they may even subscribe to beliefs that are seemingly incompatible with a secular vision of society. A case in point is the rejection by many Muslims of the distinction that secularism draws between and 'private' and 'public' manifestation of one's religion

[84]. On the influence of faiths such as Christianity, Islam and Judaism on international human rights law see Mark Janus and Carolyn Evans (eds) *Religion and International Law* (Martinus Nijhoff, 1999).
[85]. Malcolm Evans "*Religion law and human rights: locating the debate",* in Edge and Harvey (eds) *supra*, n 49, p.182.
[86]. Frances Raday, "Culture, Religion and Gender" (2003) 4 *International Journal of Constitutional Law*, 663.
[87]. Yehoshua Ariell, "The Theory of Human Rights, its Origin and Impact on Modern Society" in Daniel Gutwein and Menachem Mautner (eds) *Law and History* 25, cited in Raday, *supra*, n 86, p.663.
[88]. Benjamin Berger, "The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State", (2002) 39 *Canadian Journal of Law and Society* 49.
[89]. Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (OUP, 2005) p.74.
[90]. *Şahin v. Turkey*, *supra*, n 31, para.107. See also *Hassan and Chaush v. Bulgaria* 30 Eur.H.R.Rep. 50, para.78 (2000) and *Serif v. Greece* 31 Eur.H.R.Rep. 20, para.57 (2001).

or belief.[91] What has been described as "Islamic totalism", whereby Islam is seen as embracing all aspects of life, including the social, economic, legal and political spheres,[92] rests uneasily with the secular model which effectively views religion as merely having a private (rather than a public) dimension.[93] It is thus the case that not all religious believers necessarily buy into the secular vision of society that liberalism typically regards as being so crucial for the protection of all human rights (including freedom of religion). It is this central paradox − that contemporary human rights norms are essentially secular in nature, yet may also protect one's right to behave in ways that are incompatible with secular principles − which renders the issue of religious dress so problematic within the framework of the ECHR. Furthermore, it provides the basis for several related ironies and contradictions − one of which is the challenge of ensuring that a proper balance is struck between the personal autonomy of believers and the legitimate power of the state in relation to the imposition of restrictions on religious dress.

(ii) Personal autonomy and religious dress.

Strongly connected with the principle of secularism in liberal thought is the notion of individual autonomy − the idea that "freedom of will and a capacity for self directed action within a social environment are the most important of human characteristics".[94] If, for example, a state were to impose an official orthodoxy on its critics in respect of religion, this would clearly run counter to the liberal view that individuals are autonomous agents who should be allowed to choose their own life paths. For Joseph Raz "[t]he ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny", in contrast to "a life of coerced choices" or "a life of no choices."[95] The decision to subscribe to a particular religion (and its related practices, including its dress codes) is but one choice available to rational autonomous individuals, and the state's role is to provide a neutral framework within which such a choice may be exercised. A necessary concomitant of a commitment to personal autonomy is some form of value pluralism. For one to be free to exercise a meaningful choice there must be a plurality of life paths from which one is able to choose. As Raz reasons: "[i]f all the choices in life are like the choice between two identical-looking cherries from a fruit bowl, then that life is not autonomous".[96] Indeed, a necessary *consequence* of autonomy is that people *will* pursue a variety of paths. Inevitably these paths will sometimes conflict and yet still be viewed as valuable, because they derive from the free choices of rational agents.[97]

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[91]. Other examples of religious beliefs that are difficult to reconcile with a secular vision of society include religious doctrines that discriminate against certain groups, such as children born out of wedlock or gays and lesbians.

[92]. William Shepherd, "Islam and Ideology: Toward a Typology" (1987) 19 *International Journal of Middle East Studies* 327.

[93]. See, generally, David Harte, "Defining the Legal Boundaries of Orthodoxy for Public and Private Religion in England", in Richard O'Dair and Andrew Lewis (eds) *Law and Religion* (OUP, 2001), pp.471-496.

[94]. David Feldman, *Civil Liberties and Human Rights in England and Wales* (OUP, 2002) p.9.

[95]. Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986) pp.369–71. See also Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) p.272; and John Rawls, *A Theory of Justice* (Clarendon Press, 1999) pp.17-22.

[96]. Raz, *id*, pp.398–9.

[97]. *Id*, pp.395– 9.

There is evidence of this approach in the jurisprudence of the European Court.[98] Yet the liberal discourse of autonomy is difficult to square with why some people adopt a particular faith and related lifestyle. Very often a believer's adherence to a particular religious practice is not the result of a process of rational decision making, whereby a choice is made between various competing life paths.[99] Instead, from the believer's perspective it may instead be a matter of obedience to the "will of God".[100] For example, Muslim women of all ages doubtlessly wear the *hijab* for a wide variety of reasons, but for some (at the very least) it is because of their belief that such dress is *required* by a divine obligation. After all, the Qur'an, believed by Muslims to be the will of God revealed through his prophet Mohammed, commands:

> "And tell believing women that they should lower their glances, guard their private parts, and not display their charms beyond what [it is acceptable] to reveal; they should let their headscarves fall to cover their necklines and not reveal their charms except to their husbands, their fathers, their husbands' fathers, their sons …[101]
>
> and
>
> Prophet, tell your wives, your daughters, and women believers to make their outer garments hang low over them so as to be recognised and not insulted."[102]

The liberal language of autonomy, so central to human rights doctrine, may thus not be adequate to explain the obligation on the wearer of *hijab*. As Anastasia Vakulanko asserts − "the paradigm of choice may not be an adequate tool to comprehend religiousness … [t]he veiled subject is not quite graspable by the classic Western liberal notions of autonomy and choice …".[103]

It is perhaps significant that many liberals have assumed that compliance with a religious duty is irreconcilable with the paradigm of choice:

> "Women who contend that the veil is part of religious doctrine, a divine edict, or a form of ethical practice . . . are usually judged to be victims of false consciousness, mired in a traditionalism that leads them to mistakenly internalize the opinions of misogynist jurists whom

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[98]. See *Serif v. Greece*, *supra*, n 90, para.53, and *Şahin v. Turkey*, *supra*, n 31, para.107.
[99]. See Benjamin. Beit-Hallahmi and Michael Argyle, *The Psychology of Religious Behaviour, Belief and Experience* (Taylor and Francis, 1997) pp.97-113.
[100]. For example the literal meaning of "Islam" is "surrender [to the will of God]": Karen Armstrong, *The Battle for God*, (Harper Collins, 2000) p.375. Some commentators have argued that the whole notion of individual rights sits uneasily with some religious cultures. For example, the Islamic concept of *ummah* or community raises potential difficulties for Muslims bringing individual human rights claims. See Anthony Bradney, "Law and Religion in Great Britain at the End of the Second Christian Millennium" in Edge and Harvey (eds) *supra*, n 49, pp.24-6.
[101]. *The Light* 24:31 (M. A. S. Abdel Haleem trans: OUP, 2004).
[102]. *The Clans* 33:59 (M. A. S. Abdel Haleem trans: OUP, 2004).
[103]. Anastasia Vakulenko, "Islamic Dress in Human Rights Jurisprudence: A Critique of Current Trends" (2007) 7(4) *Human Rights Law Review* 717, 729.

> they should resist. Such is the fate that must befall the veil in a secular imaginary."[104]

It may be that it is because of these factors that the courts have accorded comparatively little weight to principles of autonomy when hearing claims involving the right to wear religious dress. In *Şahin* the Grand Chamber, citing with approval the view of the Turkish Constitutional Court and the Chamber of the European Court, reiterated that "in the Turkish context" the Islamic headscarf was "presented as a compulsory religious duty", and its impact had to be born in mind on those who "[chose] not to wear it".[105] The autonomy based arguments of those claiming the "right" were therefore seriously undermined. Only the dissenting judge, Judge Tulkens, made reference to the autonomous choice of the applicant:

> "The applicant, a young adult university student said – and there is nothing to suggest that she was not telling the truth – that *she wore the headscarf of her own free will*. . . I fail to see how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted . . . *Paternalism of this sort runs counter to the case law of the Court, which has developed a real right to personal autonomy* on the basis of Article 8."[106] (emphasis added).

This doctrinal uncertainty – and the issue of whether the exercise of autonomy can be a valid argument for a woman claiming the *right* to wear the headscarf because of a divine *obligation* − is one of the components reflected in the widened margin of appreciation granted to states when dealing with religious dress. This is evident when comparing the Court's approach to cases brought under the right to respect for a private life (Article 8 ECHR) in which, as Judge Tulkens observed in *Şahin*, the principle of autonomy has been fully recognised.[107] In cases involving the "most intimate aspect of private life", such as those concerning sexual orientation and gender identity, the Court has found that there have to "exist particularly serious reasons before interferences by public authorities [can] be legitimate".[108] Consequently the margin of appreciation afforded in such cases to states has been very narrow. For example, in *Goodwin v. UK*, which concerned the right to legal recognition of change in gender, the Court stated that:

> "Under Article 8 of the Convention … where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings."[109]

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[104]. Mahmood, *supra*, n 53, at 343–4.
[105]. *Şahin v. Turkey*, *supra*, n 31, para.115.
[106]. *Id*, para. 12 of Judge Tulkens' dissenting judgment.
[107]. *Id.*
[108]. *Dudgeon v. U.K.* 4 Eur.H.R.Rep. 149, para.52 (1982); *Norris v. Ireland* 13 Eur.H.R.Rep. 186, para.46 (1991); *Smith and Grady v. U.K.* 29 Eur.H.R.Rep. 493**,** para.89 (1999).
[109]. *Goodwin v. U.K.* 22 Eur.H.R.Rep. 123, at para.90 (1996). See also *Keenan v. UK* 33 Eur.H.R.Rep. 38, para.92 (2001); and *Pretty v. UK* 35 Eur.H.R.Rep. 1, para. 61 (2002).

The language of autonomy is one which the European Court readily understands. Its invocation clearly has the effect of successfully narrowing the margin of appreciation that the Court is prepared to grant, and consequently increasing protection for claimants. Yet, in comparison with Article 8, the use of the language of autonomy to under-gird arguments relating to religious practice (under Article 9), tends to be much less well received or accepted by the Court. This contrast perhaps illustrates the caution that is generally associated with Convention jurisprudence in respect of Article 9 of the ECHR.[110] Moreover, the conservative way in which Article 9 has been interpreted stands in marked contrast to the Court's approach to what it considers to be values that are particularly worthy of protection, such as those associated with the principle of democracy.

4. Democracy and religious dress

(i) The prioritization of rights associated with democracy

As is the case with autonomy, democracy is an essential prerequisite for a contemporary liberal state[111] − and like autonomy, the European Court has embraced the principle of political democracy.[112] For example, in *United Communist Party of Turkey v. Turkey*, the Court stated that democracy appeared "to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it."[113] Rights that are considered to be essential for the preservation of an effective democratic polity are jealously guarded by the Court. Of particular importance are key principles such as freedom of political and journalistic expression, as guaranteed by Article 10 of the ECHR.[114] Yet, where the very same Article is invoked in support of *religious* expression, a significantly lower level of protection is afforded. The starkness of the distinction is well illustrated by comparing the outwardly similar cases of *VgT Verein Gegen Tierfabriken v. Switzerland*[115] (which concerned a blanket ban on the broadcasting of political advertising) and *Murphy v. Ireland*[116] (which concerned a similar ban on religious advertising). The ban in *VgT* was designed to prevent wealthy organisations from buying up large slots of airtime, and dominating the airwaves with their own political messages. Even though VgT, a small charitable group campaigning against factory farming, was patently *not* such an organisation, the Court held it was still caught by the ban, on the basis that this ban constituted a disproportionate interference with its Article 10 (freedom of expression) rights. Yet in contrast, in *Murphy*, where the Court accepted that a radio advert for a public talk to be given by a small evangelical Christian group was only "innocuous

[110]. See Peter Cumper, "Freedom of Religion and Belief", in David Harris, Michael O'Boyle, Colin Warbrick, Ed Bates and Carla Buckley, *Law of the European Convention on Human Rights* (OUP, 2nd edn, 2008) chapter 10 (forthcoming).
[111]. See Eamonn Callan, *Creating Citizens: Political Education and Liberal Democracy* (Oxford University Press, 1997) pp.10,11,
[112]. See Alistair Mowbray, "The Role of the European Court of Human Rights in the Promotion of Democracy" (1999) *Public Law* 703.
[113]. *United Communist Party of Turkey v. Turkey* 26 Eur.H.R.Rep. 121, para.45 (1998).
[114]. See *Castells v. Spain* 14 Eur.H.R.Rep. 445 (1992) and *Lingens v. Austria* 8 Eur.H.R.Rep. 407 (1986).
[115]. *VgT Verein Gegen Tierfabriken v. Switzerland* 34 Eur.H.R.Rep. 10 (2002).
[116]. *Murphy v. Ireland* 38 Eur.H.R.Rep. 13 (2004).

and … informational",[117] there was no violation of Article 10. In reaching this conclusion the Court expressly distinguished *VgT* from *Murphy* and reasoned that, in the latter case, the *content* of the expression required that a greater margin of appreciation be granted to the state:

> "[Whilst there was] little scope . . . for restrictions on political speech or on debate of questions of public interest . . . a wider margin of appreciation [was] generally available . . . when regulating freedom of expression in areas liable to offend intimate personal convictions within the sphere of morals or, especially, religion . . . [and that what is] … likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations."[118]

The rationale behind this difference of approach appears to lie in the relative instrumental value of the content of the expression in question.[119] For example, the European Court has stated on numerous occasions that "freedom of political debate is at the very core of the concept of democratic society which prevails throughout the Convention."[120] Thus, given that freedom of political speech is vital to the democratic process, the goal of securing effective representative democracy is best served by granting strong protection to "political" expression.

In contrast, however, the instrumental value of religious expression and its manifestation is less obvious. It is not vital for the protection of democracy, because it apparently produces less in the way of overall societal benefit. Instead, it primarily benefits the *individual* who engages in his/her religious activity. As Andrew Geddis explains, it is

> "[B]ecause religious expression is not thought to generate as great an externalised benefit for society as a whole when compared to political expression that there is less of a 'thumb on the scale' when it comes to weighing the value of the speech against the possible harms it may engender".[121]

The distinction between rights regarded as being beneficial to democracy and those seen as being primarily of benefit for an individual right's holder is emphasised, yet further, in the wider case law of Article 9 of the ECHR. A comparison may be drawn in this context between the 'religious dress cases', and a series of recent cases concerning the refusal of states to permit the registration of religious organisations.

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[117]. *Id*, at para.37.
[118]. *Id*, at para.67.
[119]. See Andrew Geddis, "You Can't Say "God" on the Radio: Freedom of Expression, Religious Advertising and the Broadcast Media after Murphy v Ireland" (2004) *European Human Rights Law Review* 181.
[120]. See *Rekvényi v. Hungary* 30 Eur.H.R.Rep. 519, para.26, (2000); *Oberschlick v* Austria 19 Eur.H.R.Rep. 389, para. 68 (1995); and *Lingens v. Austria* 8 Eur.H.R.Rep. 407, para. 42 (1986).
[121]. Geddis, *supra*, n 119, at 189.

For example, in *the Moscow Branch of the Salvation Army v. Russia,*[122] the Moscow authorities refused to grant legal recognition to the applicant organisation, while the Salvation Army claimed a breach of Articles 9 and 11 (the right to peaceful assembly and association) in tandem.[123] In giving judgment the European Court noted that religious communities traditionally exist in the form of organised structures, and accordingly it reasoned that Article 9 had to be interpreted in the light of Article 11.[124] In a revealing passage the Court stated that:

> "While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, *associations formed for other purposes*, including those proclaiming or teaching religion, *are also important to the proper functioning of democracy*. For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. *The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively*."[125] (emphasis added).

This hitching of Article 9 to Article 11 seems to have resulted in the European Court adopting a higher level of scrutiny as to the grounds on which the state can restrict freedom of religion or belief. Thus, the extremely wide margin of appreciation that the Court so readily granted in respect of Article 9 in *Şahin* was dramatically narrowed:

> "The exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom. In determining whether a necessity within the meaning of paragraph 2 of these Convention provisions exists, the States have *only a limited margin of appreciation, which goes hand in hand with rigorous European supervision …*".[126] (emphasis added).

As a result the Court held that the actions of the Russian authorities were not justified, and there was a violation of Article 11 of the Convention "read in the light of Article 9".[127] Article 11 is thus viewed as being of vital importance to the "proper functioning

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[122]. *The Moscow Branch of the Salvation Army v. Russia* 44 Eur.H.R.Rep. (2007) 46. See also *Biserica Adevarat Ortodoxa din Moldova v. Moldova*, App. No. 592/03, Feb.27, 2007 and *Church of Scientology Moscow v. Russia*, 46 Eur.H.R.Rep. (2008) 16.

[123]. The grounds for the refusal to register the Salvation Army changed throughout the course of the domestic proceedings. They included: an insufficient number of founding members and the absence of documents showing their residence in Russia; the paramilitary structure of the organisation; and an inconsistent indication of the organisation's religious affiliation.

[124]. *Moscow Branch of the Salvation Army*, *supra*, n 122, para.58.

[125]. *Id*, para.61.

[126]. *Id*, para.76.

[127]. *Id*, para.98.

of democracy".[128] Indeed, the European Court sees clear benefits deriving from popular participation in civic associations and societies whose existence is central to democratic pluralist society, even where such groups are not *in themselves* directly contributing to democracy. The conjoining of the religious with the associative right seems, therefore, to have been an important component in the success of the Salvation Army before the Court.[129] Accordingly, the canonical position of democracy under the ECHR means that aspects of rights regarded as being vital for its protection − even if only tangentially so[130] − receive enhanced protection from the Court. But where an applicant *merely* wishes to invoke Article 9 in support of his/her form of religious dress, the absence of a clear nexus with the democratic process apparently condemns him/her to almost certain defeat at the hands of the state, which enjoys a wide margin of appreciation.

(ii) Article 9, democracy and 'slippery slopes'

In *Şahin*, as noted above, when presented with the cataclysmic possibility of the future downfall of democracy and human rights protection in Turkey, the Grand Chamber of the European Court accorded the state a wide margin of appreciation. This essentially proved to be the death knell for the applicant's claim. In accepting that individuals may legitimately be prevented from wearing items of clothing, not because of anything inherently objectionable about the dress per se, but on account of the risk of *future* consequences associated with it (i.e., the threat to democracy posed by an inexorable slide toward extremism), the Court constructed a version of the "slippery slope" argument. Frederick Schauer has characterised such arguments as leading to a situation where: "a particular act, seemingly innocuous when taken in isolation … may yet lead to a future host of similar but increasingly pernicious events".[131]

Whilst slippery slope arguments often underpin many policy decisions in public life, they are undoubtedly dangerous, particularly in the field of fundamental human rights. They tend to rely, by definition, not on any actual harm stemming from conduct, but are rather based on the possibility of some (often unquantifiable) anticipated future harm. As Schauer points out:

> "[A] . . . slippery slope argument depends for its persuasiveness upon temporally and spatially contingent empirical facts rather than (or in addition to) simple logical interference … slippery slope claims deserve to be viewed sceptically, and the proponent of such a claim must be expected to provide the necessary empirical support. This

[128]. *Id*, para.61.
[129]. The Court in *Moscow Branch of the Salvation Army* concluded that despite its para-military structure and appearance "[i]t could not seriously be maintained that the applicant branch advocated a violent change of constitutional foundations or thereby undermined the integrity or security of the State": *supra*, n 122, para.92. This is in contrast to the Article 11 claim in *Refah Partisi (Welfare Party) v. Turkey* 26 Eur.H.R.Rep 121 (1998), where the Court found that a political party's policies were anti-democratic and thus contrary to the entire ethos of the ECHR.
[130]. For example, in *Moscow Branch of the Salvation Army*, *supra*, n 122, the gathering together of people in associations was *in itself* regarded as being good for democracy
[131]. See Frederick Schauer, "Slippery Slopes" (1985) 99 *Harvard Law Review* 361-2.

> empirical support provides the supplement necessary to complete the structure of a slippery slope argument."[132]

However, as we have seen, the European Court has *not* insisted upon such evidence in religious dress cases. The need for evidence has been submerged in the deep ocean of the margin of appreciation, so readily afforded by the Court to the state. As the dissenting judge in *Şahin*, Judge Tulkens, commented:

> "Only indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears – are capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention … [m]ere affirmations do not suffice: they must be supported by concrete examples. Such examples do not appear to have been forthcoming in [this] case."[133]

This is a discouraging picture for anyone who wishes to invoke the ECHR and is hoping to win the right to wear the religious dress of their choice. Furthermore, such an applicant's position is even worse when we again compare the European Court's approach to the hierarchy of rights. Cases such as *Gündüz v Turkey*[134] make it clear that, even within the general parameters of religious freedom, certain forms of this right (eg., participation in public debate or in political associations) are granted higher levels of protection than others.

In *Gündüz v Turkey*, the applicant (Müslüm Gündüz), a member of an Islamic religious sect, took part in a live televised debate in which he advocated the introduction of sharia law, as well as vehemently criticising democracy and secularism. Convicted of incitement to religious hatred, he was sentenced to two years imprisonment and a fine by the Turkish courts. Gündüz's claim, that these curbs had (inter alia) unfairly restricted his freedom of expression, was upheld by the European Court, which found that there had been a violation of Article 10 by the Turkish state.[135] The Court found it relevant that there had been considerable public interest in the applicant's sect,[136] and that the programme in which the applicant had taken part had been designed to provoke debate and "even an argument".[137] Some of the applicant's comments may have been offensive but, because they were made orally during a live television broadcast, there had been "no possibility of [the applicant] reformulating, refining or retracting them before they were made public". The Court held that, in these circumstances, it was particularly significant that the applicant had been "actively participating in a lively public discussion".[138] On the question of his advocacy of sharia, the Court reiterated its opinion that sharia law was not compatible with the underlying values of the Convention.[139] However, the mere fact one spoke in defence of sharia, without calling for violence to establish it, could not be regarded as

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[132]. *Id*, at 381–2
[133]. *Şahin v. Turkey*, *supra*, n 31, Judge Tulkens (dissenting) at para.5.
[134]. *Gündüz v. Turkey* 41 Eur.H.R.Rep 5 (2005).
[135]. *Id*. The Court stressed the need to look at the context and circumstances of the case "as a whole": paras 42 and 52.
[136]. *Id*, at para.43.
[137]. *Id*, at para.44
[138]. *Id*, at para.49.
[139]. *Id*, at para.51, where the Court restated its position in *Refah Partisi (Welfare Party) v. Turkey* 26 Eur.H.R.Rep. 121, at para.108 (1998).

"hate speech", especially in the context of a television programme in which other counter-balancing views had been put forward.[140] Thus, the Court concluded that there was a violation of Article 10 of the ECHR because Gündüz's views "were expressed in the course of a pluralistic debate in which [he] was actively taking part."[141]

As has been well documented elsewhere, the question of whether democracy is compatible with sharia law is a problematic and emotive one.[142] Thus, perhaps not surprisingly, the Court confined itself to making reference to its earlier decision in *Refah Partisi*, in which it had found that the banning of a political party, whose members had (inter alia) called for *jihad* and advocated the introduction of sharia, did not breach Article 11 of the ECHR.[143] Refah had been elected as the largest party in the Turkish Grand National Assembly in 1995, so there was deemed to be a real prospect of it "seizing political power" and putting its policies into practice. However, the Court in *Gündüz* considered that "such a situation [was] hardly comparable with the one in issue,"[144] and distinguished *Refah Partisi* on the ground that in *Gündüz* the applicant was only engaging in "pluralistic debate" – exactly the *sort* of activity which the Court maintains is a foundation of a democratic society, and is thereby vital for the effective protection of human rights.

So where does this leave an applicant like Şahin, who is seeking to challenge a state's restriction on the Islamic headscarf in Turkey? Unlike Gündüz, the applicant in *Şahin* was not actively *advocating* anything. In contrast, she was merely manifesting her belief through her clothing and was therefore, by that very same token, *not* engaged in "pluralistic debate". Her activity did not fit within the template of an active citizen, engaged in civic discourse, in a pluralist democratic society. If we return to the slippery slopes metaphor, Müslüm Gündüz would appear to be much further down the slope than Leyla Şahin. But it would appear that there exists more than one slope. The slope envisaged when the applicant is engaged in "pluralistic debate" is less steeply inclined (or is less slippery, perhaps) than that which is envisaged when the applicant is manifesting his/her religious belief through dress. Hence the "debater" seems to be permitted to descend much further down the incline before his/her behaviour can be legitimately proscribed.[145] After all, "pluralistic debate" is a form of expression that the Court regards as being generally beneficial.[146] However, wearing the headscarf is not afforded the benefit of such a presumption. On the contrary, it is often viewed as being little more than a strange manifestation of an irrational belief, with no redeeming social utility to ameliorate the perilous angle of its own slippery slope.

The European Court's judgment in *Şahin* must of course be seen in the context of the contemporary political challenges facing those governing Turkey. That said, it has, nonetheless, led to a situation where a Muslim woman in (at least some parts of)

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[140]. *Id*, at para.51.
[141]. *Id*, at para.51.
[142]. See Abdullahi An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari`a* (Harvard University Press, 2008).
[143]. *Refah Partisi (Welfare Party) v. Turkey* 26 Eur.H.R.Rep, at para.121.
[144]. *Supra*, n 134 at para.51.
[145]. See, for example, the facts of *Refah Partisi*, *supra* n 139.
[146]. Indeed, a counter-slippery slope argument could be advanced on the following lines: "if you do allow censorship of such 'pluralistic debate on *this* subject matter today, what speech will you be punishing tomorrow?" See Schauer, *supra* n 131 at 381.

Europe needs only *wear* the Islamic headscarf before the state can legitimately restrict her freedom on the basis of some future event(s) that might ensue. Yet, as noted above, in regard to the "pluralistic debater" – even where the topic is religion, and s/he actually advocates the overthrow of the entire system − s/he is likely to obtain the Court's protection unless there is a real chance s/he could actually put into practice what is preached.

Conclusion

The European Court of Human Rights, in having to interpret Article 9 of the ECHR in a continent that is the home of numerous religions and equivalent systems of belief, has an undeniably formidable task. Yet its success in this regard is questionable, not least because its judges have tended to give the impression that religion − or rather the manifestation of religious belief through symbols and dress − is not really that important in contemporary Europe. Of course the Court has recognised that religion is a socially useful tool when it fosters democratic interests – such as when it is claimed in tandem with the right to association[147] or is part of a "pluralistic debate"[148] – but that otherwise its influence on public life should (as far as possible) be limited or discouraged.

In this context it is perhaps worth recalling that when the ECHR was drafted in post war Europe, the continent's dominant religion (Christianity) was generally seen as being a positive social force, because it was a strong bulwark against Communism. Today, however, radical Islam rather than Communism is seen by many as posing a serious threat to liberal European values.[149] Thus, rather than guarding against the *threat* to freedom, religion (or more specifically Islam) is viewed by some as positively contributing to it. Consequently, as Gareth Davies notes:

> "It seems that Europeans, to a very large extent are not prepared to afford [Islam or its stricter adherents] the same respect that they would to milder or more familiar beliefs. They remind them too forcefully, perhaps, of views that this continent has itself barely left behind".[150]

Claims of 'Islamaphobia',[151] and a perception that the West is guilty of applying "double standards" where Islam is concerned,[152] has evidently fuelled the disenchantment of many young Muslims in parts of Europe with secular liberal values. Yet, ironically, the European Court's ruling in *Şahin* was predicated on the basis of the need to protect democracy in Turkey from religious extremism. When the Court next considers the issue of religious dress, it is to be hoped that it will interpret

[147]. See *Moscow Branch of the Salvation Army v. Russia*, *supra*, n 122, para.46.
[148]. See, for example, *Gündüz*, *supra*, n 134.
[149]. See Dilip Hiro, *War Without End: The Rise of Islamist Terrorism and Global Response* (Roli Books, 2002), and Emran Qureshi and Michael Sells (eds), *The new crusades: constructing the Muslim enemy* (New York, 2003).
[150]. Gareth Davies, "Banning the jilbab: Reflections on Restricting Religious Clothing in the light of the Court of Appeal in SB v Denbigh High School" (2003) 1 *European Constitutional Law Review* 528-9.
[151]. See Runnymede Trust, *Islamophobia: A Challenge To Us All* (London, 1997).
[152]. See Peter Nesser, "Jihadism in Western Europe after the invasion of Iraq: Tracing motivational influences from the Iraq war on jihadist terrorism in Western Europe" (2006) 29(4) *Studies in Conflict and Terrorism* 323.

Article 9 more robustly than was the case in *Şahin*. The consequences of a failure to do so should not be ignored. The perception that the Court does not take religion seriously, could foster bitterness and might, paradoxically, push many within Europe's Muslim communities into the arms of radical Islamists − the very groups whose values the Court sought to guard against in *Şahin.*