

The Manifestation of Religious Belief Through Dress

Human Rights and Constitutional Issues

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Abstract

Jurisdictions around the world continue to grapple with the clash between religious freedoms and other freedoms and values to which a society subscribes. A recent, and current, debate concerns the extent to which a person is free to wear items of clothing often thought to be symbolic of the Muslim faith, though the issues are not confined to any particular religion. Bans on the wearing of this type of clothing have often (surprisingly) survived human rights challenges, on the basis that governments had legitimate objectives in banning or restricting them. A pending case gives the European Court another chance to reconsider the issues. It is hoped that the Court will closely scrutinise claims of legitimate objectives for such laws; perceptions can arise that sometimes, governments are pandering to racism, intolerance and xenophobia with such measures, rather than seeking to meet more high-minded objectives.

Keywords: religion, religious freedom, burqa, hijab, Muslim.

A. Introduction

In recent years, the issue of the extent to which an individual has or should have the right to religious freedom, and to manifest that freedom by wearing particular items of clothing, has become very contentious. Some nations have seen fit to ban the wearing of particular items of clothing thought to have religious significance, at least in some contexts. Courts from a range of jurisdictions have sought to grapple with these issues, involving a range of values and sometimes competing interests. As we will see, they have done so in different ways, and some of the results are, at first blush, somewhat surprising. In late 2013, a Muslim woman, known as SAS, brought a legal challenge to the French laws banning face coverings, arguing that it infringed several freedoms enshrined in the European Convention on Human Rights. A result is expected in mid-2014.

In this article, I will consider constitutional and human rights issues that arise when lawmakers enact legislation prohibiting the wearing of particular items of clothing often thought to have religious significance, in particular the

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hijab, burqa or niqab.¹ This ban could take the form of a direct ban on the wearing of such items, or an indirect ban, for example one that prohibits face coverings while in public. While the ban could apply to other items of clothing or jewellery of religious significance other than Islam, given that most of the current debate concerns symbols of Islam, I will use this particular context as the focus of discussion.

In Section A, I set the statutory framework for the discussion that follows. In Section B, the meaning of the wearing of the hijab and burqa is considered. Section C considers how laws banning the wearing of religious dress or symbols have been considered in various courts. In Section D, I synthesise some of the common themes that arise from the jurisprudence of the jurisdictions studied, before drawing some conclusions.

B. Regulatory Context of Freedom of Religion

The right to freedom of religion is recognised as fundamental in various international human rights documents. These include Article 9 (1) of the European Convention on Human Rights, protecting the right to freedom of religion and to manifest that religion in worship or practice, subject to limited exceptions.² It is clear that 'practice' here includes the wearing of distinctive clothing or head covering.³ Very similar provisions appear in Article 18 of the International Covenant on Civil and Political Rights, and Article 18 of the Universal Declaration of Human Rights.

The American anti-establishment clause is found in the First Amendment, and Article VI, Section 3 prohibits the use of religious tests as a precondition of taking office. The Constitution of the author's home country, Australia, follows the example of the United States in forbidding the Australian Parliament from passing a law establishing a religion, imposing a religious observance or prohibiting the free exercise of religion, and forbids a religious test from being required as

1 The *hijab* is taken to refer to a head covering traditionally worn by Muslim women (the word can also be used to explain modest Muslim styles of dress in general), the *burqa* is a full dress covering a woman's body, including a veil over the woman's face (this veil is separately referred to as a *niqab*).

2 Art. 9 (2) provides for limits to the freedom if they are prescribed by law and necessary in a democratic society in the interests of public safety, protection of the public order, to protect health or morals or to protect the rights and freedoms of others. Related rights that could also be used to challenge restrictions on religious dress include the right to respect for private and family life (Art. 8), right to freedom of expression (Art. 10), the right to freedom from discrimination based on religion (Art. 14) and the right to education (Art. 2 of the First Protocol). The interpretation of these limits must be strict, and limits must be directly related and proportional to the specific need; they must not be applied in a discriminatory manner: Human Rights Commission, *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion* (Art. 18), Forty-Eighth Session, 1993. The European Court has found that restrictions on religious freedom call for 'very strict scrutiny' by the Court since the right is fundamental in nature: *Manoussakis v. Greece*, Applic. No. 18748/91, (1997) 23 EHRR 387, 407.

3 Human Rights Committee, 1993.

a qualification for office in Australia.⁴ No law has ever been struck down as being offensive to the Section 116 prohibition. The prohibition applies (expressly) only to national laws, not subnational laws.

It has been suggested that freedom of religion and conscience may be the oldest of the internationally recognised human rights.⁵ These rights protections have been borne out of a long history of violence and persecution in relation to religion, oppression of religious minorities, imposition of religion by states, etc. As the United States Supreme Court noted:

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favoured churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy.⁶

There was also the historical view that the monarch of the past, in whom lawmaking functions were reposed, was the representative of a higher religious authority. Links with theories of natural law may be acknowledged here. The separation of religion and state can be seen in great contrast to the historical position of the monarch as lawmaker and religious figure.⁷

Despite these provisions,⁸ some jurisdictions have recently moved to ban some forms of religious expression.⁹ As one example for discussion purposes, Law 2004-228, passed in France, prohibits in Article 1 in public elementary schools, colleges, junior high schools and high schools the wearing of signs and behaviours by which the pupils openly express a religious membership. On its face the Article does not single out a particular religion; however, in practice it has been applied

4 At the subnational level, see also s 14 of the *Human Rights Act 2004 (ACT)* and s 3 of the *Charter of Rights and Responsibilities Act 2006 (Vic)*. Section 46 of the Tasmanian Constitution provides for free profession and practice of religion 'subject to public order and morality': *Constitution Act 1934 (Tas)*.

5 W.C. Durham Jr., 'Freedom of Religion: The United States Model', *American Journal of Comparative Law*, Vol. 42, 1994, pp. 617, 618; A. Saeed & H. Saeed, *Freedom of Religion, Apostasy and Islam*, Ashgate, Burlington, 2004, p. 10.

6 *Everson v. Board of Education*, 330 US 1 (1947).

7 Great advocates for religious freedom in the past have included J.S. Mill, *On Liberty*, John W. Parker and Son, West Strand, London, 1859, pp. 51-52 and J. Locke, *A Letter Concerning Toleration*, 1689, Awnsham Churchill, London.

8 M. Todd Parker argues that legal precedents allowing restrictions on religious dress and other practice are often not faithful to the requirements of the International Covenant and European Covenant on Human Rights: M.T. Parker, 'The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of the ICCPR and the ECHR', *Duke Journal of Comparative and International Law*, Vol. 17, 2007, p. 91.

9 Links with post 9-11 hysteria have been noted here: "women who are readily identified as Muslim because they wear a headscarf or veil report that they have often been the target of racist violence and discrimination and that this increased post 9-11 as their clothing is now read to signify religious fundamentalism, danger and terrorism": M. Thornton & T. Luker, 'The Spectral Ground: Religious Belief Discrimination', *Macquarie Law Journal*, Vol. 9, 2009, pp. 71, 83.

almost exclusively to require that the hijab and burqa not be worn at these venues.¹⁰ In 2011, the French Government moved to extend the ban beyond educational settings, by enacting a ban on persons wearing any form of face covering in public. Other countries in Europe and elsewhere took similar steps.

As already indicated, in late 2013 a formal legal challenge to the French laws was mounted in the European Court of Human Rights, by a Muslim woman known by her initials SAS. It is expected that the Grand Chamber will render its decision by mid-2014. It is noteworthy that although there have been changes in governance in France since these previous laws were introduced, the current government is choosing to defend the validity of these laws. It should be borne in mind that recent elections in France, and other parts of Europe, have seen the rise of what would traditionally be characterised as far-right political parties, many of whom openly oppose immigration. It would be naïve to think that these developments are irrelevant to the legislative moves to restrict, and subsequently ban, 'religious dress' in France, or moves by the current government to defend the laws, although they were conceived by the previous President, someone of a different political persuasion than the incumbent.

C. Meaning of the Hijab and Burqa

The fundamental question arises as to whether a banning of either or both the hijab and burqa interferes with the person's right to freedom of religion, and their right to manifest that religion in practice. Some connection between the wearing of such items and religion is required in order to enliven the religious freedom provisions. It is considered necessary to refer to religious documents as well as views as to the symbolism of such dress in order to answer this question. No simplistic answer can be given.

An important source of information in attempting to answer this question are the relevant provisions of the Koran (Qur'an) itself. Typically, the following passage is quoted:

And say to the believing women that they should lower their gaze and guard, their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers, their husband's fathers, their sons, their brothers or their brother's sons, or their women.¹¹

10 Mark Levine reports that in the first year following the passage of the French law, 47 Muslim girls had been expelled from French schools for wearing the hijab: M. Levine, 'The Modern Crusade: An Investigation of the International Conflict Between Church and State', *California Western International Law Journal*, Vol. 40, 2009, pp. 33, 42.

11 Qur'an 24:30-31, 24:60, 33:59 and 33:53; A.Y. Ali, *The Qur'an Text, Translation and Commentary*, 2001, Tahrike Tarsile Qur'an, New York, pp. 904-905.

As with many issues in religion, the above passage has been interpreted in different ways. A specific challenge with Islam is that, as Baker notes, there is no central authority figure, such that followers adhere to different forms and interpretations of Islamic tenets.¹² Opinions differ as what ‘guarding their modesty’ might mean; some interpret this strictly to require that the full-body garment (burqa) be worn, others see the headscarf as being sufficient, while others argue that the woman merely cannot wear clothing showing the outline of her bosom.¹³ Others say that the headscarf is a cultural tradition that has nothing to do with Islam, and the hijab referred to in the Qur’an is a curtain Muhammad used to separate his wives from male visitors, and is not a piece of clothing at all.¹⁴

There have been other suggestions as to the significance of the hijab or burqa that are based around culture rather than religion per se. For example, Tiefenbrun summarises these as including:

- a It is a positive symbol designating the cultural and religious source of protection, respect and virtue;
- b It is a positive sign signifying Muslim identity, which might (arguably) be seen as opposition to Western civilisation;
- c It is a positive sign allowing Muslim women to freely participate in public life, preventing women from ‘tempting men and corrupting morality’¹⁵;

12 C. Baker, ‘French Headscarves and the U.S. Constitution: Parents, Children and Free Exercise of Religion’, *Cardozo Journal of Law and Gender*, Vol. 13, 2008, pp. 341, 359.

13 M. Saxena, ‘The French Headscarf Law and the Right to Manifest Religious Belief’, *University of Detroit Mercy Law Review*, Vol. 84, 2007, pp. 765, 779-780; S. Tiefenbrun, ‘The Semiotics of Women’s Human Rights in Iran’, *Connecticut Journal of International Law*, Vol. 23, 2008, pp. 1, 25; T.J. Gunn, ‘Religious Freedom and Laicite: A Comparison of the United States and France’, *Brigham Young University Law Review*, Vol. 2004, No. 2, 2004, pp. 419, 471; R. Kahn, ‘The Headscarf as Threat: A Comparison of German and US Legal Discourses’, *Vanderbilt Journal of Transnational Law*, Vol. 40, 2007, pp. 417, 438.

14 Gunn, 2004, at 471-472.

15 A. Abdo, ‘The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf’, *Hastings Race and Poverty Law Journal*, Vol. 5, 2008, pp. 441, 449: “Hijab is not only meant to guard women from inappropriate leering male attention, but it is considered to be a liberating experience to be free from societal expectations and judgments over a woman’s body and other physical characteristics”; Levine, 2009, at 33, 41. Writing of the Iranian position, Susan Tiefenbrun claims “women in Iran today are no longer excluded from public life and politics, and their participation has in fact increased in some areas due to, and not in spite of, the compulsory wearing of the veil or hijab”: Tiefenbrun, 2008, at 19.

- d It is a negative symbol of Islam's power over women¹⁶; for instance, Badinter claims that the veil "is the symbol of the oppression of a sex [...] putting a veil on the head, this is an act of submission. It burdens a woman's whole life."¹⁷

Some studies based on interviews with Muslim women suggest that while some Muslim women adopt the veil to comply with family values and expectations, it is becoming more common that women choose to wear the headscarf themselves, often without pressure and often against their parents' wishes. It is sometimes argued by Muslim women that the veiling forces males to deal with them on a mental level as equals, rather than sexual objects.¹⁸ Economics may even be a factor.¹⁹ A multitude of reasons is plausible.²⁰ Baroness Hale engages with the com-

- 16 Tiefenbrun, 2008, at 22-23; S. Walterick, 'The Prohibition of Muslim Headscarves From French Public Schools and Controversies Surrounding the Hijab in the Western World', *Temple International and Comparative Law Journal*, Vol. 20, 2006, pp. 251, 255: "to many people in France, the hijab is also a symbol of the oppression and subjugation of Muslim women"; *Commission de Reflexion sur l'Application due Principe de Laicite dans law Republique* (Stasi Commission Report), 2003, pp. 46-48; C. Belelieu, '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', *Columbia Journal of European Law*, Vol. 12, 2006, pp. 573, 583: "just like Islam itself, the practice of veiling can take on a range of styles and meanings [...] (619) the message conveyed (by the wearing of the veil) depends on the carrier of the symbol as well as the audience of that symbol"; A. Wing & M. Smith, 'Critical Race Feminism Lifts the Veil?: Muslim Women, France and the Headscarf Ban', *University of California Davis Law Review*, Vol. 39, 2006, pp. 743, 746-747, 750-751. Chouki El Hamel argues that the hijab ensures that men will maintain their status as providers and guardians of women and ensures that women remain isolated: C.E. Hamel, 'Muslim Diaspora in Western Europe: The Islamic Headscarf, the Media and Muslims' Integration in France', *Citizenship Studies*, Vol. 6, 2002, pp. 293, 302; G. Jasser, 'The Twin Evils of the Veil', *Social Identities*, Vol. 5, 1999, pp. 31, 37: 'the veiled woman is reduced to impotence'.
- 17 E. Badinter, 'Interview With L Joffin', *The Nouvel Observateur*, 1989, pp. 7-11; N. Gole, 'The Voluntary Adoption of Islamic Stigma Symbols', *Social Research*, Vol. 70, 2003, pp. 809, 817-818; Azar Majedi denounces the veil as "the ideological banner of Iran's sexual apartheid and misogynist values": A. Majedi, *Women's Rights vs Political Islam: A Series of Political Writings About the Devastating Effects of Political Islam on Women's Situation and the Struggle of Women Against It*, 2007; S. Gey, 'Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools', *Houston Law Review*, Vol. 42, 2006, pp. 1, 62: "In France, the government is seeking to create a limited area in which especially vulnerable students are free to consider all areas and possibilities, free from the constraints imposed on them by the religions and social mandates of their community and family"; cf. Aliah Abdo who describes these views as a "severely flawed and false reflection of Islamic principles": Abdo, 2008, at 441.
- 18 Wing & Smith, 2006, at 761-763. Others note that in other cultures such as the Berber-speaking Tuareg of West Africa men veil, and masks are common, which has not attracted the same controversy as that of a woman veiling: J. Borneman, 'Veiling and Women's Intelligibility', *Cardozo Law Review*, Vol. 30, 2009, pp. 2745, 2748-2749.
- 19 D. Alsowayel, 'Commentary: The Elephant in the Room: A Commentary on Steven Gey's Analysis of the French Headscarf Ban', *Houston Law Review*, Vol. 42, 2006, pp. 103, 118.
- 20 J. Gunn, 'Commentary: French Secularism as Utopia and Myth', *Houston Law Review*, Vol. 42, 2006, pp. 81, 98; Y. Barbibay, 'Citizenship Privilege or the Right to Religious Freedom: The Blackmailing of France's Islamic Women', *Cardozo Journal of International and Comparative Law*, Vol. 18, 2010, pp. 159, 201; K. Bennoune, 'Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression and Women's Equality Under International Law', *Columbia Journal of Transnational Law*, Vol. 45, 2007, pp. 367, 388; Belelieu, 2006.

plex symbolism of the wearing of religious dress such as the hijab or burqa in her judgment in *R v. Headteacher and Governors of Denbigh High School*.²¹ As Choudhury summarises it, “Islamic scholars and feminists continue to debate whether hijab is compulsory and, if so, what practices of dress constitute valid observance.”²²

Given this range of views, it would be difficult for a court to determine emphatically that the wearing of the hijab or burqa either was, or was not, a manifestation of a religious practice. The courts have often (understandably) expressed their reluctance to judge the ‘validity’ of an asserted religious belief, acknowledging that religious belief is intensely personal:

Emphatically, it is not for the court to embark upon an inquiry into the asserted belief and judge its validity by some objective standard such as the source material upon which the claimant found his belief or the orthodox teaching of the religion in question or the extent to which the claimant’s belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual [...] religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising.²³

This view is supported. It would place the judges in an impossible position to expect them to pass some kind of judgment on the religious views of another, or the tenets of a particular faith. This is surely outside the realm of the judicial role.

D. The Fate of Bans on Religious Dress in Other Jurisdictions

I. Europe

With its melting pot of different cultures, religions and complex history, it is not surprising that these issues have received significant airing in Europe. In some

21 [2006] UKHL 15, [94], quoting Yasmin Alibhai-Brown that “what critics of Islam fail to understand is that when they see a young woman in a hijab she may have chosen the garment as a mark of her defiant political identity and also as a way of regaining control over her body”.

22 N. Choudhury, ‘From the Stasi Commission to the European Court of Human Rights: L’Affaire du Foulard and the Challenge of Protecting the Rights of Muslim Girls’, *Columbia Journal of Gender and Law*, Vol. 16, 2007, pp. 199, 218.

23 *R (Williamson) v. Secretary of State for Education and Employment* [2005] 2 AC 246, [22-23] (Lord Nicholls); *Employment Division, Department of Human Resources of Oregon et al. v. Smith et al.*, 494 US 872, 887 (1990); *Syndicat Northcrest v. Amselem* (2004) 241 DLR (4th) 1, 27 (para. 52); *Multani v. Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256 (para. 35); *Manoussakis v. Greece*, (1997) 23 EHRR 387, 45; cf. early cases, where the Court appeared judgmental of the religious views of others whose opinions the judges presumably did not share: *Krygger v. Williams* (1912) 15 CLR 366, 370-372; *Mormon Church v. United States*, 136 US 1, 49 (1889).

parts of Europe veiling has not created difficulty.²⁴ Elsewhere, major issues have arisen, especially in France with its high Muslim population. For instance, in 2004, the Republic passed legislation stating that “in public elementary schools, junior high schools and high schools, students are prohibited from wearing symbols or clothing through which they conspicuously evince a religious affiliation.” The legislation was, on its face, applicable to all religions; however, the intention apparently was, and the practice has been, that the legislation has overwhelmingly been applied in relation to the wearing of the hijab, and, to a lesser extent, the burqa.²⁵ In 2011, a more general ban on face covering in public was enacted. Other countries in Europe have also enacted bans or restrictions; however, for the purposes of this article, I will concentrate on France in order to keep the discussion manageable.

France has a long and complex history concerning the relation between the Church and State, and a formal separation that occurred in a 1905 Act arguably completed the separation that commenced in 1789, with the Revolution creating the secular nature of the State, and the 1905 Act confirming the State’s non-ability to regulate ecclesiastical matters.²⁶ This principle of secularism, also known as *laïcité*, has come to be associated very strongly with French identity and notions of equality, such that differences based on culture, ethnicity or religion, or things that symbolise such differences, may be seen by some as problematic.

Questions have arisen as to the extent to which the wearing of religious dress such as the hijab or burqa infringes the French concept of *laïcité*. In a 1989 opinion, the Conseil d’Etat, one of the three High Courts of France (the others being the Cour de Cassation and Conseil Constitutionnel), found that *laïcité* and the wearing of religious dress could be compatible:

It results from the constitutional and legislative texts and from France’s international engagements [...] that the principle of *laïcité* in public education, which is one of the elements of *laïcité* of the state and of the neutrality of all of the public services, requires that education be dispensed with respect,

- 24 In 2003, for instance, the German Federal Constitutional Court held that Muslims could wear their veils while teaching (rejecting the idea that public authorities could themselves decide to implement a ban, but not objecting to legislation to that effect; subsequently eight Laender legislated to ban headscarves): *Kopftuch-Urteil* [Headscarf Decision], *Entscheidungen des Bundesverfassungsgerichts (BVerf GE)* (Federal Constitutional Court) 108, 282 24/9/03, 2 BvR 1436/02, NJW 2003, 3111 (FRG). The German Constitution does not expressly refer to principles of secularism. See for further discussion of the German jurisprudence A.F. von Campenhausen, ‘The German Headscarf Debate’, *Brigham Young University Law Review*, 2004, p. 665.
- 25 Nusrat Choudhury notes that 45 of the 48 students expelled in the four months following the implementation of the ban were Muslim girls who refused to remove their headscarves when entering a public school: Choudhury, 2007, at 201; Walterick, 2006, at 251: “the law was enacted with the specific intent to eliminate the Muslim hijab, or headscarf, from French public school classrooms.”
- 26 D. Custos, ‘Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004’, *American Journal of Comparative Law*, Vol. 54, 2006, pp. 337, 345; Baker, 2008, at 343-344; T.J. Gunn, ‘Religion and Law in France: Secularism, Separation and State Intervention’, *Drake Law Review*, Vol. 57, 2009, p. 949; E. Beller, ‘The Headscarf Affair: The Conseil d’Etat on the Role of Religion and Culture in French Society’, *Texas International Law Journal*, Vol. 39, 2004, p. 581.

on the one hand, for this neutrality by the programs and teachers, and on the other hand, for the students' liberty of conscience [...] This freedom on the students' part includes the right to express and to manifest their religious beliefs inside educational establishments (as long as such expression is done) with respect for pluralism and for the freedom of others, and without detracting from the (school's) educational activities (and) the content of (its) program.²⁷

The Conseil concluded that wearing religious dress in a school "is not in itself incompatible with the principle of laïcité", but that it could not constitute an act of pressure, provocation, proselytism or propaganda, impinging upon the freedom of others.²⁸

However, a very different approach was evident in a report by the Stasi Commission, set up to study the French concept of *laïcité*. In its 2003 report, the Commission concluded that a tension existed between *laïcité* and the wearing of religious dress or symbols, justifying a ban on wearing them in public institutions such as schools. As discussed earlier, this recommendation was legislated into existence in the following year. Part of the argument that the Commission provided to justify this recommendation was that the wearing of religious dress or symbols often represented an involuntary act:

Pressures exert themselves on young girls, forcing them to wear religious symbols. The familial and social environment sometimes imposes on them a choice that is not theirs. The Republic cannot remain deaf to the cries of distress from these young women.²⁹

Former President Sarkozy, at the time of the 2011 changes, claimed that the purpose of the new laws was to "protect women from being forced to cover their faces and to uphold France's secular values". Immigration Minister at the time, Eric Besson, stated that the wearing of the veil was proof of "insufficient integration into French society, creating an obstacle to gaining nationality".³⁰

The French Government may have been emboldened in its decision to ban the wearing of religious dress in a school environment by some decisions interpreting the right to freedom of religion in this context. Somewhat surprisingly,

27 Conseil d'Etat, 27 November 1989.

28 J. Rivero, 'Laïcité Scolaire et Signes d'Appartenance Religieuse', *Revue Française de Droit Administratif*, Vol. 6, 1990, pp. 1, 6; Beller, 2004, at 611.

29 Stasi Commission Report, 2003, s 4.2.2.1; cf. Alsowayel, 2006, at 103, speaking of the French ban, "A young French Muslim girl who was previously shrouded in the hijab removes it to go to school. By removing her cover, she is suddenly more receptive to other ideas regarding matters of faith and can now freely choose among them. This reasoning indicates a woeful lack of understanding about the hijab and Islam" (107).

30 In the case of Mme M, the French Conseil d'Etat denied M citizenship of France on the ground that her wearing of a niqab demonstrated her lack of assimilation, a pre-condition to citizenship in the court's view: No. 286798, Conseil d'Etat, 27 June 2008; see for discussion S. Bienkowski, 'Has France Taken Assimilation Too Far?', *Rutgers Journal of Law and Religion*, Vol. 11, No. 2, 2010, p. 437.

several European Court of Human Rights decisions have apparently condoned such restrictions on the right of an individual to manifest their religious views, despite the strong protection given to religion by the Convention.³¹ It is to these decisions that I now turn.

In *Dahlab v. Switzerland*,³² the court considered a Swiss law restricting the wearing of religious clothing, in this case applied against a teacher who wished to wear an Islamic headscarf. The court found that although there was an interference with the right to freedom of religion espoused in Article 9 (1) of the Convention, it was justified within the 'margin of appreciation' granted to member states. Here, allowing a teacher to wear the scarf would violate the notion of institutional neutrality associated with public schools. It was relevant that the teacher taught students aged 4 to 8, where their vulnerability was high. (However, the court acknowledged that there was no evidence that the teacher had attempted to indoctrinate her students in any way.) Further, the court concluded that the wearing of the Islamic scarf "is hard to square with the principle of gender equality" and "it appeared 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".³³

In *Sahin v. Turkey*, the court considered a ban on the wearing of an Islamic headscarf at a Turkish university.³⁴ Sahin was excluded from the university because she refused to comply with the ban. Her arguments to the European Court of Human Rights were unsuccessful. By a majority of 16-1, the Grand Chamber dismissed her case. They held that although there was an interference with Sahin's right to freedom of religion, the ban fell within the Turkish Govern-

31 Art. 9 of the European Convention on Human Rights provides that everyone has the right to freedom of thought, conscience and religion, including the freedom to manifest one's religion or belief in worship, teaching, practice and observance. This right is subject only to such limitations as are prescribed by law and necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or protection of the rights and freedoms of others.

32 ECHR (2001), 1.

33 The findings have been criticised: *see, e.g.*, I.T. Plesner, 'Legal Limitations to Freedom of Religion or Belief in School Education', *Emory International Law Review*, Vol. 19, 2005, pp. 557, 572-573: "it is hardly a sign of tolerance to not accept symbols that are carried by women of a particular religious tradition."

34 The Turkish Constitution contains a principle of 'laiklik', similar to French laicite, emphasising the secular nature of the state. However, in an earlier Turkish case in which the government dissolved a political party thought to have a religious agenda, the European Court accepted the validity of the government's action, on the ground that "in a democratic society the State may limit the freedom to manifest a religion, for example by wearing an Islamic headscarf, if the exercise of that freedom clashes with the aim of protecting the rights and freedoms of others, public order and public safety [...] (and) impose on its serving of future civil servants [...] the duty to refrain from taking part in the Islamic fundamentalist movement, whose goal and plan of action is to being about the pre-eminence of religious rules": *Refah Partisi (The Welfare Party) v. Turkey*, Applic. Nos. 41340/98, 41343/98 and 41344/98, (2003) 37 EHRR 1; K. Boustead, 'The French Headscarf Law Before the European Court of Human Rights', *Journal of Transnational Law and Policy*, Vol. 16, 2007, p. 167.

ment's 'margin of appreciation', necessary to combat the headscarf's threat to secularism and gender equality, important values in the Turkish Republic.³⁵ The court reiterated the value of secularism, to protect equality and liberty. The majority found the headscarf was "difficult to reconcile with the message of tolerance, respect for others [...] and non-discrimination".³⁶ Referring to the *Dahlab* case, the majority noted that the court in that case had stressed the 'powerful external symbol' that the wearing of the headscarf represented, and questioned whether it might have a proselytising effect, given that it was worn as a religious precept that was difficult to reconcile with equality.³⁷ The majority claimed that:

In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf to be worn.³⁸

The dissentient, Judge Tulkens, noted that there was no evidence of Sahin's reasons for wearing the headscarf, or that she was seeking to make any particular statement, or achieve any particular purpose, by wearing it. There was no evidence that Sahin's wearing of the scarf had caused, or would likely cause, disruption on the campus. As the Judge noted:

Merely wearing the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and 'extremists' who seek to impose the headscarf as they do other religious symbols. Not all women who wear the headscarf are fundamentalists and there is nothing to suggest that the applicant had fundamentalist views. She is a young adult woman and a university student and might reasonably be expected to have a heightened capacity to resist pressure, it being noted in this connection that the judgment fails to provide any concrete example of the type of pressure concerned. The applicant's personal interest in exercising the right to freedom of religion and to manifest her religion by an external symbol cannot be wholly absorbed by the public interest in fighting extremism.³⁹

35 The notion that Turkey is secular is contestable: B. Bleiberg, 'Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in *Leyla Sahin v. Turkey*', *Cornell Law Review*, Vol. 91, 2006, pp. 129, 153.

36 *Id.*, Para. 111.

37 The ban was subsequently lifted in 2008: F. Raday, 'Traditionalist Religious and Cultural Challenges – International and Constitutional Human Rights Responses', *Israel Law Review*, Vol. 41, 2008, pp. 596, 613.

38 Para. 116; B. Dunlop, 'Protecting the Space to Be Unveiled: Why France's Full Veil Ban Does Not Violate the European Convention on Human Rights', *Fordham International Law Journal*, Vol. 35, 2012, p. 968.

39 *Id.*, Para. 10.

The judge noted that Sahin said in her evidence that she wore the headscarf of her own free will, giving the lie to the suggestion of the majority that allowing Sahin to wear it would be perpetuating inequality or intolerance. The judge asked what the connection was between the ban and sexual equality, accusing the majority judgment of paternalism.⁴⁰ As has been noted, if the government really were serious about promoting equality, and really did believe that a ban was necessary to promote or preserve it, the ban actually implemented was grossly inadequate to the task – the ban should have been applied to all of Turkish society rather than in schools and government.⁴¹ Further, the effect of such laws may be, in effect, to deny Islamic women the right to education, a result actually exacerbating inequality rather than addressing it. According to one estimate, the result of the *Sahin* case has been that thousands of Turkish Islamic women have dropped out of Turkish universities.⁴²

In *Dogru v. France*,⁴³ the European Court upheld the legal validity of the expulsion from school of a student who refused to remove her headscarf in a physical education class. The court found that the expulsion did interfere with religious freedom, but was justified under the margin of appreciation, protecting the rights and freedoms of others and protecting public order.

In 2010, the court may have signaled the limits of its findings in *Dahlab* and *Sahin*. In *Ahmet Arslan*,⁴⁴ the court considered a Turkish law prohibiting the wearing of religious attire in a public place. Members of a religious group (Aczimenditarikaty) wore clothing identifying their group (including a turban, particular trousers and a tunic, and carried a stick) in a public place. They were arrested. The court found that the law, as applied to the group, infringed the rights of the group under Article 9. Unlike the *Dahlab* and *Sahin* cases, this case involved (a) a private individual, not a state employee, and (b) a general ban applying to all public places. The court did not accept that such a widely drawn ban was within Turkey's margin of appreciation.⁴⁵ We will see when the Grand Chamber renders its decision in *SAS* in mid-2014 whether it takes a different view of the current French laws given that they apply to the public realm, rather than the more restrictive provisions considered in *Dahlab* and *Sahin*, perhaps taking *Ahmet Arslan* as a cue.

40 The judge said it was not for the court to make an appraisal of this type on a religion or religious practice. See for further discussion of the case Choudhury, 2007, at 199; J. Westerfield, 'Behind the Veil: An American Legal Perspective on the European Headscarf Debate', *American Journal of Comparative Law*, Vol. 54, 2006, p. 637; N. Lerner, 'How Wide the Margin of Appreciation? The Turkish Headscarf Case, the Strasbourg Court, and Secularist Tolerance', *Willamette Journal of International Law and Dispute Resolution*, Vol. 13, 2005, p. 65; C. Skach, 'Leyla Sahin v Turkey and the Teacher Headscarf Case BVerfG, Case No2 BvR 1436/02', *American Journal of International Law*, Vol. 100, 2006, p. 186; Westerfield, 2006.

41 Bleiberg, 2006, at 162. Further critique of the decision appears in Belelieu, 2006, at 573.

42 Bleiberg, 2006, at 163.

43 [2008] ECHR 1579..

44 *Ahmet Arslan and Others v. Turkey* [2010] ECHR 2260.

45 L.R. Powell, 'The Constitutionality of France's Ban on the Burqa in Light of the European Convention's *Arslan v. Turkey* Decision on Religious Freedom', *Wisconsin International Law Journal*, Vol. 37, No. 1, 2012, p. 118.

At the national level, British courts have adopted a similar philosophy. An example is *R v. Headteacher and Governors of Denbigh High School*.⁴⁶ The case involved a school with a very diverse ethnic student body; approximately 79% of its students were Muslim. A majority of the school governors were Muslim, as was the head teacher. The school had a uniform policy drawn up in consultation with the school community, including Muslim representatives. It provided for three uniform options, one of which was undoubtedly acceptable to Muslim requirements. Students were allowed to wear a headscarf. The school argued that its uniform policy was designed to promote harmony and avoid students segregating along race or religious lines. A student turned up for school in a jilbab, a long coat-like garment. The student complained that it was only this garment that satisfied her Muslim beliefs. The student was advised to go home and change dress, because what she was wearing was not consistent with the school's uniform policy. The student brought legal action asserting that her right to free exercise of religion in Article 9 had been unjustifiably infringed.

In the House of Lords, her claim was unanimously rejected. A majority found that the student's religious freedoms had not been infringed⁴⁷; two judges (Lord Nicholls and Baroness Hale) concluded that her freedoms had been infringed, but that such infringement was justified on the basis of the school's desire for harmony and collegiality within the school.⁴⁸

In contrast, a student complaint was upheld in *The Queen on the Application of Watkins-Singh and the Governing Body of Aberdare Girls' High School and Rhondda Cynon Taf Unitary Authority*.⁴⁹ In this case, argued on the basis of indirect discrimination on the ground of race rather than the European Convention on Human Rights, a student complained about a school decision to refuse her permission to wear the Kara, a plain steel bangle, which was very significant to the student as a Sikh. The student stated that she wore the Kara out of a sense of duty, as well as an expression of her race and culture. An expert testified to the importance of the bangle, reminding Sikhs of God's infinity and that followers were handcuffed to God. The school argued that its uniform policy prohibited the wearing of jewellery, and that it would be discriminatory to allow an exception to this particular student. The court found that the school had unlawfully discriminated against the student on the ground of race and religion.

II. North America

The US Supreme Court has alluded at some length to the history creating the context in which religious freedoms were protected by the First Amendment:

46 [2006] UKHL 15.

47 This was largely on the basis that the complainant could choose to attend other schools that would accept her wearing the jilbab to school; the court concluded that the complainant had 'sought a confrontation' on the matter, and that Art. 9 "does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing. Common civility also has a place in the religious life" (Lord Hoffmann [50]); to like effect Lord Bingham [25] and Lord Scott [87-89].

48 See also *R and Headteachers of Y School and the Governors of Y School*, [2006] EWHC 298.

49 [2008] EWHC 1865 (Admin).

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favoured churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy [...] The practices of the old world were transplanted to and began to thrive in the soil of the new America. The very charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorised these individuals and companies to erect religious establishments which all, whether believers or non-believers, would be required to support and attend. An exercise of this authority was accompanied by a repetition of many of the old world practices and persecutions. Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their consciences dictated. And all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.⁵⁰

In its interpretation of the free exercise of religion and anti-establishment provisions of the First Amendment, the Supreme Court has moved from a requirement that a law affecting religious practice be justified by a ‘compelling governmental interest’⁵¹ to a more modest requirement that the law not be directed at specific religious practices, or ban the performance of acts solely because of their religious motivation.⁵² This more recent approach validates laws that incidentally affect a religious practice but that are of general application and otherwise constitution-

50 *Everson v. Board of Education*, 330 US 1, 8-9 (1947); Justice Jackson noted that the purpose of the First Amendment religious freedom was “broader than separating church and state [...] It was to create a complete and permanent separation of the spheres of religious activity and civil authority” (29) [...] for Madison, as also for Jefferson, religious freedom was the crux of the struggle for freedom in general (34).

51 *Sherbert v. Verner*, 374 US 398 (1963). In *Wisconsin v. Yoder*, 406 US 205 (1972) Chief Justice Burger wrote for the court that “only those interests of the highest order and those not otherwise served can overbalance legitimate aims to the free exercise of religion” (215). The Court has not been impressed with laws that single out particular religions for special treatment: *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 US 520 (1993).

52 So, for instance, a law prohibiting public school teachers from wearing religious emblems or insignia in the workplace was invalid, because the law singled out clothing with religious connotations as opposed to jewellery or clothing more generally: *Nichol v. ARIN*, 268 F. Supp 2d 536 (2003).

ally valid.⁵³ The United States Supreme Court considered a religious ban in *Goldberg v. Weinberger, Secretary of Defense*.⁵⁴ At issue here was an air force regulation prohibiting employees from wearing headgear while indoors, as part of the uniform policy. An employee who was serving as a psychologist on an air force base was an Orthodox Jew and ordained rabbi, and wore a skullcap (yarmulke) while on duty indoors, and under his service cap while outdoors. He was informed by his commander that he was in breach of the air force uniform regulation, and that if he persisted, he could be the subject of a court martial. The employee claimed that the regulation was an infringement of his First Amendment right to free exercise of religion.

A majority of the Supreme Court (Burger CJ, White, Powell, Stevens and Rehnquist, Brennan Blackmun O'Connor and Marshall JJ dissenting) upheld the validity of the regulation. The majority suggested that the court should be more deferential in the context of military provisions than in respect of provisions with civilian application. The majority claimed that great deference should be given to the professional judgment of military authorities concerning the relative importance of a particular military interest. The military had a legitimate interest in ensuring "instinctive obedience, unity, commitment and esprit de corps".⁵⁵ The regulation was not aimed at a particular religion.⁵⁶ The dissentients said that the regulation set up an absolute bar to fulfilment of a religious duty,⁵⁷ dismissing the contention that the wearing of the skullcap would affect discipline within the forces as "surpass(ing) belief".⁵⁸ It would not affect the government's military mission in the slightest.

53 *Employment Division, Department of Human Resources of Oregon et al. v. Smith et al.*, 494 US 872 (1990); see also the *Religious Freedom Restoration Act*, 42 USCA 2000bb-1 (1993) in response to the *Smith* decision where Congress sought to re-establish the 'compelling justification' requirement, and the Supreme Court's rejoinder in *City of Boerne v. Flores*, 521 US 527 (1997); as a result, that Congress law was confined in its application to actions of the federal government. See V. Bonventre, 'A Second-Class Constitutional Right? Free Exercise and the Current State of Religious Freedom in the United States', *Albany Law Review*, Vol. 70, 2007, p. 1399; S. Green, 'Religious Liberty as a Positive and Negative Right', *Albany Law Review*, Vol. 70, 2007, p. 1453; C. Vogel, 'An Unveiling: Exploring the Constitutionality of a Ban on Face Coverings in Public Schools', *Brooklyn Law Review*, Vol. 78, No. 2, 2013, p. 741. A possible way around the newly liberalised test is to argue that the challenged law impugns not just the freedom of religion but another constitutionally protected right (in other words, the 'hybrid principle'), in which case, the 'compelling justification' test may apply: I. Tourkochorit, 'The Burka Ban: Divergent Approaches to Freedom of Religion in France and in the USA', *William and Mary Bill of Rights Journal*, Vol. 20, 2012, pp. 791, 818.

54 475 US 503 (1986).

55 *Id.*, at 507.

56 *Id.*, at 512; see also *EEOC v. GEO Group Inc.*, 616 F. 3d 265 (3rd Cir. 2010) upholding the validity of the 'no headgear' policy of a private company running a prison.

57 *Id.*, at 513 (Brennan and Marshall JJ); cf. *EEOC v. Abercrombie and Fitch Stores Inc.*, 798 F. Supp. 2d 1272 (N.D. Okla, 2011).

58 *Id.*, at 516 (Brennan and Marshall JJ).

Courts in the United States have been prepared to uphold legislation prohibiting public school teachers from wearing religious clothing in the classroom.⁵⁹ In this context, courts have had to grapple with possible inconsistencies that could arise between the anti-establishment aspect of the First Amendment in relation to religion, and its free exercise.⁶⁰ So a decision to suspend a Sikh teacher for wearing white dress and a turban to school was upheld,⁶¹ as was a decision to dismiss a Muslim teacher for wearing a headscarf in the classroom.⁶²

Some of these cases have been argued on the basis of alleged discrimination on the basis of religion contrary to Title VII of the Civil Rights Act 1964.⁶³ For instance, in *Webb v. City of Philadelphia*, the United States District Court found that the defendant was justified in insisting the plaintiff not wear hijab to work; this was due to the need for uniformity, cohesiveness, cooperation and esprits de corps among the police. Disallowing the hijab here ensured religious neutrality among the police and avoided divisiveness.⁶⁴

The most directly relevant case for present purposes in Canada is *Multani v. Commission Scolaire Marguerite-Bourgeoys*.⁶⁵ G was a student of the Sikh faith enrolled in a Canadian school. He believed that his religion required him to wear a kirpan at all times. This is a religious object resembling a dagger and required to be made of metal. The school's governing board claimed that wearing of the kirpan violated the school's code of conduct, which prohibited the carrying of weapons. It cited concerns with safety. It was suggested that G could wear a kirpan as long as it was made of a non-metallic substance. G refused this; he subsequently

59 This legislation exists in Oregon, Pennsylvania and Nebraska. Apparently, these kinds of laws, now mostly repealed, were originally designed to prevent Catholic nuns and priests from teaching in public schools, reflecting anti-Catholic sentiment, although they were typically facially neutral in terms of religion: Walterick, 2006, at 264.

60 W. Sadurski, 'Neutrality of Law Towards Religion', *Sydney Law Review*, Vol. 12, 1990, pp. 420, 427-447.

61 *Cooper v. Eugene School District*, 723 P. 2d 298 (Or. 1986).

62 *United States v. Board of Education for the School District of Philadelphia*, 911 F. 2d 882, 893-894 (3d Cir. 1990); however, see *Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp 2d 536 (W.D. Pa. 2003), where an educational provider's dress code banning teachers from wearing Christian crosses or Stars of David was deemed to violate the free exercise clause. The United States Supreme Court has not yet decided whether the teacher dress statutes in these states is consistent with the First Amendment: see for further discussion Walterick, 2006, at 264-267.

63 42 USC 2000e-16 (2007).

64 *Webb v. City of Philadelphia*, 2007 WL 1866763, 1 (E.D Pa, June 27, 2007); see also *Rogers v. American Airlines*, 527 F. Supp 229 (S.D.N.Y. 1981) (validating airline policy preventing employees from wearing braided hairstyles, despite its disproportionate impact on African-American employees). These cases are discussed further in W. Greene, 'A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair', *Florida International Law Review*, Vol. 8, 2013, p. 333.

65 [2006] 1 SCR 256.

brought legal action alleging a breach of the freedom of religion provisions of the Canadian Charter of Rights and Freedoms.⁶⁶

All members of the Supreme Court of Canada overturned a finding that the interference with religious freedom was justified by Section 1 of the Charter.

The court was satisfied that there was no doubt that the wearing of the kirpan had religious significance to G, and that it was a genuinely held belief. G also believed that the wearing of a kirpan made of wood or plastic would not meet his religious obligations. The risk of G using his kirpan as a weapon was extremely low, and there had been no history of any violent incidents involving kirpans in Canadian schools. While the kirpan could in theory be used as a weapon, it was above all a religious symbol, the word deriving from 'kirpa', meaning mercy, kindness and honour. Although the school's concern with safety was laudable, they were required to provide a reasonable level of safety, not guarantee absolute safety. A ban on metallic kirpans was not a proportional response to the public interest in providing a safe environment in schools given the lack of any history of violence involving them, particularly when Canada had strongly embraced multicultural values.⁶⁷

III. Australia

Rights associated with religion are referred to both in the Constitution, and in discrimination legislation.⁶⁸ The Racial Discrimination Act 1975 (Cth) does apply to the Commonwealth,⁶⁹ and Section 9 prima facie prohibits distinctions based on race, colour, descent or national or ethnic origin that impair the exercise of human rights, and Section 10 provides for equality before the law, denying the

66 Section 2(a) of the *Charter*, as well as s 3 of the Quebec *Charter of Human Rights and Freedoms*. In both cases, as is the case with most human rights provisions, the rights expressed are not absolute – in the case of Canada, the allowance is for “reasonable limits as prescribed by law as can be demonstrably justified in a free and democratic society” (s 1 of the *Charter*). Examples where limits on religious freedom were justified include *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825 and *B (R) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315; cf. *Amselem v. Syndicat Northcrest*, [2004] 2 SCR 551.

67 This value was also recognised in an Australian religious discrimination case: *Catch the Fire Ministries v. Islamic Council of Victoria*, (2006) 15 VR 207, 241 (Nettle JA).

68 For example, in some states the legislation makes discrimination based on religion or religious belief unlawful: *Anti-Discrimination Act 1991* (Qld) s 7(i); *Anti-Discrimination Act 1998* (Tas) s 16(o); *Equal Opportunity Act 1995* (Vic) ss 6(j); *Equal Opportunity Act 1994* (WA) Pt IV; *Discrimination Act 1994* (ACT) ss 7(h); *Anti-Discrimination Act 1992* (NT) ss 19(l)(m). Of indirect relevance are provisions outlawing discrimination on the basis of race: *Racial Discrimination Act 1975* (Cth) ss 9; *Anti-Discrimination Act 1977* (NSW) Pt 2; *Anti-Discrimination Act 1991* (Qld) s 7(g); *Equal Opportunity Act 1984* (SA) Pt 4; *Anti-Discrimination Act 1998* (Tas) ss 16(a), *Equal Opportunity Act 1995* (Vic) s 6(i); *Equal Opportunity Act 1994* (WA) Pt III; *Discrimination Act 1994* (ACT) s 7(h); *Anti-Discrimination Act 1992* (NT) s 19(1)(a). See for further discussion of these statutes G. Blake, 'God, Caesar and Human Rights: Freedom of Religion in Australia in the 21st Century', *Australian Bar Review*, Vol. 31, 2009, p. 279; R. Mortensen, 'Rendering to God and Caesar: Religion in Australian Discrimination Law', *University of Queensland Law Journal*, Vol. 18, 1995, p. 208; religious vilification is also proscribed in some jurisdictions: P. Parkinson, 'Religious Vilification, Anti-Discrimination Laws and Religious Minorities in Australia: The Freedom to be Different', *Australian Law Journal*, Vol. 81, 2007, p. 954.

69 Section 6.

validity of laws that mean that a person of a particular race, nationality or ethnic origin does not enjoy rights enjoyed by others or another race. However, there is debate as to the extent to which these provisions could apply to discrimination based on religion rather than race, and there is the possibility that the Australian Parliament could amend the provisions of the Act since there is nothing enshrining its contents.

It remains an open question in Australia whether followers of the Islamic faith constitute an 'ethnic group' within the meaning of the Racial Discrimination Act 1975 (Cth).⁷⁰ If it were decided that Muslim followers were an 'ethnic group' for the purposes of the Racial Discrimination Act 1975 (Cth), it appears that Section 10 of that Act would in effect prohibit a State law that banned symbols of a particular 'ethnic group' but not symbols of a different ethnic group. For instance, a law banning the burqa but not the Star of David could be challenged under Section 10.⁷¹ This is consistent with the position in other nations; it explains why, at least on their face, the laws said to be aimed at banning the burqa tend to be cast in religious-neutral tones, apparently applying to all religious symbols, as in the case of the French ban, for instance.⁷² Apparently then, a State law could ban the wearing of religious symbols/dress as long as it did not discriminate against a particular ethnic group, etc.

Arguments about discrimination legislation may become more important if the validity of a subnational law banning religious dress were considered, since the constitutional provision discussed presently applies only to national laws.

Section 116 of the Australian Constitution prohibits the Australian Government from passing any law establishing a religion and a law for prohibiting the

70 The Explanatory Memorandum to the *Racial Hatred Act 1995* (Cth) states an intention that the concept 'ethnic origin' be applied to those of the Muslim faith: *Explanatory Memorandum, Racial Hatred Bill 1994* (Cth), 2-3; however, some United Kingdom decisions suggest that Muslim people are not of 'ethnic origin' because although they profess a common belief system, followers were divided across many nations, colours and languages: *Tariq v. Young* (Unreported, Employment Appeals Tribunal 24773/88), *Nyazi v. Rymans Limited* (Unreported, Employment Appeals Tribunal 6/88). The New South Wales Anti-Discrimination Tribunal found that a Muslim follower did not have an 'ethnoreligious' origin within that State's discrimination laws (*Khan v. Commissioner, Department of Ethnic Services*, [2002] NSWADT 131, [21], but see *State of Queensland v. Mahommed*, (2007) EOC 93-452 (Supreme Court of Queensland)). Rachel Bloul criticises the distinctive treatment of Muslims here compared with, for example, Jews and Sikhs, as "ridiculously unjust but perfectly legal": R. Bloul, 'Anti-Discrimination Laws, Islamophobia and Ethnification of Muslim Identities in Europe and Australia', *Journal of Muslim Minority Affairs*, Vol. 28, No. 1, 2008, p. 7.

71 However, a law banning the burqa but not a cross would apparently be valid, since adherents of the Christian faith are unlikely to constitute a particular race, ethnic group or nationality. The law would thus not be offensive to s 10.

72 It is, of course, one thing to consider what the law on its face says; it is another to consider how it has been applied. As discussed above, although the French ban was on its face neutral as applying to all religious symbols, in practice it has overwhelmingly been applied against those wearing Islamic dress.

free exercise of any religion.⁷³ Very few cases alleging a breach of Section 116 have been brought, and in no case has a law been struck down as being offensive to Section 116.

The High Court has decided that Section 116 protected the ‘exercise’ of religion; this included acts done in pursuance of religious beliefs as part of religion.⁷⁴ It has noted the strong similarity between Section 116 and the relevant provisions of the United States Constitution, to which reference was made above.⁷⁵ The court has concluded⁷⁶ that the religious freedom protected by Section 116 was not absolute, and would be subject, at least, to the validity of laws passed designed to ensure the maintenance of civil government.⁷⁷ A balancing exercise was necessary in relation to laws challenged under the provision, where the end sought to be achieved by the law invasive of religious freedom would be weighed

73 The section also prevents the Commonwealth from passing a law imposing any religious observance, or imposing a religious test as a qualification for office or public trust under the Commonwealth, but these aspects of s 116 have never been litigated. Some tension between clauses in s 116 are possible, in particular the anti-establishment and free exercise aspects: Sadurski, 1990, at 427; J. Puls, ‘The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees’, *Federal Law Review*, Vol. 26, 1998, pp. 139, 159-160.

74 *Adelaide Company of Jehovah’s Witnesses Incorporated v. Commonwealth*, (1943) 67 CLR 116, 124 (Latham CJ).

75 131; Starke J also observed that the Australian provision was substantially the same as the United States provision, and referred to the American case law (155); speaking of the similarity, Panam spoke of the ‘fairly blatant piece of transcription’ involved in the drafting of s 116: C. Panam, ‘Travelling Section 116 With a United States Road Map’, *Melbourne University Law Review*, Vol. 4, 1963, p. 41, at 41. On the other hand, in at least two respects the interpretation of the two provisions has diverged: in relation to government funding for certain denominational schools, this was invalidated as a breach of the First Amendment anti-establishment clause in *Everson v. Board of Education*, 330 US 1, 15 (1947) (although see now *Zelman v. Simmons-Harris*, 536 US 639 (2002)) but upheld by the High Court of Australia despite a s 116 challenge in *Attorney-General (Vic) ex rel Black v. Commonwealth*, (1981) 146 CLR 559; further, the United States Supreme Court has interpreted the anti-establishment clause broadly to invalidate laws that advance or benefit religion (e.g. *McCreary County v. ACLU*, 545 US 844 (2005)), while the High Court of Australia has interpreted it strictly to forbid only the actual establishment of a religion (*Attorney-General (Vic) ex rel Black v. Commonwealth*, (1981) 146 CLR 559); see for further discussion Sadurski, 1990, at 420. The question of the extent to which the American provision was similar to, and thus should guide interpretation of, the Australian provision divided the High Court of Australia in *Attorney-General (Vic) ex rel Black v. Commonwealth*, (1981) 146 CLR 559, with a majority emphasising the literal differences (laws ‘for’ in s 116, compared with laws ‘respecting’ in the First Amendment): Barwick CJ 579, Gibbs J 598, Wilson J 653; cf. Murphy J 622 (dissenting).

76 Rich J (149).

77 126; similarly Rich J (149) and Starke J (155), who referred to laws “reasonably necessary for the protection of the community and in the interests of social order” being valid, despite interference with religious freedoms; McTiernan J referred to laws so the “Commonwealth could defend itself against invasion” (157); and Williams J spoke of laws necessary to ensure that the nation was safe and its existence preserved (160). Although these comments were made in dicta, they are narrower than the margin of appreciation exception that the European Court has applied in its decisions in relation to laws that restrict religious freedoms but that arguably do so for justified reasons. It may be that if the High Court were again asked to consider a law in terms of s 116, it would cast the ‘margin of appreciation’ more broadly than the dicta comments in *Jehovah’s Witness* suggest.

against the extent to which religious freedom had been infringed; in other words, whether the infringement was 'undue'.⁷⁸

In its most recent detailed pronouncement on Section 116, members of the High Court have concluded that in order for a law to be offensive to the section, it must have *the* purpose of achieving an object that Section 116 forbids. Presumably, a law without this purpose, but that may have this effect, would not be offensive to Section 116, according to this view.⁷⁹ This view, which is presumably⁸⁰ based on the word 'for' in the section,⁸¹ has the effect of limiting the impact of the section and its ability to protect religious freedoms.⁸² The result of this interpretation is to greatly narrow the scope the section would otherwise have to protect fundamental rights. This phenomenon is all too familiar to observers of Australian constitutional law at a more general level of abstraction.

E. Synthesis

I will take as a given for the discussion that follows that religious freedom is recognised as an important, universal value worthy of the law's protection. I will take

⁷⁸ 128.

⁷⁹ Gaudron J claimed in *Kruger v. Commonwealth*, (1997) 190 CLR 1, 132 that purpose was the 'criterion and sole criterion' selected by s 116 for invalidity. Toohey J was slightly more equivocal in *Kruger v. Commonwealth*, (1997) 190 CLR 1, 86, concluding that the purpose should be taken into account, and referring to whether 'a purpose' was to prohibit the free exercise of religion, rather than this being the predominant or only purpose, to be invalid under s 116; see also Latham CJ in *Adelaide Company of Jehovah's Witnesses Inc. v. Commonwealth*, (1943) 67 CLR 116, 132 who argued that purpose was a factor to be taken into account (132). On the other hand, in *Attorney-General (Vic) ex rel Black v. Commonwealth*, (1981) 146 CLR 559, two of the judges also suggested that the effect of the law may be relevant in assessing validity under s 116 – Gibbs J 'purpose or effect' (604) and Mason J 'purpose or result' (615); see also comments considering the 'effect' of legislation in relation to s 116 in *Minister for Immigration and Ethnic Affairs v. Lebanese Moslem Association and Others*, (1987) 17 FCR 373, 374 (Fox J) and 388 (Jackson J), and *Halliday v. Commonwealth of Australia*, [2000] FCA 950, [21](Sundberg J). For criticism of the High Court's approach here see S. McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116', *Monash University Law Review*, Vol. 18, 1992, pp. 207, 233.

⁸⁰ No reason is given by Brennan CJ in *Kruger v. Commonwealth*, (1997) 190 CLR 1; the assertion that "to attract invalidity under s 116, a law must have the purpose of achieving an object which s 116 forbids" appears without reference to prior authority or further elaboration of rationale.

⁸¹ Toohey J justified it on this basis in *Kruger* (86), citing the judgment of Barwick CJ in *Black* for the proposition, as did Gaudron J (132-133); Gummow J took the same view, citing the judgment of Gibbs J in *Black* (160). It was not necessary for Dawson and McHugh JJ to consider this issue, because of their view that s 116 did not apply to laws passed pursuant to s 122. However, the view that the word 'for' means that the law has a particular purpose has been challenged, with Dixon J in *Lamshed v. Lake*, (1958) 99 CLR 132, 141 concluding that 'for' (in the context of s 122) meant 'with respect to'; see also Murphy J in *Attorney-General (Vic) ex rel Black*, (1981) 146 CLR 559, 622.

⁸² There are links here with the American jurisprudence, most notably *Employment Division, Department of Human Resources of Oregon et al. v. Smith et al.*, 494 US 872 (1990), where the United States Supreme Court moved from a requirement that a law affecting religious practice be justified by a compelling governmental interest to a more modest requirement that the law not be directed at specific religious practices, validating laws that may incidentally affect religious freedoms in pursuance of another objective.

as a given that, in common with other rights, this right is not an absolute, and that some restrictions on the exercise of the right may be justifiable. The right to manifest religious beliefs must be balanced with other rights, including national security, equality, etc. I will also take as a given that, for at least some individuals, the wearing of clothing such as the burqa, niqab, etc. is connected with, and is an expression of, the Islam faith such that legal bans on covering the face implicate religion rights.

The first observation that can be made across the jurisdictions studied is that none of them would accept a law that facially (or directly) discriminated against some religions, compared with others. This would offend discrimination principles common across the European Union, United States, Canada and Australia. Most contentious statutes in this field avoid this obvious difficulty by not referring to any religion. However, the reality is that bans on face covering overwhelmingly affect, and are surely designed to affect, followers of the Muslim faith. I am not aware of another major religion that (arguably) requires its adherents to follow such a practice. Indirectly then, such bans discriminate against those of the Muslim faith, and interfere with the right of followers of Islam to express their faith.

Some jurisdictions (e.g. the United States and Australia) have surprisingly restricted religious freedom by considering whether the challenged legislation has the purpose of inhibiting the exercise of religion. If it does, it is unlikely to be valid; however, if the government is able to argue that the legislation has another legitimate purpose, and the effect on religion is somehow incidental, the legislation is more likely to pass constitutional challenge. This is an unduly narrow position to take, minimising the protection that the law can provide to religious freedom, and allowing governments broad latitude in passing laws seriously restrictive of religious rights, as long as they can claim a plausible alternative objective.

In applying the type of balancing exercise called for in the human rights context, where legislation infringes fundamental human rights such as freedom of religion, the extent to which the challenged legislation serves a legitimate objective, the proportionality between the objective and the means chosen to achieve it, and the question whether means less invasive of the relevant human right were available to achieve the claimed legitimate objective are all relevant in each of the jurisdictions considered here. In this context, bans on religious dress are problematic for a number of reasons.

Justification for the introduction of such bans has typically revolved around arguments about equality, or integration into society. It was argued by the former French President at the time that the burqa and equivalent dress was not welcome in France because of what it reflected. He claimed that it reflected inequality. The former Immigration Minister said it reflected a lack of assimilation into French culture. These supposed justifications warrant deeper consideration.

In relation to arguments about inequality, I will accept for the purposes of argument that it is a legitimate objective of government law or policy to address inequality in society. On the other hand, I have serious reservations about claiming 'lack of assimilation' as a legitimate objective of government law or policy.

Assimilation can sound like conformity, and it is difficult to see ideals of conformity in the list of individual rights enshrined by the European Convention on Human Rights, to which France is a signatory. There would be understandable outrage if France sought to ban people from holding particular views, or from expressing particular views, that ran contrary to what someone decides is the 'French view' or that which reflected 'French culture'. Such laws would be deemed inconsistent with the European Convention. If a person is not required to ensure that their opinions are 'assimilated' with those of mainstream France, it is hard to accept that a person must ensure that their religious views are similarly 'assimilated'.

Can the ban on religious dress be justified as attacking 'inequality' in French society? Firstly, as discussed above, the reasons why an individual might wear religious dress or symbol are often complex and multiple. The Stasi Commission did not commission research to support its assertion that the wearing of religious dress was usually or often the product of pressure from others, and there is evidence to the contrary, as has been noted above.⁸³ If there were plausible evidence that most of those wearing such dress had been 'forced' to do so against their will, this might make the argument for a ban stronger. However, all we have at present is mere governmental assertion. The literature reflects a complex issue with many different reasons why women wear such clothing. This makes it difficult to justify a ban on the basis that women are being coerced against their will to wear such items, and that they reflect an anachronistic belief regarding women and their role in our society. I retain an open mind on this, but at present, the government has not made its case that such a large proportion of wearers of face coverings have been forced into it that a ban was a reasonable legislative response.

Further, the ban implemented was far from complete; it originally only banned the wearing of such dress in a (public) school environment, but not in society more generally. If it really were about avoiding the oppression of people who might feel forced to wear religious dress or symbols, why was the ban originally confined to the wearing of such dress at (public) schools? Why did it not apply to students in private schools? Or banned in any context?

In weighing government claims that the laws were justified on equality grounds, it is also worth noting that the Parliamentary Commission's Report suggested less restrictive alternatives to a full ban that could have been introduced if the aim really was to further gender equality. These included (a) conducting mediation with women wearing the veil and their families with a view to better understanding their motivations; (b) notifying the authorities of any minor wearing the full veil; (c) reinforcing civic education around equality and (d) legislating to make psychological violence between a couple a crime.⁸⁴ It is not clear why these less invasive measures were not chosen.

83 The Report has been trenchantly criticised: see Choudhury, 2007, at 199; Custos, 2006, at 337; Gunn, 2004, at 419, 468-473; Saxena, 2007, at 765; S. Nanwani, 'The Burqa Ban: An Unreasonable Limitation on Religious Freedom or a Justifiable Restriction?', *Emory International Law Review*, Vol. 25, 2011, pp. 1431, 1459.

84 France: Highlights of Parliamentary Report on the Wearing of the Full Veil (Burqa), Library of Congress.

In relation to the supposed justification of 'integration', I expressed my serious reservations with such a justification above. However, accepting for the purposes of argument that the government has some argument that integration is a legitimate objective, does this objective justify the French bans?

It is highly doubtful that a ban on religious dress (the effect of banning face coverings) will achieve or even help to achieve the stated aim of furthering integration among those societies that legislate it.⁸⁵ This is considered relevant to the court's assessment of the proportionality of such laws, in light of freedom of religion principles. It is likely to have the effect of alienating Muslim youth; the original ban in an educational environment served to deny young women an education. Denying a person a French education is a strange way to integrate them into French society. The more recent general ban on wearing such items in public is likely to lead to women wearing such items from appearing in public less, participating in community gatherings and events less and overall reducing their contact with and contribution to French society. Again, this is a strange way to integrate them into French society.⁸⁶ Surely, the effect of these laws is likely to increase the chances that individuals affected will leave France. And this may have been one of the government's true objectives, with France having a large Muslim population, thanks primarily to its former colonies in Northern Africa. We should not ignore that France endured rioting in 2005 involving disaffected Muslim youth, and that a proportion of the Muslim population in France presents as an underclass, with high unemployment and associated social problems and unrest. It is not surprising that the French Government saw the need to address, or perhaps more importantly be seen to address, these pressing issues. However, the means chosen are certainly open to strong debate. Thinly veiled xenophobia is far more offensive than any of the physical kind.

Further, as Custos notes, the ban is confined to expressions of religious affiliations through the wearing of dress or symbols; in contrast, oral or written expressions of religious affiliation are not prohibited or confined, whether at school or elsewhere.⁸⁷ It is hard to square this with claimed objectives of reducing inequality or social cohesion and assimilation. It helps fit the thesis that these laws are populist measures designed to quell fears among the French population based on visual representations of the Muslim faith in everyday society, namely the wearing of religious clothing. According to this logic, it is not as necessary to ban oral or written expressions of religious faith, because this would mostly be contained with existing Muslim circles, and not be drawn to the attention of the general French public in the same way as would a woman wearing a burqa on a Paris street.

85 Kahn sees parallels between current approaches to Islam and previous approaches to Catholicism in Europe, concluding that banning the expression of certain religions does not work in seeking to 'integrate' followers into more mainstream cultures, but rather serving to make those whose religious views are being suppressed more radicalised and more resistant to the dominant culture: R. Kahn, 'Are Muslims the New Catholics? Europe's Headscarf Laws in Comparative Historical Perspective', *Duke Journal of Comparative and International Law*, Vol. 21, 2011, p. 567.

86 Walterick, 2006, at 252.

87 Custos, 2006, at 373.

If these laws are, in the end, seen as in substance essentially pandering to xenophobia and resentment by some towards Muslim people in France, by reducing the visibility of Islam on French streets, rather than, as the government claims, seeking to reduce inequality and encourage 'assimilation', it will of course be virtually impossible to save them from a challenge under the European Convention.

F. Conclusion

While human rights and constitutional instruments around the globe purport to protect religious freedoms as fundamental, as interpreted by the courts (as a generalisation), protection for religious freedoms has not been as robust as expected. Governments have been able to subvert religious freedoms by claiming that the purpose of the law is unrelated to religion, with the impact on religion merely incidental. This has been assisted by the move in the United States, for example, away from the need for the government to show 'compelling justification' for its interference with religious freedoms. It has also been assisted by relying on the 'margin of appreciation' in human rights instruments, seeking to 'dress up' bans as being reasonably necessary to reduce inequality or to encourage 'assimilation'.

While reducing inequality may be seen as a laudable aim, those making the argument have not presented an articulate case that bans on face coverings are a legitimate, proportionate means to achieve it. Moreover, many other less invasive measures are available to assist in achieving this end. Attempts at 'assimilation' are more difficult to justify conceptually, and even if they could be, it is not at all clear that denying a person the right to cover their face whilst in public will achieve or assist in achieving that goal. If anything, it is likely to exacerbate any lack of integration. The European Court of Human Rights, and other bodies charged with protecting and enforcing rights, must see through legislation pandering to xenophobia and far-right-wing anti-immigration agendas, thinly disguised as laws for the common good of a country, in order to give effect to the letter and the spirit of the European Convention. Its opportunity arises in the SAS case presently before it.