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Islamic Symbols in Europe: the European Court of Human Rights and the European Institutions [*]

SUMMARY: 1. Preliminary Remarks - 2. The veil before the European Court of Human Rights – 3. Religious Symbols in Article 9 ECHR case law and women's religious freedom in Europe – 4. Islamic Symbols and European Institutions. Indirect Discrimination? – 5. Conclusive Remarks.

1 - Preliminary Remarks

Islamic symbols are generally derived from religious beliefs as well as their manifestation in worship, observance, practice and teaching.

Article 18 (1) of the International Covenant on Civil and Political Rights (ICCPR)[1] guarantees everyone "the right to freedom of thought, conscience and religion" and guarantees the right to manifest one's religion in observance and practice[2]. In a General Comment, the Human Rights Committee (CCPR) states explicitly that the concept of worship also extends "to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship"[3] . In fact the displaying of religious symbols is considered as a manifestation of religion or belief by most international

[*] Paper, evaluated, for: R. Scarciglia (ed.), *Islamic Symbols in European Courts*, Quaderni giuridici del Dipartimento di Scienze politiche e sociali, Cedam – Kluwer, Trieste, 2014.

[1] International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (no. 16) 49, U.N. Doc. A/6136 at 52 (1966), in force since 3.1.1976; International Covenant on Civil and Political Rights, R.A. Res. 2200 (XXI) 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 at 52 (1966), in force since 23.3.1976.

[2] See e.g. Universal Declaration of Human Rights (UDHR), GA Res. 217/A (III), 10.12.1948, U.N. Doc. A/810 at 71.

[3] Human Rights Committee (HRC), General Comment adopted by the Human Rights Committee under Article 40, § 4 of the ICCPR, General Comment No. 22(48), *The right to freedom of Thought, Conscience and Religion*, U.N. Doc. CCPR/C/21/Rev.1/Add. 4 (July 30, 1993), § 4: hereinafter General Comment No. 22.

judicial or quasi – judicial bodies. According to the Human Rights Committee's General Comment No 22 on Article 18 of the ICCPR,

> "the observance and practice of religion or belief may include not only ceremonial acts but also such customs as … the wearing of distinctive or head coverings (para.4), a viewpoint shared by the Special Rapporteur on freedom of religion or belief"[4].

From an international human right perspective, it has been accepted that "the wearing of distinctive clothing or head – coverings" constitutes part of the observance and practice of religion or belief[5]

In Europe, the main problems brought before the most important judicial body, the European Court of Human Rights, concern islamic clothing symbols, and the ban adopted on them by some european States. Other Islamic symbols, such as buildings may be theoretically reconducted to the same legal framework, but have not until now produced significant case – law, like in the well known case of the Swiss ban on minarets adopted in 2009[6].

The origins of these problems may be found in the fact that in most religious traditions, the wearing of religious clothes – i.e. the Jewish yarmulke, the Sikh turban, the Islamic *hijab* (the more commonly worn headscarf or *foulard* covering the woman's neck and hair, but not her face), the *niqab* (a full body covering, with a veil that covers a woman's hair and face, leaving only eyes visible), the *chador* (a black veil covering the body and closed under the chin, leaving the face uncovered), or the *burqa* (a loose enveloping garment, worn outside the home, covering a woman's body including her face, which is hidden from view by a mesh of fabric) – is considered not exclusively as a matter of religious duty, ritual and observance[7]. Sometimes, veiling and unveiling are deemed to be relational

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[4] UN Commission on Human Rights, *Report submitted by Asma Jahangir, Special Rapporteur on freedom of religion or belief*, 16 March 2005, E/CN.4/2005/61/Corr.1, § 40, available at: *http://www.refworld.org/docid/42d66e970.html*. The aim of the "general criteria", developed by the UN Special Rapporteur, is to assist "national and international bodies in their analyses and reviews of laws and draft legislation pertaining to freedom of religion or belief" (§ 51). They are extremely relevant for evaluating full face bans from an international human rights perspective (§§ 51 – 60).

[5] HRC, General Comment No. 22(48), § 17.

[6] Bundesratsbechluß über das Ergebnis der Volksabstimmung, Nov. 29, 2009, Bundesblatt 3437, 3440 (2010). See **L. LANGER**, *Panacea or Pathetic Fallacy? The Swiss Ban on Minarets, Vanderbilt Journal of Transnational Law*, 2010, 863 ff.

[7] On this topic, see generally **A. AN–NA'IM**, *Human Rights in the Muslim World, Harvard Human Rights Journal* 1990, 13 ff.: a general principle of the Islamic religious law,

actions: their reasons and meanings are to be found in the woman's relations with others. The presence, the absence and the type of veil speaks of gender, religion, politics, ethnicity, profession and fashion to other people[8].

Religious clothes work in different ways within the different traditions: in Judaism, for example, the *yarmulke* is worn because of a religious obligation; for muslim women, the wearing of the *hijab* is a spiritual practice as well as a defining element of group identity, or a form of social obligation. The common feature of religious clothes is the centrality of such practices to the manifestation of religious belief. An Islamic Veil could mean: loyalty to tradition, belief in the chastity of women, religious identity, respect for wishes of parents and families, signal of not being sexually available or expression of cultural identity[9]

Thus it is doubtful that, despite these acknowledged facts, some States seek to limit this aspect of the freedom to manifest one's religion, as in the well known *affaire du foulard,* the case determined by French law proscribing the wearing of religious symbols in public schools[10].

Many States consider Islam, as manifested by the headscarf, a threat to the secular character of their system[11]. However the connection between the concept of a State's religious neutrality and the banning of the Islamic Veil is not evident. The neutrality of the State needs to be understood as the consequence of the freedom of thought, conscience and religion of

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known as Shari'a, is the *al-hijab*. In Arabic *hijab* means barrier or screen. This principle is founded on the fact that according to the Qu'ran women are supposed to stay at home and not leave it except when required to it by urgent necessity. When they are permitted to go out the home, they must do so with their bodies and faces covered.

[8] For example, in Iran head covering is mandatory. Full hijab is very rare and it is worn by the women of the Ahwazi Arab persecuted minority. It speaks of a kind of intra – Islamic national, linguistic and cultural resistance against oppression, rather than about religion. *Islam without veil*, *www.wluml.org/node/6530*.

[9] In the words of the German Constitutional Court, 3.6.2003, 2BvR 1436/02, *www.bverfg.de/entscheidungen*, § 52.

[10] Act no. 2004 – 228, 15.3.2004, *www.legifrance.gouv.fr.* Subsequently, see Act no. 2010 – 1192, 11.10.2010 prohibiting the concealing of the face in public, *Journal Officiel,* 12.10.2010, 18344, *www.legifrance.gouv.fr*. On this topic, see generally **O. CAYLA**, *Dissimulation du visage dans l'espace public: l'hypocrisie du juge constitutionnel trahie par la sincérité des circulaires?*, *Recueil Dalloz,* 2011, 1166 – 1170; **R.W. HILL**, *The French Prohiition on Veiling in Public Places: Rights Evolution or Violation?*, *Oxford Journal of Law and Religion,* 2012, 1 ff.; **A. FORNEROD**, *The Burqa Affair in France,* in *The Burqa Affair Across Europe (Between Public and Private Space),* (A. Ferrari, S. Pastorelli eds.), 2013, 59 ff.

[11] **P.G. DANCHIN**, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law,* 33 *Yale Journal of International Law,* 2010, 21 – 22.

citizens[12]. Guaranteeing these freedoms, States assume neutrality. In fact, respect for different beliefs and convictions is a basic obligation for the State, which accepts that individuals may choose them freely and change their minds[13]. The State is able to guarantee the religious freedom of citizens and the non – discrimination on religious grounds, if it does not identify with any religion and is neutral[14]. It's not clear why neutrality requires the banning of the religious symbols.

Moreover, among the arguments advanced in the debate concerning the banning of the veil, we may find gender discrimination. On the one hand, the laws and regulations banning the islamic veil have been justified on the grounds that they protect the dignity and equal rights of women, help preserve public security and reflect national values, such as official secularism. On the other hand, such laws have been attacked on the basis that they undermine women's rights to equal treatment, freedom of expression and of religion and are counterproductive to their aim of promoting integration. The roots of this debate may be found in the fact that the use of religious symbols to manifest one's beliefs has been asserted to threaten the rights of others if it is associated with " a definite and particular kind of religious culture"[15].

This article aims to investigate the complex problem of islamic symbols in the european context. Stepping back from the cases decided by the European Court of Human Rights, the article focuses not only on the place of Islamic clothing symbols within the normative structure of Article 9 ECHR, but also on the broader international debates on prohibitions or regulations on religious symbols. These are part of other debates, concerning the position of religion in the public sphere, and not only the issue of wearing of religious symbols, but also the displaying of religious symbols[16].

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[12] As affirmed by the German Constitutional Court in the case *Kirchenbausteuer*, 14.12.1965, BVerfGE, 19, 206, 216.

[13] **J.F. RENUCCI**, *Article 9 of the European Convention on Human Rights,* Human Rights File No. 20, Council of Europe Publishing, Strasbourg, 2005, 22.

[14] See the case *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (1976), App. No. 5095/71, 5920/72, 5926/72, Series A, no. 23, § 53. In this case neutrality means that at schools all religious indoctrination is prohibited.

[15] **J. FINNIS**, *Endorsing Discrimination Between Faiths: A Case of Extreme Speech?*, in *Extreme Speech and Democracy*, 430, 436, I. Hare & J. Weinstein eds., 2009.

[16] *Lautsi v. Italy*, App. No. 30814/06, § 70 (Eur. Ct. H. R. Grand Chamber Mar 18, 2011), *http://www.echr.coe.int*; in this case, the Grand Chamber reversed the judgment of the Second Chamber (*Lautsi v. Italy, App. No., 30814/06,* Eur. Ct. H. R., Second Section, Nov., 3, 2009, *http://www.echr.coe.int*), holding that "the decision whether crucifixes should be

Moreover the article asks if different solutions could be found on the basis of a different notion of religious freedom in international law, bringing out the idea that a new concept, such as value pluralism, can offer a theoretical basis for religious freedom. This value pluralism compels us to accept that there is a plurality of ways of thinking about fundamental rights. So we should expect different approaches to toleration and different interpretations of neutrality.

"Pluralism in Europe and the way diversity is treated in policymaking are sensitive issues", according to the European Commission. The main idea is that research in social sciences and humanities can underpin the European capacity to respond to the growing religious and cultural diversity within European societies. Therefore, this paper focuses on the management of the value pluralism in religious matters as a fundamental way to achieve the social inclusion, which is one of the main goals of the Horizon 2020 strategy. In this context, it is well known that the European Union's legislative measures make little reference to religious phenomena, and that religious matters are regulated at the national level. Nevertheless, EU decision – making has a direct impact on religious matters through directives, regulations and the jurisprudence of the European Court of Justice, while it is indirectly implemented through political acts[17].

2 - The veil before the European Court of Human Rights

In many countries, there has been a significant case law concerning the wearing of islamic symbols, particularly in public institutions such as school, universities and public service offices – from British schoolgirls who did not find the school's uniform sufficiently strict for their religious convictions[18], to two muslim women who were refused a bus ride because

present in State – school classrooms is, in principle a matter falling within the margin of appreciation of the respondent State". See § 68 and below § 3.

[17] **A. FERRARI, S. PASTORELLI**, *The Burqa in Europe: European Institutions and the Comparative/Interdisciplinary Approach,* in *The Burqa Affair Across Europe (Between Public and Private Space),* (A. Ferrari, S. Pastorelli eds.), 2013, 231.

[18] *Regina (Begum) v. High School Governors* [2007] 1 AC 100 ([2006] UKHL 15). This case involved a fourteen year old Muslim girl's claim to freedom of religion under Article 9 ECHR to wear the *jilbab* (a long cloak covering the whole body except the hands and face) without the *shalwar kameez* (traditional dress worn by both women and men in Afghanistan, Bangladesh, India and Pakistan), allowed by a coeducational community school in Luton, if the pupils did not wish to wear the traditional school uniform. The

one had covered her face with a *niqab*[19], to a school teacher who was banned from teaching in a Swiss primary school because she wore a headscarf[20], to a university student in Turkey, who was prohibited from enrolling because she wished to wear a headscarf in her classrooms and examinations[21], to a Muslim witness in New Zealand whose wearing of a veil over her face when giving evidence in a car theft trial was challenged by the defence.

Bans on the wearing of the full face veil may be discussed from the perspective of freedom of religion (art. 9.2. of the European Convention on Human Rights (ECHR), as well as from the perspective of freedom of expression (art. 10.2. of the ECHR).

At the same time, on this topic, it is necessary to consider the range of different human rights and public interests put forward by States banning the veil, including women's and children's rights[22]. Finally, it is worthwhile pointing out that there is evidence to indicate that the wearing

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House of Lords (now the United Kingdom Supreme Court) overturned the decision of the Court of Appeal, ruling that even if there had been an interference with Shabina Begum's right to manifest her religion under Article 9(1), the school's policy could be considered a justifiable limitation on that right under Article 9(2). The House of Lords held that schools in the UK have the right to introduce a uniform policy and the uniform policy in Denbigh School also accommodated as much as possible different cultural traditions. In any case it was possible for the complainant to choose another school which suited her dress preferences. Notwithstanding, the House of Lords hold that the practice of wearing jilbab was covered by the freedom of religion. See **M. IDRISS**, *Dress Codes, the Right to Manifest Religion and the Human Rights Act 1998: The defeat of Shabina Begum in the House of Lords*, *Coventry Law Journal*, 2006, 11; **N. NATHWANI**, *Islamic Headscarves and Human Rights: A Critical Analysis of the Relevant Case Law of the European Court of Human Rights, Netherlands Quarterly of Human Rights,* 2007, 227 ff.; **M. SSENYONJO**, *The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases, Chinese Journal of International Law,* 2007, 675; **M. HILL QC**, *Legal and Social Issues Concerning the Wearing of the Burqa and Other Head Coverings in the United Kingdom,* in *The Burqa Affair Across Europe (Between Public and Private Space),* (A. Ferrari, S. Pastorelli eds.), 2013, 77 ff.

[19] *BBC News 23 July 2010, http://www.bbc.co.uk/news/uk-england-berkshire-10728912.*

[20] *Dahlab v. Switzerland* (2001) Eur. Cour. HR 449.

[21] *Leyla Sahin v. Turkey* [2005], Eur. Cour. N. 44774/98, 2005-XI Eur. Ct. H. R. 173, 165.

[22] About girls expelled from schools, as a result of the french legislation, see the observations of the Committee on the Rights of the Child, CCPR/C/15/Add.240, §§ 25 – 26; concerning the ban on schoolteachers wearing headscarves in Germany, see the Committee's Concluding Observations on the second periodic report of Germany, CRC/C/15/Add, 226, §§ 30 – 31.

of some symbols may affect other human rights such as the right to health (i.e. the problems caused by the *burqa*[23]).

Some of these controversies focused principally on the rights of freedom of expression and freedom of religion as the principal rights at issue, in considering islamic symbols, and found their way to the European Court of Human Rights. The wearing of religious symbols is clearly a form of religious expression as well as a manifestation of one's religious beliefs. On this concern, the European Court notes in fact that "all opinions or beliefs do not fall within the scope of art. 9, 1 c of the Convention", because «as stated by the Commission the term "practices" used in art. 9, par. 1, does not include any act which is motivated or influenced by a religion or a belief» [24], and beliefs are considered as "viewpoints that express a certain degree of strength, of seriousness and importance"[25]. Protection may be accorded to their manifestation in public or in private as a form of expression, by investigating the collective understanding of religion, to verify the legality of the conduct claimed by the applicant[26].

So, these instances, in their social dimension, can access the protection of Article 9, 1 ECHR only if they pass the test of seriousness and good faith. Moreover they can be subject to further limitations, if considered necessary to the needs of a democratic society, according to § 2 of Article 9, such as public safety, security, public order, health or morals, or the protection of the rights and freedoms of others (doctrine of the margin of appreciation)[27]. For example the Court had held that the

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[23] See Physicians for Humans Rights, *The Taliban's War on Women: A Health and Human Rights Crisis in Afghanistan*, 1998, available at *http://physiciansforhumanrights.org/library/the-talibans-war-on-women.html*.

[24] *Pretty v. United Kingdom*, [2002], ECHR, 2002 – III, 203 ff.

[25] *Campbell and Cosans v. United Kingdom*, [1982], series A, n. 48, 36.

[26] *Kosteski v. The Former Yugoslav Republic of Macedonia*, n. 55170/00 (2006): the case concerns a Macedonian coach of a power company who didn't show up at work, having informed his superiors the day before that he wanted to celebrate two Islamic religious holidays. In both cases, the right to be absent from work (without deduction of salary) is recognised by a decree of the Ministry of Labour for all followers of Islam. In *Jakòbski v. Poland*, [2010], a prisoner complained of an infringement of his freedom of conscience and religion because the prison structure refused to serve him vegetarian food for the diet he followed because of his Buddhist religion. The Court accepted the applicant' s petition, judging that the choice was "motivated or inspired by a religion and not unreasonable".

[27] The doctrine of the margin of appreciation has often been relied upon, in the European context, by the European Court of Human Rights in cases involving the wearing of religious symbols. It appears that the ECHR employs a wider margin of appreciation when it considers a form of expression as religious expression rather than

dissolution of a Turkish Islamic political party which had the goal of creating a society based on *Sharia* law was not opposed and incompatible with democracy and with the principles posed by the Convention[28]. In fact, in the second case of *Refah*, the Grand Chamber upheld a ban on the largest political party in Turkey, the Welfare Party, on the ground that its activities violated the constitutional principles of secularism and democracy. The Court, endorsing the findings of both the Turkish Constitutional Court and the majority of the Chamber of the Third Section of the European Court, asserted that "shariah is incompatible with the fundamental principles of democracy, as set forth in the Convention", because it is a religion in which pluralism in the political sphere has no place. A different solution might be found, considering both Islamic Law, and the notion of the legal pluralism in the context of the ECHR, as suggested by Judge Kovler in his separate concurring opinion[29].

Thus, we may ask if the Islamic Veil is among the practices invoked as a manifestation of a religion or belief, protected under art. 9 ECHR.

Generally, the European Court affirmed that a practice may be defined as a manifestation of religion protected under Article 9 ECHR if it follows a religious rule according to a credible source, independently of eventual differences of opinion concerning the interpretation of the rule. In the case *Cha'are Shalom ve Tsedek v. France*[30], the ECtHR stated that ritual slaughter constitutes a rite the purpose of which is to provide Jews with meat from animals slaughtered in accordance with religious prescriptions, which is an essential practice of the Jewish religion, independently of the correct interpretation of Jewish religious sources.

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political expression. Yet, that which will "likely 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": *Leyla Sahin v. Turkey* [2005], Eur. Cour. N. 44774/98, §§ 110 – 122.

[28] *Refah Partisi v. Turkey* [2003], Eur. Cour. N. 41340/98, Eur. Ct. , H. R. Rep. 1 (2003), 35.

[29] *Refah Partisi v. Turkey* [2003], Eur. Cour. N. 41340/98, 37 Eur. H. R. Rep. 1, 50 - 51 (2003) (Kovler J. Concurring): "*(…) the concept of a plurality of legal systems (…) is linked to that of legal pluralism and is well – established in ancient and modern legal theory and practice. Not only legal anthropology but also modern constitutional law accepts that under certain conditions members of minorities of all kinds may have more than one type of personal status. Admittedly, this pluralism, which impinges mainly on an individual's private and family life, is limited by the requirements of the general interest. But it is of course more difficult in practice to find a compromise between the interests of the communities concerned and civil society as a whole than to reject the very idea of such a compromise from the outset".*

[30] *Cha'are Shalom Ve Tsedek v. France* [2000], Eur. Cour. N. 27417/95, available at *http://cmiskp.echr.coe.int*.

Regarding the islamic practice of the veil, the jurisprudence does not seem to have recognised the protection provided by art. 9 ECHR on islamic clothing symbols, as already pointed out by the Commission. In *Karaduman v. Turkey*[31], the European Commission of Human Rights (ECmHR) stated some preliminary indications subsequently followed by the ECHR in its approach to the issue of veil. In fact, as regards the Article 9 complaint, the ECmHR was of the opinion that the article in question

> "does not always guarantee the right to behave in public in a way dictated by this conviction", and that "the term practice, in the sense of paragraph 1 of Article 9 … does not denote any act motivated or inspired by a religion or a conviction" [32].

Clearly, in this case the ECmHR did not appear to believe that the wearing of the headscarf, as such, fell within the scope of Article 9 ECHR[33].

Confirmation of this is provided by the decision in the case *Dahlab v. Switzerland*[34]. In this case, a Swiss primary school teacher converted to Islam and decided to wear her headscarf at work in 1991. Five years later, the Directorate General for Primary Education in the Canton of Geneva prohibited the applicant from wearing religious clothing at school, in the performance of her professional duties, on the grounds that it constituted an "obvious means of religious identification imposed by a teacher on her pupils, especially in a public, secular education system", violating section

[31] In the contemporaneous decisions, *Karaduman v. Turkey*, and *Bulut v. Turkey*, n. 16278/90, [1993], the applicants, Muslim students of Ankara University, claimed the violation of their right to freedom of thought, conscience and religion protected by art. 9 ECHR, as the university regulation provided that the photo ID, for issuing the certificate of graduation, had to be bareheaded. The Commission stated that the claim was inadmissible, because the regulatory provision "does not conflict with freedom of religion, protected by art. 9 of the European Convention on Human Rights, the legislative provision by which a secular university, in order to ensure respect for the rights of freedom of all its students, requires that the degree provided by her does not reflect in any way the membership of a particular religious movement and that, therefore, it reproduced the photo figuring the pupil bareheaded in an estate according with that provision of a regulation".

[32] *Karaduman v. Turkey*, and *Bulut v. Turkey*, n. 16278/90, [1993], §§ 6 – 7.

[33] In the case *Karaduman v. Turkey*, n. 16278/90, [1993], the applicant claimed that foreign nationals studying at Turkish universities enjoyed total freedom in respect of clothing, whereas Turkish women suffered from the mentioned restrictions, affecting their freedom of religion. This claim involving gender and nationality was not elaborated in the admissibility decision as the ECmHR declared it inadmissible due to the non – exhaustion of domestic remedies (Article 26 – now 35- ECHR).

[34] *Dahlab v. Switzerland* [2001], (2001) Eur. Cour. HR 447, § 2.

6 of the Public Education Act[35]. She refused, challenged the decision in the Swiss courts and, after loosing before the Swiss Federal Court, took her case to the European Court of Human Rights. She relied on Article 9 and Article 14 ECHR, alleging discrimination on the grounds of sex. Switzerland argued that the case was "manifestly ill founded" and should not proceed on the merits. The Court agreed with the Swiss Federal Court, relying on the margin of appreciation doctrine, to conclude that the measure was justified by the principles of neutrality and gender equality protected by the Swiss Constitution[36].

Moreover another line of argument descending from the Article 9 ECHR could be the negative freedom of religion of children. The arguments seem to be the fact that it is easier to influence young children with religious messages than adults, and the negative freedom of religion of children needs more protection than the negative freedom of religion of adults. However if a teacher wears a headscarf without making religious declarations, it is difficult to see how children can be influenced, especially if it is a manifestation of a minority religion, in a society fundamentally pluralistic like the swiss one[37]. The perception of the ECtHR that the veil constitutes a threat for children is absolutely not at all convincing.

As to the principle of gender equality, the ECtHR noted that the headscarf "appears to be imposed on women by a precept which is laid down in the Koran and which is hard to square with the principle of

[35] Section 6 of the Public Education Act provides that " The public education system shall ensure that the political and religious beliefs of pupils and parents are respected. Article 27 (3) of the Swiss Federal Constitution States that "it shall be possible for members of all faiths to attend state schools without being affected in any way in their freedom of conscience or belief".

[36] *Dahlab v. Switzerland* [2001], (2001) Eur. Cour. HR 447, § 6. "The impugned decision is fully in accordance with the principle of denominational neutrality in schools, a principle that seeks both to protect the religion beliefs of pupil and parents and to ensure religious harmony…Schools would be in danger of becoming places of religious conflict if teachers were allowed to manifest their religious beliefs through their conduct and, in particular, their clothing…Here the appellant's interest in obeying a precept laid down by her faith should be set against the interest of pupils and their parents in not being influenced or offended in their own beliefs, and the concern to maintain religious harmony in schools".

[37] On the basis of these considerations, it appears irreconcilable with the Swiss constitutional bill of rights the Swiss constitutional ban adopted on 29 November 2009 on the construction of minarets in Switzerland. On this topic and on the conflict with the ECHR see **L. LANGER**, *Panacea or Pathetic Fallacy? The Swiss Ban on Minarets, Vanderbilt Journal of Transnational Law*, 2010, 863 ff.

gender equality"[38]. The ECtHR did not clarify what gender equality meant and the statement of the principle seems to go against Dahlab's contention, under Article 14 ECHR, that the requirement that she stop wearing the headscarf discriminated against her as a woman. Finally, in *Dahlab v. Switzerland*, the ECtHR presented the Islamic headscarf as a "powerful religious symbol" and, as a such, already problematic for the freedoms of the others. Clearly, this ignores the complexity of the applicant's attitude towards her headscarf- wearing.

In *Sahin v. Turkey*[39], the Grand Chamber of the Court upheld the headscarf ban under Articles 8, 9 and 14 of the ECHR and Article 2 of the First Protocol to the ECHR. Contrary to the Chamber's 2004 ruling, the Grand Chamber held that the ban restricted Sahin's religious expression in violation of article 9 (1), but was justified under Article 9 (2).

The case involved a fifth – year medical student at the University of Istanbul who was denied enrollment, in her fifth year in the medical faculty of Istanbul University, on the grounds that she was wearing the islamic headscarf. The applicant came from a family of practicing Muslims and regarded it as her religious duty to wear the headscarf. She wore the headscarf during all her years of study at Bursa, and until 1998 in Istanbul. In February 1998, Istanbul University issued an administrative regulation prohibiting the admission to classes of students wearing the hijab, with the result that Leyla Sahin was refused admission to classes and examinations. Leyla Sahin was suspended for a semester in 1999, in part due to her protest against the university rules. The regulations were appealed to the Istanbul Administrative Court which dismissed the complaint because the regulatory power of the University had been exercised in accordance with relevant legislation and judgments of the Constitutional Courts and the Supreme Administrative Court. In 1999, Leyla Sahin enrolled at Vienna University in Austria. Before the European Court of Human Rights, Leyla Sahin complained of the violation of her right to freedom of religion under Article 9.

The ECtHR focused on § 2 of Article 9 ECHR, which provides that freedom to manifest one's religion is subject to

> "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".

[38] *Dahlab v. Switzerland* [2001], (2001) Eur. Cour. HR 447, § 13.
[39] *Leyla Sahin v. Turkey* [2007], Eur. Cour. N. 44774/98, Eur. Ct. H. R. Rep. 99.

Therefore, in this case, no violation of Article 9 was found. The headscarf ban was considered in "its legal and social context", within the constitutionally embedded fundamental principles of secularism and gender equality[40]. In fact, the Court held that the ban freed women from religious beliefs, that signify subordination, and liberated them from the pressures to adopt patriarchal practices[41]. According to the Court, national regulations could be regarded as "necessary in a democratic society" as they pursued the legitimate aims of protecting the "rights and freedoms of others" and "public order"[42].

Many justified criticisms have been made of the court's judgment on several grounds: inadequate application of the margin of appreciation doctrine, narrow interpretation of the freedom of religion, imposition of "fundamentalist secularism", adverse implications on Muslim women's rights to education and presentation of Islam as a threat to democracy[43].

The decision, in this case, is quite different from the one adopted in the *Dahlab* case, not only because it concerns an Islamic Veil worn by a student at the university, while the other one regards an Islamic veil worn by a teacher in a primary school, but because the fundamental argument in the former decision is the fact that the veil worn by a teacher, who is a civil servant, can be authorized by the State and taken on by the State as its responsibility under the international law doctrine of state responsibility[44], whereas headscarves worn by students and pupils cannot be treated in this manner.

Therefore the argument concerning the State's neutrality is more relevant for the *Dahlab* case than for the *Sahin* one.

On the contrary, in the *Sahin* case, the argument concerning women's discrimination is stronger than in the *Dahlab* one: the assertion that the *hjiab* is "imposed" on women is particularly relevant. Apparently, the reasoning of the Court on the "legal and social context" is promising. However, the reasoning was not developed properly, as the ECtHR did

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[40] *Leyla Sahin v. Turkey* [2007], Eur. Cour. N. 44774/98, Eur. Ct. H. R. Rep. 112- 123.

[41] *Leyla Sahin v. Turkey* [2007], Eur. Cour. N. 44774/98, Eur. Ct. H. R. Rep. 99.

[42] *Leyla Sahin v. Turkey* [2007], Eur. Cour. N. 44774/98, Eur. Ct. H. R. Rep. 105 – 106.

[43] **D. DECKER, C. and M. LLOYDD**, *Case Comment: Leyla Sahin v. Turkey, European Human Rights Law Review,* 2004, 672 ff; **C. EVANS**, *The "Islamic Scarf" in the European Court of Human Rights, Melbourne Journal of Int. Law*, 7, 2006, 52; **C.D. LOVEJOY**, *A glimpse into the future: what Sahin v. Turkey means to France's Ban on ostensibility religious symbols in public schools, Wisconsin International Law Journal*, 2006, 661.

[44] See International Law Commission, Responsibility of States for Internationally Wrongful Acts, annex to the General Assembly Resolution 56/83, 12.12.2001, *http://untreaty.un.org/ilc/texts* (Article 4).

not consider that, within the European and global debate, the headscarf represents for women a "variety of meanings"[45]. Muslim women wear it for several reasons, some of which are expressions of autonomy. The veil might be imposed, but this should be demonstrated. All these criticisms are incorporated in the dissenting opinion of Judge Tulkens:

> "the principle of sexual equality can not 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. Equality and non – discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them" [46].

Finally, in this case, the link to the notion of militant democracy asserted in the *Refah* case, in holding that the Islamic headscarf is a symbol of political Islam and thus a "genuine threat to republican values and civil peace"[47], and to the fundamental principle of gender equality recognized in both the Turkish constitution and the ECHR is clear [48]. In this case, the Court reiterates its acceptance of the Turkish state's rationale and defers to the state's judgment that any person wearing the headscarf in public institutions should be understood as making a statement promoting political Islam and endangering civil order. As the headscarf is assimilated to political Islam and political Islam is assimilated to a threat to democracy, the limitation on Sahin's right to manifest her religious beliefs becomes "necessary" to maintain democracy.

The case *Dogru v. France*[49] involved an eleven year old French Muslim student who refused to remove her headscarf in physical education classes. The school expelled her because an internal school rule prohibited students from wearing *"conspicuous signs which are in themselves of proselytizing or discriminatory effect"*[50]. The Court accepted the French government's argument that the purpose of the restriction "*was to adhere to the requirements of secularism in state schools*"[51]. So, considering both *Refah*

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[45] **D. LYON, D. SPINI**, *Unveiling the Headscarf Debate*, *Feminist Legal Studies*, 2004, 333-345; **C. MAHABIR**, *Adjudicating Pluralism: the Hijab, Law and Social Change in Post – Colonial Trinidad*, *Social and Legal Studies*, 2004, 435 – 452; **M. MAZER IDRISS**, *Laïcité and the Banning of the 'Hijab' in France*, *Legal Studies*, 2005, 260 – 295.

[46] *Leyla Sahin v. Turkey* [2007], N. 44774/98, Eur. Ct. H. R. Rep. 99, § 12. On this topic see specifically below § 3.

[47] *Leyla Sahin v. Turkey* [2007], N. 44774/98, Eur. Ct. H. R. Rep. 99, 111.

[48] *Leyla Sahin v. Turkey* [2007], N. 44774/98, Eur. Ct. H. R. Rep. 99, 110.

[49] *Dogru v. France*, N. 27058/05, Eur. H. R. Rep., 182.

[50] *Dogru v. France*, N. 27058/05, Eur. H. R. Rep., 186.

[51] *Dogru v. France*, N. 27058/05, Eur. H. R. Rep., 198.

and *Sahin*, the Court held that the restriction was justified under Article 9 (2) as it was directed towards a legitimate aim in a democratic society[52]. This case is different from *Sahin v. Turkey*, because it considers the place of religious minorities in secular democracies; so we can see that according to the European Court the religious diversity is to be respected only on terms that conform to the majority's conception of the public identity in the French nation (*laïcité*). The individual's right to freedom of religion and manifestation of that religious belief is thus to be balanced against the state's interest in the principle of neutrality.

Again, in the case *Aktas v. France*[53], the Court considered that it was legitimate to exclude from school a girl who refused to uncover her head during physical education classes, according to art. 9, § 2 ECHR.

Differently, in *Ahmet Arslan and others v. Turkey*[54], the Court deemed that the general ban on wearing religious symbols in any public place, which is present in the Turkish legal system, was not justified by the requirements of the notion of Turkish secularity in the case of ordinary citizens. The case involved Turkish nationals, who were convicted for their touring the streets of the city wearing the distinctive dress code of their religious group *Aczimendi tarikatÿ.* The Court distinguishes this case from the *Leyla Sahin* one, as the applicants wore the garments "in public areas that were open to all such as streets or public places"[55]. About the national margin of appreciation, in this case the Court «adds however that public spaces open to all do not fall within the "special importance given to the role of the national decision-making body"»[56].

From this perspective, in this case, national laws prohibiting the veil in all public spaces, regardless of the specific status of the people concerned, seem to be considered by the Court as a violation of art. 9 ECHR, because the statements contained in such laws are not proportionate to the needs of a secular, democratic society, if they do not

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[52] *Dogru v. France*, N. 27058/05, Eur. H. R. Rep., 196 - 200: "(…) *religious freedom thus recognised and restricted by the requirements of secularism appears legitimate in the light of the values underpinning the Convention".*

[53] *Aktas v. France*, App. no. 43563/08 (2009), available at *http://hudoc.echr.coe.int/sites/ /eng/pages/search.aspx?i=001-93697.*

[54] *Ahmet Arslan and others v. Turkey*, App. no. 41135/98 (2010). On this case see **J.F. FLAUSS**, *Actualité de la Convention Européenne des droits de l'homme (septembre 2009 – février 2010), Actualité Juridique Droit Administratif,* 2010, 998; **J.P. MARGUÉNAUD**, *La liberté de porter des vêtements religieux dans le lieux publics ouverts à tous*, *Recueil Dalloz*, 2010, 682.

[55] *Ahmet Arslan and others v. Turkey*, App. no. 41135/98 (2010), § 34.

[56] *Ahmet Arslan and others v. Turkey*, App. no. 41135/98 (2010), § 49.

concern the concrete needs of public order or safety. Therefore, in the balancing exercise between individual rights and State interests, the latter are understood as the prevention of religious strife, a concern scarcely demonstrated to be coextensive with the mere presence of religious symbols.

3 - Religious Symbols in Article 9 ECHR case law and women's religious freedom in Europe

Article 9 (1) ECHR provides :

> "Everyone has the right to freedom of thought, conscience and religious … 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".

In relation to the cases concerning the headscarf as a religious symbol, the European Court of Human Rights has adopted a legal reasoning defined "*liberal anti – pluralism*"[57], above all in comparison with the jurisprudence developed by the Court, regarding the claims made by Christian groups.

Despite the fact that the right to have or maintain a religious tradition is widely granted in *Kokkinakis*[58], and the right to be free from injury to religious feelings is well recognized in *Wingrove and Otto Preminger*[59], the scope of Article 9 is read narrowly in case law concerning

[57] **P.G. DANCHIN**, *Islam in the Secular Nomos of the European Court of Human Rights,* in *Michigan Journal of International Law,* 32, 2011, 45.

[58] *Kokkinakis v. Greece,* App. No. 14307/98, 260 Eur. Ct. H. R., (ser. A), at 3, 11 (1993). In this case, Greece prosecuted a Jehova's witness, who called at the home of a lady and engaged a discussion with her, and was arrested and prosecuted for proselytism directed toward a member of the dominant religion, Christian Eastern Orthodoxy. As the Court distinguished between proper proselytism which is protected and improper proselytism which may be prohibited, it finally held that a state may legitimately consider it necessary to take measures aimed at repressing certain forms of conduct (in this case proselytism), judged incompatible with the respect for the freedom of thought, conscience and religion of others. This ruling was confirmed in *Larissis v. Greece,* App. No. 23371/94, 26377/94 and 26378/94, Reports 1998 – I; See **N. NATHWANI**, *Islamic Headscarves and Human Rights,* 237; **P.G. DANCHIN & L. FORMAN**, *The Evolving Jurisprudence of the European Court and the Protection of Religious Minorities,* in *Protecting the Human Rights of Religious Minorities in Eastern Europe*, 192, 200 – 10 (P.G. Danchin & E.A. Cole eds., 2002).

[59] *Wingrove and Otto – Preminger – Institut v. Austria*, 295 Eur. Ct. H. R. (ser. A), at. 1, 17

islamic symbols: in *Dogru*, to deny the claims of Muslim minorities in European nation – States to manifest their religious beliefs and collective identities, in *Sahin, Dogru*, and *Aktas,* to recognize wide States margins of appreciations to limit religious freedom on the grounds of protecting the public order values of secularism and neutrality.

In all the decisions described above[60], the particular position of the applicants towards the organisational structures of the State has justified a legitimate restriction on the use of the veil, while in relation to *Kokkinakis*, the Court has acknowledged the collective dimension of freedom of religion and belief and the role of Christianity in the way of life of the affected communities.

The approach to the presence of Islamic religious symbols in the public sphere seems particularly inconsistent or discriminatory, in light of the Court's decision in *Lautsi*[61], that the compulsory displaying of crucifixes in the classroom did not breach Italy's Convention obligation. While in 2009, the Second Chamber of the European Court of Human Rights held unanimously that the presence of crucifixes in Italian public school classrooms violates the right of children to religious freedom under Article 9[62], in 2011, the Grand Chamber reversed the judgment, holding that "the decision whether crucifixes should be present in State – school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State" [63]. The Grand Chamber agreed with the Second Chamber that the right to religious freedom in Article 9 includes the freedom not to belong to a religion and imposes a duty on the State of "neutrality and impartiality"[64]. However, about the scope of Article 9, the Court held that "a crucifix on a wall is an essentially passive symbol … and cannot be deemed to have an influence on pupils

– 18 (1994). In this case, the Court upheld the Austrian government's seizure of the film *Das LieberKonzil* on the basis that it constituted an attack on the Christian religion by violating "the respect for the religious feelings of believers as guaranteed in Article 9 … by provocative portrayals of objects of religious veneration ...".

[60] See § 2.

[61] *Lautsi v. Italy*, App. No. 30814/06, § 70 (Eur. Ct. H. R. Grand Chamber Mar 18, 2011), *http://www.echr.coe.int*.

[62] *Lautsi v. Italy,* App. No., 30814/06, Eur. Ct. H. R., Second Section, Nov., 3, 2009, *http://www.echr.coe.int*), §§ 48 – 58: "The compulsory display of a symbol of a particular faith in the exercise of public authority in relation to specific situations subject to governmental supervision, particularly in classrooms, restricts the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe".

[63] *Lautsi v. Italy*, App. No. 30814/06, § 70.

[64] *Lautsi v. Italy*, App. No. 30814/06, § 60.

comparable to that of didactic speech or participation in religious activities" [65], and moreover that "the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation" [66]. In light of these arguments, it's clear that the European Court fails to explain how the diversity of religious values and traditions in the public sphere of European States is compatible with the Court's conceptions of neutrality and secularism underpinning the decisions about islamic symbols[67].

In *Lautsi*[68], the European Court rejects any notion that to be democratic you must not be religious and, while insisting on respect for individual freedom of religion and belief, recognizes that the State may define itself by reference to the religious heritage, symbols and collective identity of its people[69].

Moreover, the arguments of the *Lautsi* decision fail to explain how the rich diversity of religious values and traditions in the european States is compatible with the Court's earlier more demanding conceptions of neutrality and secularism[70]. On this last concern, some interesting suggestions may be found in the separate concurring opinion of Judge Power. Judge Power asserts that neutrality does not require a secularist approach, distinguishing clearly the crucifix from other symbols:

> "Italy opens up the school environment to a variety of religions and there is no evidence of any intolerance shown towards non – believers or those who don't have religious philosophical convictions. Islamic headscarves may be worn. The beginning and end of Ramadan are 'often celebrated'. Within such a pluralist and tolerant context, a Christian symbol on a classroom wall presents yet another and a different world view. The presentation of an engagement with different points of view is an intrinsic part of the educative process. It

[65] *Lautsi v. Italy*, App. No. 30814/06, § 72.

[66] *Lautsi v. Italy*, App. No. 30814/06, § 68.

[67] *Leyla Sahin v. Turkey* [2007], Eur. Cour. N. 44774/98, Eur. Ct. H. R. Rep. 99, 110; *Dogru v. France*, App. no. 27058/05, 49 *Eur. H. R. Rep.*, 179, 182 (2008).

[68] *Lautsi v. Italy*, App. No. 30814/06, § 70 (Eur. Ct. H. R. Grand Chamber Mar 18, 2011), *http://www.echr.coe.int*.

[69] *Lautsi v. Italy*, App. No. 30814/06, §§ 73 - 74 (Eur. Ct. H. R. Grand Chamber Mar 18, 2011), *http://www.echr.coe.int*.: This case is distinguished from Dahlab v. Switzerland on the bases that crucifixes are "not associated with compulsory teaching of Christianity"; Italy "opens up the school environment in parallel to other religions". Moreover there was no claim that "the presence of the crucifix in classrooms has encouraged the development of teaching practices with a proselytizing tendency".

[70] See **J. WEILER**, *Lautsi: Crucifix in the Classroom*, 21 *Eur. J. Int. Law*, 1,1 (2010), *http://www.ejil.org/pdfs/21/1/1985.pdf*; **P.G. DANCHIN**, *Islam in the Secular Nomos*, p. 59.

> acts as a stimulus to dialogue. A truly pluralist education involves exposure to a variety of different ideas, including those which are different from one's own. Dialogue becomes possible and, perhaps, is at its most meaningful where there is a genuine difference of opinion and an honest exchange of views"[71].

In the opinion of Judge Power it is fundamental to reply to the claim that the presence of religious symbols in the public sphere violates the negative freedom of followers of other religions or non religionists, that a pluralist and inclusive approach by the State is more necessary than an exclusionary and secularist one.

Perhaps, the inclusive approach suggested by Judge Power is the way to solve the contradictions characterizing the article 9 ECHR jurisprudence, which are, on the one hand, finding a danger of pressure or proselytizing when a medical student wears an Islamic headscarf to a public university[72], but not when a State officially adopts a majority religious symbol in its public schools[73], and, on the other, finding the decision "whether or not to perpetuate a religious tradition in the public sphere to be a violation of the principle of secularism in a Muslim – majority state[74], but within the margin of appreciation in a Christian – majority state[75].

Moreover, the inclusive approach should consider that wearing the Islamic headscarf has no fixed meaning[76].

Muslim women wear the *hijab* for several reasons, often conflicting, some of which are expressions of autonomy[77]. These reasons vary, depending on the country specifically considered. In many Islamic countries wearing the veil is an obligation, an imposition often legitimated by the institutions and it is widely imposed on women both by the family and by the community. In Europe the situation is different. There are women who wear the veil because they are obliged to by their father, husband, family or by the community in which they live, but there are also

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[71] *Lautsi v. Italy*, App. No. 30814/06, §§ 2. 10 (Power J., separate concurring), 45 – 46.

[72] *Leyla Sahin v. Turkey* [2007], Eur. Cour. N. 44774/98, Eur. Ct. H. R. Rep. 99.

[73] *Lautsi v. Italy*, App. No. 30814/06, §§ 73 - 74.

[74] *Refah Partisi v. Turkey* [2003], Eur. Cour. N. 41340/98, 37 Eur. H. R. Rep. 1, 50 - 51.

[75] *Lautsi v. Italy*, App. No. 30814/06, §§ 73 - 74.

[76] **D. LYON, D. SPINI**, *Unveiling the Headscarf Debate*, *Feminist Legal Studies*, 2004, 333-345; **C. MAHABIR**, *Adjudicating Pluralism: the Hijab, Law and Social Change in Post – Colonial Trinidad*, *Social and Legal Studies*, 2004, 435 – 452; **M. MAZER IDRISS**, *Laïcité and the Banning of the 'Hijab' in France*, *Legal Studies*, 2005, 260 – 295.

[77] **P.G. DANCHIN**, *Islam in the Secular Nomos*, p. 63.

women who freely choose to do so. The relationship between women, culture and rights is complex and its simplification, banning the veil in Europe, does not lead to greater dignity and autonomy for women[78].

In fact, in my opinion, equality and non – discrimination should be considered in the right approach, that is well summarized in the dissenting opinion of Judge Françoise Tulkens in her dissenting opinion on the case *Leyla Sahin*[79]:

> «the principle of sexual equality can not 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. Equality and non – discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them. "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» … "A general prohibition of wearing the *burqa* and the *niqab* would deny women who freely desire to do so their right to cover their face"[80].

This suggests that in both *Dahlab* and *Sahin*, the headscarf was given a highly abstract meaning of a religious symbol detrimental to gender equality, but the European Court did not attempt to give the principle of gender equality any specific content, which may have included some elaboration for the benefit of the person that the principle seeks to protect. This approach was overshadowed by the ECtHR's further interpretation of the "Islamic Veil" as irreconcilable with gender equality in all cases.

The necessity of a structured meaning of the gender equality principle is recently reaffirmed in the resolution 1743 of the Parliamentary Assembly of the Council of Europe[81] where we can read:

> "The veiling of women, especially full veiling through the *burqa* or the *niqab*, is often perceived as a symbol of the subjugation of women to men, restricting the role of women within society, limiting their professional life and impeding their social and economic activities. Neither the full veiling of women, nor even the headscarf, are

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[78] **M. MALIK**, *Complex Equality: Muslim Women and the Headscarf, Droit et Societé*, 2008, 127.

[79] *Leyla Sahin v. Turkey* [2007], N. 44774/98, Eur. Ct. H. R. Rep. 99, § 12.

[80] *Leyla Sahin v. Turkey* [2007], N. 44774/98, Eur. Ct. H. R. Rep. 99, Diss. Tulkens, § 16.

[81] Council of Europe (2010), Resolution n. 1743, 23 June 2010, *Islam, Islamism and Islamophobia in Europe*, Strasbourg, available at *http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/ERES1743.htm*.

> recognized by all Muslims as a religious obligation of Islam, but they are seen by many as a social and cultural tradition. The Assembly considers that this tradition could be a threat to women's dignity and freedom. No woman should be compelled to wear religious apparel by her community or family (…) Article 9 of the Convention includes the right of individuals to choose freely to wear or not to wear religious clothing in private or in public. Legal restrictions to this freedom may be justified where necessary in a democratic society, in particular for security purposes or where public or professional functions of individuals require their religious neutrality or that their face can be seen. However, a general prohibition of wearing the burqa and the niqab would deny women who freely desire to do so their right to cover their face. In addition, a general prohibition might have the adverse effect of generating family and community pressure on Muslim women to stay at home".

Thus, a general ban of headscarves from schools might protect those girls who do not want to wear headscarves, but will be harsh on those girls who consider it important for their cultural and religious identity and as a symbol of respect for their tradition. A general ban cannot be justified by reference to its protection element for young girls, because it is an excessive measure which is not proportionate to its goal[82].

Therefore, it's clear that, to extend the effective individual and collective aspects of religious freedom, a different approach should be adopted. In this case the problem regards women who are part of minority cultures in Europe; so it is necessary to give them a hearing in order to provide concrete solutions and to identify effective strategies for their integration. The complexity of the condition of muslim women in Europe requires structured actions and instruments and not measures concerning only a specific garment. Perhaps a good model to protect minorities' religious rights is the Indian one, where religious freedom consists in the State giving various religious groups juridical autonomy over family affairs in the form of family or personal status laws[83]. The positive autonomy of women of a certain ethnic background should be encouraged by publicly valuing their ethnic identity, by highlighting the plurality of lifestyles compatible with this ethnic identity.

In light of these considerations, the perspective adopted by the ECtHR about women's rights seems to be self – contradictory, if we

[82] **N. NATHWANI**, *Islamic Headscarves and Human Rights*, 243.

[83] **T. MAHMOOD**, *Religion, Law and Judiciary in Modern India*, 2006, *BYU L. Rev.*, 755 (2006).

consider that after *Dahlab* and *Sahin*, the Court, in *Ahmet Arslan and others v. Turkey*[84], deemed that the general ban on wearing religious symbols in any public place, present in the Turkish legal system, was not justified. The logical conclusion of the Court's perspective would be that the veils should be banned everywhere, not only in schools, as suggested in the dissenting opinion of Judge Tulkens in *Sahin*[85].

Perhaps, in this context, the right to the wearing of the headscarf could be founded on Article 8 ECHR, as suggested by Judge Tulkens considering that the European Court appears "to paternalistically deny the applicant's right to personal autonomy developed on the basis of Article 8"[86]. However the application of Article 8 which protects the right to respect for private life could destabilize the meanings of the Islamic Veil. According to the ECHR, the rights protected by Article 8 "are more fundamental than those protected by Article 9"[87] and so this legal basis could undermine the ECtHR's theory of "secularism" and "gender equality" in the case law regarding headscarves.

4 - Islamic Symbols and European Institutions. Indirect Discrimination?

In the decisions described above, the European Court of Human Rights often implements the need to impose restrictions on religious symbols in order "to reconcile the interests of the various groups and ensure that everyone's beliefs are respected"[88]. This approach is apparently in keeping with the principles stated in Article 2 of the Treaty on European Union – TEU:

> "The Union is founded on values of respect for human dignity, freedom, democracy (…) including the rights of persons belonging to minorities. These values are common to the member States in a society characterised by pluralism, by non discrimination".

Moreover the ECtHR case law is in keeping with the provisions of Article 17 of the Treaty on the functioning of the European Union (TFEU),

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[84] *Ahmet Arslan and others v. Turkey*, App. no. 41135/98 (2010).

[85] *Leyla Sahin v. Turkey* [2007], N. 44774/98, Eur. Ct. H. R. Rep. 99, Diss. Tulkens, § 12.

[86] *Leyla Sahin v. Turkey* [2007], N. 44774/98, Eur. Ct. H. R. Rep. 99, Diss. Tulkens, ibidem.

[87] **A. VAKULENKO**, *"Islamic Headscarves" and the European Convention on Human Rights: an Intersectional Perspective*, *Social and Legal Studies*, 2007, 196.

[88] *Kokkinakis v. Greece*, 260 Eur. Ct. H. R. § 33.

where it refers to religious associations and communities and non – confessional organisations, respecting the different national identities (article 4 TEU). In fact the European Union must relate with social groups in the same way, independently of their religious nature. Moreover, the recognition of the national margin of appreciation in the symbols' regulation in the public sphere, as well as in the private one, affects the contents of the right to freedom of thought, conscience and religion, recognized also by the EU Charter of Fundamental Rights (Article 21)[89], which, with the Treaty of Lisbon[90], has acquired the same value as the Treaties[91].

Other rules concerning religious symbols may be found within the Treaty of Lisbon. While Article 17 TFEU refers the regulation of religious organisations as well as that of non confessional organisations to national legislators, Article 19 provides some guarantees concerning measures necessary to combat all forms of discrimination, including those based on religion or belief.

The right to freedom of thought, conscience and religion coincides with the "freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and ritual observance" (article 9, § 1 ECHR, art. 10 § 1 Charter). The coherence between the Charter and the Convention regarding the meaning of this rule is ensured by article 52 § 3 of the EU Charter. Setting the scope of rights and principles of the Charter and establishing criteria for their interpretation, this rule prevents conflicts of interpretation on the meaning to attribute to the two catalogues of rights and gives the monopoly of interpretation on the rights affirmed in the same way in the two acts to the ECtHR. In these cases it is possible to affirm that the EU has in fact acceded to ECHR[92].

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[89] Proclaimed in 2000, the Charter has become legally binding on the EU with the entry into force of the Treaty of Lisbon, on 1st December 2009, just like the EU Treaties themselves.

[90] Treaty of Lisbon, OJ, C 306, 17.12.2007.

[91] Article 10, § 1, of the Charter States:" Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance".

[92] Article 6, § 2 of the TEU, states the commitment of the European Union to accede to the ECHR. This accession was proposed several times (in 1979, in 1990 and in 1993). The Court of Justice in its opinion 2/94 (28.3.1996) noted that the Community had no competence to accede to the ECHR, due to the limits of Article 308 TEC. The legal basis for accession to the ECHR was introduced through the provision of the Article 6, § 2,

However, the effectiveness of these principles depends on the EU Court of Justice. On this concern, it must be pointed out that, in the case of coincident rights, asserted by the ECHR and by the European Charter, the protection granted by the Charter may never be at a lower level than that provided by the ECHR. While the ECtHR indicates the minimum levels of protection of coincident rights to the EU Court of Justice, due to the compatibility clause of the European Charter, the Court of Justice can

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TEU. The membership will depend on the member States meeting within the European Council. In the ECHR, the legal basis for the accession of the EU is provided for by Article 59, § 2 ("the European Union may accede to this Convention"), as amended by Protocol No. 14 to the ECHR which entered into force on 1 June 2010. On 26 May 2010, the Committee of Ministers of the Council of Europe gave an ad-hoc mandate to its Steering Committee for Human Rights (CDDH) to elaborate with the EU the necessary legal instrument for the EU's accession to the ECHR. On the EU side, the EU Justice Ministers gave the European Commission on 4 June 2010 the mandate to conduct the negotiations on their behalf. Official talks on the European Union's accession to the European Convention of Human Rights (ECHR) started on 7 July 2010. Thorbjørn Jagland, the Secretary General of the Council of Europe, and Viviane Reding, Vice-President of the European Commission, marked the beginning of this joint process at a meeting in Strasbourg. The CDDH entrusted the task of elaborating an accession instrument to an informal group of 14 members (7 coming from member States of the EU and 7 coming from non-member States of the EU), chosen on the basis of their expertise. Between July 2010 and June 2011, this informal working group (CDDH-UE) held in total eight working meetings with the European Commission, reporting regularly to the CDDH on progress and on outstanding issues. In the context of these meetings, the informal group also held two exchanges of views with representatives of civil society, who regularly submitted comments on the working documents. In June 2011, the CDDH-UE finalised its work by submitting to the CDDH a draft accession agreement together with its explanatory report. In the context of the regular meetings which take place between the European Court of Human Rights and the Court of Justice of the European Union, delegations from both European courts discussed the accession of the EU to the Convention on 17 January 2011. In particular, they addressed the question of the future relationship between the two European courts concerning certain cases brought against the EU under the ECHR system. In October 2011, the CDDH discussed the draft instruments and, given the political implications of some of the pending problems, agreed to transmit a report and the draft instruments to the Committee of Ministers for consideration and further guidance. On 13 June 2012, the Committee of Ministers instructed the CDDH to pursue negotiations with the European Union, in an ad hoc group "47+1", with a view to finalising without delay the accession instruments. Negotiators of the 47 Council of Europe member States and the European Union have finalised the draft accession agreement of the European Union to the European Convention on Human rights. The EU Court of Justice in Luxembourg will now be asked to give its opinion on the text. Accession of the EU to the ECHR will strengthen the protection of human rights in Europe, by ultimately submitting the EU and its legal acts to the jurisdiction of the European Court of Human Rights.

draw up higher levels of protection than those of Strasbourg (Article 52, par. 3 Charter).

Therefore, to identify the meaning of Article 10 of the EU Charter, it is necessary to consider the Strasbourg case law, and the consideration of the right to wear the veil as an expression of freedom of conscience and religion. However the same right may have very different effectiveness, depending on the judge involved and on the protection provided in the case.

As a result of the mandatory nature of the Charter of Fundamental Rights, following the entry into force of the Treaty of Lisbon, and due to the fact that religious symbols cross several areas of EU competence, it is conceivable that the EU Court of Justice issue a decision concerning the prohibition to wear the veil in public. If this prohibition inhibited the free movement of workers or the possibility to access to a workplace, the Court could consider the lawfulness of the national measure with respect to the Treaties, without taking account of the religious implications that would be involved in the case[93]. If the Court did not find "any limitations justified on grounds of public policy, public security or public health" (Article 45, § 3 TFEU)[94], it could decide that there has been a violation of EU law granting the right to free movement of persons.

At the same time, the European Commission could penalise a State, by means of an infringement procedure (Articles 258 – 260 TFEU), if a general prohibition of the veil could be deemed give rise to religious discrimination, relevant in the perspective that the homogenization of the laws of member States is supported by several acts, such as the Directive n. 2000/78 EC[95], concerning other grounds of discrimination, including religion. In the European process of development of anti – discrimination legislation, we may consider, within the scope of this paper, the concept of indirect discrimination.

Indirect discrimination is an apparently neutral provision, criterion or practice which would put individuals having one of the features accepted as grounds of discrimination (e.g. religion) at a particular disadvantage compared with other individuals, unless that provision is

[93] See Court of Justice, 4 December 1974, *Van Duyn v. Home Office*, No. 41/74, *ECR*, 1974, 1337. In this case, the Court has stated that it cannot make assessments of merit of the danger to society of religiously motivated behavior.

[94] Court of Justice, 4 December 1974, *Van Duyn v. Home Office*, No. 41/74, *ECR*, 1974, 1337.

[95] Directive n. 2000/78/EC of Council, 27 November 2000, "*establishing a general framework for equal treatment in employment and working*", OJ L 303/2000.

justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

In some cases, indirect discrimination have been identified by national judges in relation to religious symbols, such as the sikh turban[96]. In labour law, there are cases which confirm that dismissals founded on the banning of the veil are unlawful[97].

More generally the Human Rights Committee, in its Communication no. 208/1986[98] recognized that the requirement that a hard hat be worn at work can be seen as a "discrimination de facto" against individuals of the Sikh religion, like the author of the communication, Mr. Singh Binder, canadian citizen, born in India, who wore a turban in his daily life and refused to wear safety headgear during his work[99]. Recently, the Committee on Economic, Social and Cultural Rights, in its General Comment No. 20[100], defines indirect discrimination as referring to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights, as distinguished by prohibited grounds of discrimination.

Finally, after the entry into force of the Lisbon Treaty, and due to the fact that religious symbols cross the areas of EU competence, the UN approach about indirect discrimination, produced by the religious clothing symbols, could be followed also by the European Union Institutions.

5 - Conclusive Remarks

[96] See i.e. the House of Lords (now the United Kingdom Supreme Court) decision, 24.3.1983, *Mandla v. Dowell Lee* (1983) 2 AC 548. In this case, a sikh boy was refused admission to a school based on the Christian faith because he insisted on wearing the turban. The Court did not accept the justification offered by the school that the turban was an outward manifestation of non – Christian faith, because the no – turban rule adopted by the school was discriminatory in itself. On this see N. Nathwani, *Islamic Headscarves and Human Rights,* 248 ff.

[97] See i.e. Bundesarbeitsgericht, 10.10.2002, 2 AZR 472/01.

[98] Human Rights Committee, *Karnel Singh Binder v. Canada,* Communication No. 208/1986, (CCPR/C/37/D/208/1986), 9.11.1989, *www.un.otg*.

[99] In the case, the canadian legislation, requiring that workers in federal employment be protected from injury and electric shock by the wearing of hard hats is to be regarded a reasonable limitation to the individual's religious freedom.

[100] UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, available at: *http://www.refworld.org/docid/4a60961f2.html*.

Multicultural Europe is increasingly debating about the complex relationship between personal freedom, religious freedom and public spaces. Limitations on personal freedoms seem to be justified in public space, according to the fundamental principles of neutrality, secularity, on which the European legal cultures are based.

The right to veil may be considered in this context as a contentious one. The relationship between women's rights, States' neutrality, secularism, and the veil is problematic because wearing religious clothing symbols is deemed to be an expression of religious freedom, but also an expression of discrimination necessary to forbid.

The focus of recent case law, developed by the European Court of Human Rights, (ECtHR) has been on national laws, which proscribe the wearing of religious symbols in certain public places, and on the claims more generally to religious and cultural freedom of Muslim minorities in European States. Stepping back from these cases, the possible contrast between value pluralism as a basis for religious freedom in international law, and other fundamental rights (i.e. women's rights, children's rights) becomes clear. By recognizing the intrinsic connection between individual rights and communal goods, value pluralism opens new pathways for enforcing human rights.

In the words of the Parliamentary Assembly of the European Council

> " (…) Legal restrictions to this freedom may be justified where necessary in a democratic society, in particular for security purposes or where public or professional functions of individuals require their religious neutrality or that their face can be seen. However, a general prohibition of wearing the burqa and the niqab would deny women who freely desire to do so their right to cover their face. In addition, a general prohibition might have the adverse effect of generating family and community pressure on Muslim women to stay at home".

This strategy has been analyzed in the perspective of Horizon 2020. In this context, it has been pointed out that it appears in keeping with one of the main goals of the EU, social inclusion, within the complex human rights common framework pointed out by the European Charter as well as by the ECHR: the discrimination caused by the national banning of the veil could be penalised by the European Institutions and consequently by the ECHR. Therefore studies on the management of the growing religious pluralisation and diversity become fundamental.

Perhaps the common framework of these solutions could be found in the effective neutrality towards the religious symbols, generally considered "the only possible synthesis through which the European institutions can subsume different national experiences regarding the phenomenon of religion within a common European law of religion"[101].

However the accession of the European States to the European Convention on Human Rights and to the European Union did not achieve the homogeneisation in the protection of rights concerning religious topics. This consideration is confirmed by the various national rules about religious symbols, aided by the national margin of appreciation recognised by the European Court of Human Rights as well as by the European Institutions. In some cases the state authorizes the displaying of religious symbols, not proselytizing (like the crucifix in Italy); in others, the State bans the displaying of such symbols (like France, Spain and Italy for the *burqa* and the *niqab*).

In this context, we may ask if the European Court of Human Rights and the European Institutions may find the right way to a unitary european model.

The recent decisions of the Strasbourg Court on national bans of the use of the veil and the european rules highlight that two conflicting models seem to be equally accepted[102]: the multicultural one, in which the community prevails over the individual, on the assumption of the acceptance that all cultures are placed on the same level, having equal relevance; the intercultural one, in which the individual prevails over the minority community whose interests are subordinated to those of the individuals, as pluralism is limited in the name of the common values of the community – state.

My opinion is that, to avoid these evident contradictions, religious convictions must be considered in the right light, or simply for what they are.

Real pluralism may be effective, only considering the social importance of religious traditions. The Italian government, arguing before the ECHR that the crucifix "was both the symbol of Italian history and culture and consequently of Italian identity, and the symbol of the principles of equality, liberty and tolerance, as well as of the State's secularism"[103], aimed to transform one religious tradition into a general

[101] **A. FERRARI, S. PASTORELLI**, *The Burqa in Europe*, p. 243.

[102] **C. W. Jr. DURHAM, D. M. KIRKHAM, T. LINDHOLM**, *Islam and Political – Cultural Europe,* 2012.

[103] *Lautsi v. Italy, App. No., 30814/06,* Eur. Ct. H. R., Second Section, Nov., 3, 2009, § 68.

norm. This is the real threat to tolerance of other symbols and traditions, appearing in the multicultural model as well as in the intercultural one:

> «There is a deep contestation about the most suitable way to regulate the symbolic and iconographic entanglement of Church and State. The laïque position is surely not "neutral" about that contestation. It is a much polar position as is the "non – laïque" position. It does not simply choose a side. It is a side»[104].

In conclusion, as it is generally recognized that the European version of the "non – laïque" State is important in the approach to tolerance and to religious pluralism, it is clear that, by acknowledging the mainstream european Christian heritage, the equal place of all the religious convictions and symbols could be more effectively guaranteed.

Abstract

Religious freedom within Europe and the place of Islam within Europe are of particular contemporary interest. The focus of recent case law developed by the European Court of Human Rights (ECtHR) has been on national laws which proscribe the wearing of religious symbols in certain aspects of the public sphere, and on the claims more generally to religious and cultural freedom of Muslim minorities in European states. Stepping back from these cases, this Article aims at a theoretical analysis of the subject, involving the contrast between value pluralism as a basis for religious freedom in international law, and other fundamental rights, i.e. women's or children's rights. By recognizing the intrinsic connection between individual rights and communal goods, value pluralism opens new pathways for enforcing human rights.

[104] **J. WEILER**, *Editorial, State and Nation; Church, Mosque and Synagogue-The Trailer, Int'l J. Con. L.*, 2010, 157; **T. SAVAGE**, *Europe and Islam: Crescent Waxing, Cultures Clashing, The Washington Qaurterly*, 2004, 25 ff.