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FREEDOM OF RELIGION AND RELIGIOUS SYMBOLS IN THE PUBLIC SPHERE

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TABLE OF CONTENTS

Page

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FREEDOM OF RELIGION AND RELIGIOUS SYMBOLS IN THE PUBLIC SPHERE

OVERVIEW

The issue of religious symbols in the public sphere has given rise to widespread debate on the scope of freedom of religion in various countries around the world. This question touches on the presence of Islamic headscarves and Sikh kirpans in the school system, crucifixes in the courtroom and school, Sikh turbans in the workplace, and Jewish succahs on condominium balconies. Legal and public policy acceptance or accommodation of these religious symbols depends on a variety of factors, but is most often rooted in a constitutional proportionality test that balances the right to freedom of religion against the possible threat to safety, security and public order. However, different countries apply varying interpretations to this balance, driven by national political cultures and social histories that can have a profound impact on the scope accorded to freedom of religion through the interpretation of concepts of security and public order. While governments in traditional countries of immigration, such as Canada and the United States, perceive their role as one of accommodating all forms of religious expression in a neutral manner, more recent countries of immigration often apply a more restrictive and formally secular approach. In particular, France applies its historical policy of laïcité in a way that enforces strict secularism in the public domain, relegating overt forms of religious expression to the private sphere.

INTRODUCTION

In our modern world of globalization and unprecedented international migration flows, traditionally homogenous nations are facing the blurring of established spheres of cultural identity. Governments are changing laws, policies, and politics in an effort to manage these shifts – often in a manner that contrasts sharply with the approach adopted by countries with a longer history of dealing with issues of immigration.

One way in which this tension has been manifested is through the treatment of religious symbols in the public sphere, as national policies of neutrality or secularity clash with the religious traditions of recent immigrants. A number of both older and more recent countries of immigration have had to deal with the question of religious symbols over the last 20 years. Their various popular, legislative, and judicial treatments of the issue have given rise to differing interpretations of freedom of religion as defined through domestic and international laws.

Stemming from religious sources such as Islam and Sikhism that have few roots in Western European society, the wearing of religious symbols has provoked a cultural identity crisis in many countries – France in particular – that has served to reinforce the strength of principles of laïcité and potentially block the meaningful expression of fundamental religious freedoms. By contrast, other countries with more experience dealing with immigration and cultural difference, such as Canada and the United States, have used the religious symbol debate to interpret freedom of religion in its broadest sense. In these countries, the government's role is one of neutral accommodation of religion, rather than enforcing neutrality in the public sphere. Using the same proportionality test based in constitutional law to judge the scope of freedom of religion as constrained by issues such as security and public order, older and recent countries of immigration have come to very different conclusions about the extent of religious rights, in large part due to the vast diversity of cultural histories and domestic politics at play.

A. Laïcité and Secularism

While some European countries have well-established religious identities within their society – British and German Protestantism, Italian and French Catholicism – most countries today are reluctant to establish any clear connection between church and state. In moving definitively away from the religious nature of European politics, a few countries, most particularly France, have gone so far as to proclaim themselves "laic" states. An ambiguous term that is equivalent to neither "secularity" nor "neutrality," at its most general level, laïcité refers to an official separation of church and state.(1) Yet beyond this, laïcité indicates a specific state policy with respect to religion, although it varies broadly between countries. In the more extreme example of countries such as France and Turkey, laïcité indicates an active program

(1) Michel Troper, "French Secularism, or Laicité," *Cardozo Law Review*, Vol. 21, 2000, p. 1267; T. Jeremy Gunn, "Under God but Not the Scarf: The Founding Myths of Religious Freedom in the United States and *Laïcité* in France," *Journal of Church and State*, Vol. 7, 2004, pp. 8-9.

whereby the country is promoted as fundamentally politically independent of any religious authority and in which a need for public order can be used to justify interference with freedom of religion – a form of anti-religion to deal with the excesses of religion.(2)

Laïcité is inevitably an indefinable concept; yet it is one that, when combined with other concepts of neutrality, has recently had significant impact on freedom of religion for minorities throughout the Western world. While traditional countries of immigration have been dealing with cultural clashes and accommodation of "non-Western" religions for decades, rising immigrant populations pose a new dilemma for European countries, forcing society and politicians to rethink their established cultural identity and decide whether or not to make way for these new forces. Particularly in the case of Islam, well before the events of 11 September 2001 began to influence perceptions of Islamic extremism, Muslim immigrants came to be viewed as a potentially disruptive force in some parts of Europe, where elements of a xenophobic, anti-immigrant backlash gained prominence in some states and are currently threatening traditional party political systems.(3)

B. Religious Symbols

Among the most prominent of the religious symbols at stake in current debates over freedom of religion in the Western world is the Islamic headscarf, or *hijab*. The headscarf in question is worn by a female over her head, generally covering her hair, ears, and neck. However, for some Muslim women, *hijab* may involve wearing a large loose garment that can cover the hands and face – a *chador* or a *burqa*. A demonstration of Islamic *hijab* – female modesty – the headscarf is an integral part of Qur'anic teachings for a large part of the Muslim world, but there is little agreement on whether headscarves are absolutely prescribed.(4)

Within the Sikh faith, the turban and kirpan have also given rise to some controversy. The turban and kirpan are among the five religious obligations of Orthodox Sikh males. Sikh men must keep their hair uncut and wrapped in a turban as a symbol of respect for God. The kirpan is a curved ceremonial dagger, usually about 20 centimetres long with a blunt

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(2) Sebastian Poulter, "Muslim Headscarves in School: Contrasting Legal Approaches in England and France," *Oxford Journal of Legal Studies*, Vol. 17, 1997, p. 50; Gunn (2004), p. 9.

(3) Jorgen S. Nielson, *Muslims in Western Europe*, 2nd ed., Edinburgh University Press, Edinburgh, 1995, p. vii.

(4) Poulter (1997), p. 45; Sawitri Saharso, "Culture, Tolerance and Gender," *The European Journal of Women's Studies*, Vol. 10, No. 1, 2003, p. 10.

tip, which is generally worn underneath clothing. The kirpan serves as a reminder of the constant struggle between good and evil.(5)

At stake in the debate involving the Jewish faith is the kippa, or yarmulke, a small skullcap worn as a symbol of submission to God by some Jewish males. In addition, some Orthodox Jews build succahs, structures made of wood and covered with cedar branches, to be used each year for nine days during the autumn festival of Sukkot to commemorate the difficult conditions Jews faced after fleeing Egypt.(6)

An aspect of the more traditionally Western Christian faith, the crucifix is a religious symbol that can generally be found in churches. It is a representation of the Christian cross with a figure of Christ on it. Often hung on the wall, crucifixes may also be found in classrooms, courtrooms, and legislative buildings throughout the Western world.

The most prominent disputes over religious symbols in the public sphere have involved religious headcoverings – one of the most immediately obvious demonstrations of one's faith that automatically distinguishes Muslims, Sikhs, and Jews from the larger, mostly Christian population in the Western world. The recent rise of immigrants in Europe has meant that headcoverings, particularly the Islamic headscarf, have become significant symbols of difference that have often provoked conflict about their role in the public sphere.

CURRENT LAW AND PRACTICE

A. International Law

Freedom of religion is firmly entrenched in international law and the constitutions of countries around the world. Some of the most fundamental human rights covenants in international law pay direct homage to this right. Sections 18 of both the *Universal Declaration of Human Rights* (1948)(7) and the *International Covenant on Civil and Political Rights* (1976)(8) guarantee everyone the right to freedom of thought, conscience and religion, as well as the freedom to manifest his or her religion or belief in practice and observance. The United Nations

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(5) Patty Fuller, "Tempest in a Turban," *Alberta Report/Newsmagazine*, Vol. 21, No. 9, 14 February 1994, p. 26; Sarah V. Wayland, "Religious Expression in Public Schools: Kirpans in Canada, *Hijab* in France," *Ethnic and Racial Studies*, Vol. 20, No. 2, 1997, p. 546; "No Kirpans in School, Quebec Court Rules," *CBC News*, 5 March 2004; Laura-Julie Perreault, "Port du Kirpan," *La Presse*, 6 March 2004, p. A1.

(6) *Syndicat Northcrest* v. *Anselem*, [2004] S.C.C. 47.

(7) Available at: http://www.unhchr.ch/udhr/lang/eng.htm.

(8) Available at: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

Human Rights Committee has emphasized that this freedom encompasses the right to wear religiously distinctive clothing or headcoverings.(9) Finally, the United Nations *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981)(10) guarantees the freedom to practise one's religion and belief, and freedom from discrimination based on that religion or belief.

While international law in this area paints freedom of religion with broad brushstrokes, individual countries must apply the larger philosophy at home based on individual circumstances and the interpretation of freedom of religion within domestic constitutional laws. Often application of the law will depend on context and political culture, as each situation shapes interpretation of the particular freedom.

B. The Canadian Context

1. Freedom of Religion and Secular Policies

The approach to freedom of religion in Canada is informed, to a certain extent, by the fact that no policy exists in this country to officially separate church and state. The concept of laïcité does not apply in Canada, although the freedoms of religion and conscience laid out in the Constitution do create an indirect obligation of neutrality.(11) The Canadian approach to religion has been to promote multiculturalism by celebrating the expression of various religions while recognizing the supremacy of none – the government plays a role of neutral accommodation. The human rights goal is not one of assimilation, but of integration based on differences.(12) Although the Preamble to the *Charter of Rights and Freedoms*(13) does refer to God ("Canada is founded on principles that recognize the supremacy of God and the rule of

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(9) Human Rights Committee, General Comment 22, Article 18, CCPR/C/21/Rev. 1/Add 4 (20 July 1993), para. 4.

(10) Available at: http://www.unhchr.ch/html/menu3/b/d_intole.htm.

(11) J. S. Moir, ed., *Church and State in Canada, 1627-1867: Basic Documents*, McClelland and Stewart, Toronto, 1967; *Zylberberg* v. *Sudbury Board of Education* (1988), 65 O.R. (2d) 641 (C.A.); Paul Horwitz "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond," *University of Toronto Faculty of Law Review*, Vol. 54, 1996, p. 21; Pierre Bosset, Commission des droits de la personne et des droits de la jeunesse du Québec, *Pratiques et symboles religieux : Quelles sont les responsabilités des institutions?* 2000, p. 6.

(12) Wayland (1997), p. 556; Benjamin Berger, "The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State," *Canadian Journal of Law and Society*, Vol. 17, 2002, p. 51; Rosalie Abella, "Legislative, Institutional and Governmental Responses to Anti-Semitism," OSCE Conference on Anti-Semitism, 19 June 2003, available at: http://www.osce.org/documents/sg/2003/06/281_en.pdf.

(13) Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

law"), legal experts and the Supreme Court of Canada have agreed that this reference is merely symbolic and does not contradict the religious freedoms contained in the document itself.(14)

Sections 2(a) and 15 of the Charter lay out the right to freedom of religion and equal treatment in Canada.

> 2 Everyone has the following fundamental freedoms:
>
> *a*) freedom of conscience and religion; …
>
> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In *R.* v. *Big M Drug Mart Ltd.*,(15) Dickson J. described freedom of religion:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination. But the concept means more than that. Freedom can primarily be characterized by the absence of coercion or constraint.
>
> Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest belief and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.(16)

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(14) Peter Hogg, *Canada Act, 1982* (Annotated), Carswell, Toronto, 1982, p. 9; Dale Gibson, *The Law of the Charter: General Principles*, Carswell, Toronto, 1986, pp. 64-67; William F. Pentney, "Interpreting the Charter: General Principles," in *The Canadian Charter of Rights and Freedoms*, 2nd ed., ed. G.-A. Beaudoin and E. Ratushny, Carswell, Toronto, 1989, pp. 53-54; Bosset (2000), p. 9; M. H. Ogilvie, *Religious Institutions and the Law*, 2nd ed., Irwin Law, Toronto, 2003, p. 140.

(15) [1985] 1 S.C.R. 295.

(16) *Ibid*., para. 94-95.

At its core, freedom of religion encompasses both a positive dimension – freedom to believe and to manifest one's religion; and a negative dimension – no one can be forced, directly or indirectly, to recognize a particular religion or to act contrary to what he or she believes.(17)

Freedom of religion in Canada has also been interpreted as necessitating the reasonable accommodation of minorities. This means that laws must be adjusted if they have even an indirect discriminatory effect on a person or group based on their particular characteristics. In this sense, Canada's form of religious neutrality is quite different from the stricter version of laïcité adopted in countries such as France. The Canadian approach attempts to make laws receptive to the particular needs of minorities, rather than espousing a more uniform conception of equality. The policy of reasonable accommodation attempts to break from the trend promulgating the norms of the majority as the dominating values in Canadian society.(18)

However, unlike the interpretation of freedom of religion under the United States Constitution, freedom of religion under the Charter's section 2(a) is not absolute. Rather, it is a relative concept, with which courts have the power to balance certain countervailing claims. Clearly offensive conduct or symbols that harm or constrain the freedoms or human dignity of others are not tolerated. These limitations are emphasized within the Charter itself. Section 15 highlights the fact that each religion is one of many vying for equality. Section 27 suggests that religion falls under the rubric of culture, and that the Charter seeks to preserve and protect all cultures. Finally, section 1 gives courts the discretion to qualify the fundamental freedom of religion by such reasonable limits as are prescribed by law and can be demonstrably justified in a free and democratic society.(19)

As well, while the Charter contains strong freedoms to observe one's religion, it provides a lower level of protection from exposure to other religions, even in the public sphere. Public schools are the only place in which it has been clearly determined by the courts and through legislation that religion cannot be present in any institutionalized sense.(20)

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(17) Pierre Bosset, Commission des droits de la personne et des droits de la jeunesse du Québec, *Les symboles et rituels religieux dans les institutions publiques*, November 1999, pp. 17-18.

(18) Alain-G. Gagnon and Myrian Jézéquel, "Le modèle québécois d'intégration culturelle est à préserver," *Le Devoir*, 17 May 2004, p. A7.

(19) *Big M Drug Mart Ltd.*; *R.B.* v. *Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; David M. Brown "Freedom from or Freedom for? Religion as a Case Study in Defining the Content of Charter Rights," *University of British Columbia Law Review*, Vol. 33, 2000, paras. 98-103; Berger (2002), pp. 53-62; Ogilvie (2003), p. 140.

(20) Brown (2000), paras. 66-89; *Zylberberg* v. *Sudbury Board of Education*; *Canadian Civil Liberties Association* v. *Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341 (C.A.).

In addition to the courts, Canada allows provincial and federal human rights commissions to deal with many issues of discrimination on religious grounds, including the presence of religious symbols in the public sphere. For example, the Ontario Human Rights Commission's *Policy on Creed and the Accommodation of Religious Observances* states that, short of undue hardship, a school or organization has a duty to accommodate a person's religious headcovering and Sikh kirpans. The policy's discussion of the kirpan issue states that the safety arguments against kirpans that have been raised by schools in the past have not proved compelling enough. Only when there is a serious health and safety rationale which the symbol cannot be modified to accommodate may these guidelines be interfered with.(21)

2. Headcoverings

Canada has dealt with the religious symbols question in a wide variety of contexts. The question of headcoverings has been raised in the schoolroom, the courtroom, the uniformed workplace, and when dealing with safety helmets. The general trend has been for courts to allow religious headcoverings in most situations unless there is a serious safety or public order issue at stake.

In 1988, the Ontario Human Rights Commission applied a standard interpretation of section 1 of the Ontario *Human Rights Code*(22) to find a prohibition on Sikh turbans in a public school to be religious discrimination.(23) That same year, Human Rights Commissions in Alberta and again in Ontario used this interpretation of discrimination to overturn bans on uniformed employees from wearing turbans on the job.(24) In a highly publicized case in 1995, the Federal Court of Appeal also upheld a Royal Canadian Mounted Police (RCMP) policy allowing Sikh officers to wear turbans as part of their uniform. In *Grant* v. *Canada (Attorney General)*,(25) the court held that allowing RCMP officers to wear turbans was not a violation of the freedom of religion of non-Sikhs. There was no compulsion or coercion of religious expression involved, nor was there a deprivation of life, liberty, or security for persons interacting with the Sikh officers.

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(21) Ontario Human Rights Commission, *Policy on Creed and the Accommodation of Religious Observances*, 20 October 1996, pp. 8-9.

(22) R.S.O. 1990, c. H-19.

(23) *Sehdev* v. *Bayview Glen Junior Schools Ltd* (1988), 9 C.H.R.R. D/4881.

(24) *Khalsa* v. *Co-op Cabs* (1988), 1 C.H.R.R. D/167 (Ont. Bd. Inq.); *Grewal* v. *Checker Cabs Ltd.* (1988), 9 C.H.R.R. D/4855 (Alta. Bd. Inq.).

(25) (1995) 120 D.L.R. (4th) 556 (F.C. C.A.).

Once issues of safety and public order are thrown into the headcovering equation, the answer is no longer as clear in Canadian law. The British Columbia Human Rights Tribunal has upheld the right of a turbaned Sikh to ride a motorcycle without a helmet, finding that the discrimination involved in mandating the helmet despite the religious obligation to wear a turban is not justified by the marginal increase in risk to the person or increase in medical costs. The unhelmeted rider alone bears the risk.(26)

However, in *Bhinder* v. *Canadian National Railway Co.*,(27) the Supreme Court of Canada upheld a workplace policy that mandated hard hats at CN Rail, thus precluding Sikh turbans. The Supreme Court dismissed Bhinder's claim, as the *Canadian Human Rights Act*(28) allows an exception to freedom of religion where there is a *bona fide* occupational requirement. Because the safety concerns at play in this case did make the hard hat a *bona fide* occupational requirement and CN had demonstrated no intention to discriminate, the policy was upheld.

Concerns about public order and the administration of justice were the deciding factor in another case involving an imam who refused to remove his *kufi*, an Islamic headcovering, in the courtroom. The trial judge had issued a dress code protocol to the public gallery which stated that male heads must be bare except in the case of adherents of a "well established and recognizable … religious community," and only where the headcovering was an "article of faith" demanded by such a community. Upon being ordered to leave the courtroom twice because of his kufi, Michael Taylor filed a human rights complaint. In *Taylor* v. *Canada (Attorney General)*,(29) the Federal Court of Appeal held that sitting judges must be immune from threat of both civil action and human rights commission investigation into judicial conduct in order to protect judicial independence and immunity. After-the-fact human rights concerns took second place to the perception of the administration of justice.

3. Kirpan

The question of safety and security is even more integrally linked to the question of kirpans in the public sphere. Many courts have allowed them in a variety of contexts provided

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(26) *Dhillon* v. *British Columbia (Ministry of Transportation & Highways)* (1999), 35 C.H.R.R. D/293 (B.C. Human Rights Tribunal).

(27) [1985] 2 S.C.R. 561.

(28) R.S.C. 1985, c. H-6.

(29) [2000] F.C.J. No. 268 (F.C. C.A.).

that safety is not an issue of overriding importance and the dagger is properly contained. As a result, kirpans have been specifically allowed in schools by courts in British Columbia and Ontario.

In *Tuli* v. *St. Albert Protestant Separate School District No. 6,*(30) the school had passed a resolution intended to suspend any student who wore a kirpan. In this case, the Alberta Court of Queen's Bench upheld the right of Sikh students to wear a kirpan to school based on freedom of religion – the boy in question would have been seen to have fallen from his faith were he not permitted to wear it. Provided that the kirpan was both blunted and tied tight, the court held that it must be allowed in the school. The presence of the kirpan would create the added advantage of providing an opportunity for other students to develop an understanding of Sikh religion and culture. In *Peel Board of Education* v. *Ontario (Human Rights Commission),*(31) a school Board policy banned weapons from school property. Here, the Ontario Divisional Court upheld the right of both students and teachers to wear a kirpan, provided that it was of a reasonable size, was not worn visibly, and was sufficiently secured. The court based its decision partially on the Ontario *Human Rights Code* religious discrimination provisions, and partially on the fact that the Board had been unable to prove any hardship to it or a real school safety risk if permission to wear the kirpan was granted.

Using similar reasoning, the British Columbia Court of Appeal upheld the right to wear a kirpan in a hospital in *British Columbia (Worker's Compensation Board)* v. *British Columbia (Council of Human Rights)*(32) under (then) section 3 of the British Columbia *Human Rights Code*(33) prohibiting discrimination in the provision of accommodation and services.

However, where safety is of real concern, kirpans are prohibited despite provincial or federal laws protecting freedom of religion. The Canadian Human Rights Tribunal has held that prohibiting the wearing of kirpans during air travel is legitimate for the protection of passengers and staff. The Tribunal has held that an aircraft is a unique environment in which people are kept closely together and there are no police readily available; thus a kirpan, no matter what size, is prohibited.(34)

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(30) (1985), 8 C.H.R.R. D/3906 (Alta. Q.B.).

(31) (1991), 80 D.L.R. (4th) 475 (Ont. Div. Ct.).

(32) (1990), 70 D.L.R. (4th) 720 (B.C. C.A.).

(33) R.S.B.C. 1996, c. 210.

(34) *Nijjar* v. *Canada 3000 Airlines Ltd.,* [1999] C.H.R.D. No. 3.

Similarly, in order to protect personal security, public order and the administration of justice, the Manitoba Court of Appeal upheld the right of a judge to bar kirpans from the courtroom in *R.* v. *Hothi et al.*[35] While the court acknowledged that the kirpan was a religious symbol and not a weapon, it based its decision on the authority of a judge to maintain control of his or her courtroom. This authority has traditionally encompassed the right to ensure that there are no weapons whatsoever in the courtroom, as the presence of a weapon could thwart the process of justice by being perceived as an adverse influence.

4. Quebec

The legal debate over religious symbols in the public sphere takes on a character of its own in Quebec, as that province has a parallel *Charte des droits et libertés de la personne*,[36] a strong history of Catholicism, different approaches to multiculturalism, and significant control over immigration into the province. As a result, Quebec often practises a variant on the legal and political approach to minority issues that is adopted in the rest of Canada. Unlike other Canadian provinces, which have primarily focussed on Sikh symbols, Quebec has had to deal with a variety of different religions in its treatment of religious symbols in the public sphere.

Mirroring similar situations occurring across Europe, Quebec first broached the issue of Islamic headscarves in the school system when, in September 1994, a Muslim girl was expelled from her school because she wore the veil. Soon faced with a series of similar incidents, the Commission des droits de la personne et des droits de la jeunesse du Québec (the Commission) was asked to provide an opinion on the issue. In a non-binding report published in February 1995, the Commission concluded that public schools were obliged to accept Muslim girls wearing headscarves, provided that this freedom of religious expression did not constitute a real risk to personal safety or security of property. The Commission stated that prohibiting the headscarf was contrary to the Quebec Charter as a violation of both freedom of religion and the right to education. While schools may insist on certain dress codes, they must also seek reasonable accommodations with Muslim students who are discriminated against by the application of such codes. Dealing with the feminist equality argument that a headscarf ban is

(35) (1985), 35 Man. R. (2d) 159 (Man. C.A.).

(36) L.R.Q., C-12.

necessary to protect girls from an overly oppressive religious regime, the Commission was careful to state that unless it is shown that a specific girl is forced to wear the headscarf against her will, an absolute ban on the headscarf as a religious symbol is not the role of equality laws, and would be an insult to the independence of Muslim women.(37)

Freedom of religion has also been used to uphold religious symbols in a variety of other contexts in Quebec. In 1988, a Montréal municipal court agreed to change courtrooms due to the presence of a crucifix in the original room.(38) The presence of the crucifix was deemed to be a constraint on freedom of religion,(39) and has also been interpreted by the Commission as an influence that could weaken a person's confidence in the impartiality of the justice system.(40) In June 2004, the Supreme Court of Canada in *Syndicat Northcrest* v. *Amselem* also upheld the right of Orthodox Jews to construct succahs on their Montréal condo balconies to celebrate the autumn festival of Sukkot. Despite the fact that the condominium ownership agreement prohibited decorations and constructions on balconies and proposed an alternative communal structure in the garden, the court held that religious freedoms must take precedence, and that the prohibition on the succahs was a non-trivial interference with religious freedoms. However, the court emphasized that the succahs must be erected in such a manner as not to pose a threat to safety by blocking doors or fire lanes. As much as possible, the succahs must also conform with the general aesthetics of the property.

In contrast with lower court decisions in the rest of Canada, a May 2004 decision of the Quebec Court of Appeal upheld a prohibition on kirpans on school property by emphasizing the importance of security concerns. In *Multani (tuteur de)* c. *Commission scolaire Marguerite-Bourgeoys*,(41) the court held that despite its religious symbolism, the kirpan is a "dangerous object" that poses a threat to the security of students and staff. Public safety must take precedence over religious freedom, and the zero-tolerance policy on knives in the school

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(37) Wayland (1997), p. 559; R. Brian Howe and Katherine Covell, "Schools and the Participation Rights of the Child," *Education and Law Journal*, Vol. 10, 1999-2000, p. 116; Sheema Khan, *The Globe and Mail*, 1 January 2004; Gagnon and Jézéquel (2004); Pierre Bosset, Commission des droits de la personne et des droits de la jeunesse du Québec, *Religious Pluralism in Québec: A Social and Ethical Challenge*, February 1995, pp. 29-41.

(38) *R.* c. *Drouin*, No. 38-687, 6 September 1988.

(39) Bosset (1999), pp. 24-25.

(40) Commission des droits de la personne et des droits de la jeunesse du Québec, Resolution CP-277.16 of 21 June 1995.

(41) [2004] J.Q. no 1904 (C.A.Q.).

was allowed to stand. This case is currently being appealed to the Supreme Court of Canada, but does demonstrate that the case on kirpans in the schoolroom is not completely closed – particularly when the court allows the emphasis to rest on security, despite the physical constraints placed on the ceremonial weapon.

C. United States

1. Freedom of Religion and Secular Policies

The United States is founded upon a clear separation of church and state. However, rather than a more structured separation guided by laïcité, one of the fundamental principles behind the U.S. Bill of Rights is religious freedom. The broad and absolute nature of such freedoms is seen as one of the cornerstones of American society.(42) As in Canada, freedom of religion is protected under both freedom and equality guarantees. The First Amendment to the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof … ."

The Fourteenth Amendment guarantees equal protection for all citizens:

> Section 1. … No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In addition, any form of discrimination on the grounds of religious belief is prohibited under the *Civil Rights Act*.(43) Upholding these values, the federal Equal Employment Opportunity Commission (EEOC) requires employers to accommodate workers' religious beliefs unless doing so would cause an undue hardship.

As in Canada, freedom of religion in the United States does not mean that public spaces are entirely free from religion. Rather, the general rule is that public spaces must be open to all different forms of religion. Ultimately, the government's role is not to enforce secularism but to accommodate religious expression in a neutral manner.(44) This version of secularism is fundamental to the interpretations of the freedoms guaranteed under the U.S. Constitution.

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(42) Ogilvie (2003), pp. 139-140; Gunn (2004), p. 11.

(43) 1964, 88th Congress, H.R. 7152.

(44) "Unsecular America," *Christian Century*, Vol. 121, No. 4, 24 February 2004, p. 5.

The application of these principles in the public school system has been reinforced by a number of directives from the government. In 1995, the U.S. President issued an advisory statement emphasizing that "nothing in the First Amendment converts our public schools into religion-free zones, or requires all religious expression to be left behind at the schoolhouse door. … Students may display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages … ." Ultimately, schools may not prohibit attire that is "part of students' religious practice."(45) A Ministry of Education directive further stipulates that the *Religious Freedom Restoration Act*(46) prohibits schools from excluding religious headcoverings.(47)

A traditional country of immigration, like Canada, the United States strives to apply a broad interpretation to freedom of religion. Except where serious issues of individual safety or public order are used to justify limitations, religious symbols are generally granted free rein in the public sphere both by legislation and by the courts.

2. Religious Symbols

In the United States, the discussion of religious symbols in the public sphere has focussed primarily on religious headcoverings in a variety of settings. In the public school system, the government has made its wishes clear: headscarves must be allowed in the schoolroom. In the spring of 2004, a public school in Oklahoma settled a lawsuit according to U.S. Department of Justice wishes after suspending a Muslim girl for wearing a headscarf, although no dress code barred other non-religious headcoverings. The school bowed to government pressure and allowed the girl to wear her headscarf, in accordance with the government's principle that public schools cannot require students to choose between their faith and public education. The government had argued that this was a form of religious discrimination under the Fourteenth Amendment. Schools in Ohio and California have also specifically allowed kirpans on school property.(48)

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(45) *Christian Century*, 24 February 2004.

(46) 1993, 103rd Congress, 1st Session, H.R. 1308.

(47) "USA : Interdit d'interdire," *Le Parisien*, 28 November 2003.

(48) "Les Américains font la leçon sur le port du voile," *L'Express*, 4 April 2004; Thiolay Boris, "Voile : retombées étrangères," *L'Express*, 19 April 2004, p. 86; "School Relents on Headscarf Ban," *Ottawa Sun*, 20 May 2004, p. 23.

In the absence of absolute guidance from the courts, it is unclear whether this broad interpretation of freedom of religion is being applied in the context of uniformed work where issues of public safety may be more or less involved. However, the general trend has been to allow religious symbols when faced with complaints of discrimination. In April 2004, an administrative judge in New York found that the police department violated the civil rights of a Sikh traffic enforcement officer when the department threatened to fire him if he did not remove his turban. The judge found that the turban did not significantly compromise public safety and that the department had not seriously considered the officer's request for accommodation.(49) Since 2002, a number of Muslim and Sikh transit employees in New York have been moved to positions where the uniform transit cap is not necessary. The bad press resulting from one incident ensured that a Sikh man was reinstated at his old job despite his turban. However, both the EEOC and an arbitrator ruled that a complaint by three Muslim women who had been reassigned to different positions was unsubstantiated, as the reassignment policy did not violate any law. The arbitrator held that the transit authority had accommodated these women's religious rights by giving them jobs that did not require uniform transit caps. As a result of these incidents, the U.S. Justice Department has sued the Metropolitan Transport Authority and the New York City Transit, charging them with religious discrimination and calling for the transit authority to provide accommodation and compensation.(50)

As in Canada, the American courts have ensured that religious freedoms are not paramount in situations where public order and individual safety are clearly at issue. The U.S. Supreme Court has ruled that an Orthodox Jewish soldier cannot wear a kippa in the armed forces. Because the military prizes discipline and uniformity above all else, it is justified in demanding that religious headcoverings be removed from under military helmets. Similarly, a Sikh soldier in the U.S. Army Reserve was denied the right to wear a turban while on duty.(51) Even in some areas where safety is at issue, organizations have still attempted to accommodate religious headcoverings. In July 2001, the Montgomery County Fire and Rescue Service in Maryland allowed a Muslim officer to wear her headscarf while on duty, provided that she replaced it with a fireproof hood and helmet when she was required to dress in protective clothing.(52)

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(49) "Civil Rights of Sikh Violated, Judge Says," *New York Times*, 30 April 2004, p. 7.

(50) Joyce Purnick, "Transit Rules? Scratch Head, Covered or Not," *New York Times*, 10 June 2004, p. Metropolitan 1; Michael Luo, "MTA is Sued Over its Policy on Muslim Head Coverings," *New York Times*, 1 October 2004, p. 4.

(51) Aziz Haniffa, "Sikh Soldier's Right to Wear Turban – A Legal Battle?" *International Journal of Humanities and Peace*, 2001, p. 75; Ed Morgan, "Human Rights Program Wears its Litigation Hat," *Nexus*, Fall/Winter 2003, p. 36.

(52) "Maryland Firefighter Wins Right to Islamic Headscarf," *US Newswire*, 12 July 2001.

However, rather than invoking the public order and administration of justice argument used in Canada, American courts have ruled that a person has a defence under the First Amendment when facing a charge of contempt of court upon refusal to remove religious headcoverings in court.(53)

D. Western Europe

In Western Europe, a more recent destination for immigrants with diverse religious backgrounds, the debate over religious symbols in the public sphere has taken on added significance. Because of the dramatically rising number of Muslim immigrants in particular, the political culture in many European countries has had to adapt and either accommodate or find methods of dealing with "difference" within traditionally homogenous societies. Historically, many states in Europe have had strong affiliations with specific religions. In the last 250 years, many of these states have thrown off those religious ties – some only in a moderate sense, some absolutely, and some not at all. In a cultural twist that demonstrates a significant difference from the North American perspective, the European states that still recognize some affiliation with a religion are often those that have more easily accepted foreign religious symbols in the public sphere, while those which more or less absolutely reject religious ties have proven less willing to accommodate. Most European cases have revolved around the Muslim headscarves debate.

1. England

England is one country in which there is still an affiliation between church and state, while religious symbols are almost fully accommodated. The Queen is the titular head of both the Church of England and government. However, the fact that there is no separation of church and state has had no effect on integration policies. The British model of integration is generally one of cultural pluralism – multiculturalism – in which ethnic minorities are encouraged and even subsidized to practise their faith. Such policies have proven crucial in a country that has faced a large influx of immigrants from former colonies such as India in the last 25 years. Unlike most countries in Europe and in North America, England has no written constitution as such, and instead relies on its anti-discrimination laws to deal with issues of

(53) Morgan (2003), p. 37.

freedom of religion and accommodation of difference.(54) The *Race Relations Act*(55) is one of the most important of these laws, although the courts originally had to struggle with the definition of "race" to ensure adequate protection of all minorities.(56) Under this legislation, the burden of proof rests with the alleged discriminator, rather than the complainant. More recently, the *Human Rights Act*(57) provides a domestic mechanism of relief for violations of the European *Convention for the Protection of Human Rights and Fundamental Freedoms*(58) (European Convention). This Act specifically guarantees freedom of thought, conscience, and religion.

In general, British courts have ensured that religion is accommodated in the public sphere, provided that there is no threat to security or the proper functioning of institutions.(59) Muslim headscarves and Sikh turbans have traditionally been allowed in the schoolroom, particularly following the seminal case of *Mandla* v. *Dowell Lee* in 1983.(60) In that case, a school prohibited a Sikh boy from wearing his turban on the grounds that it violated the school's uniform rules. Relying primarily on the *Race Relations Act*, the House of Lords held that this prohibition was tantamount to racial discrimination, and could not be upheld.

However, when the headcovering in question stretches beyond a mere veil or turban, the courts have not always proven as accommodating. In September 2002, a girl was sent home from her high school for wearing a *jilbab* – a long, loose-fitting gown worn with a headscarf. In this particular school, 80% of the students were Muslim and there was already a flexible uniform policy in place which allowed students to wear *shalwar kameeze* (pants and tunic worn by Muslims, Hindus, and Sikhs) if they were concerned about religiously modest dress. In June 2004, a High Court judge ruled that the school's dress code was a "reasoned, balanced, proportionate policy" in a multicultural, multi-faith school and that the girl's right to

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(54) Basil R. Singh, "Responses of Liberal Democratic Societies to Claims from Ethnic Minorities to Community Rights," *Educational Studies*, Vol. 25, No. 2, 1999, p. 195; "The War of the Headscarves," *Economist*, Vol. 370 (8361), 7 February 2004, p. 24.

(55) 1976, c. 74.

(56) *Mandla* v. *Dowell Lee*, [1983] 2 AC 548.

(57) 1998, c. 42.

(58) Available at: www.echr.coe.int/Convention/webConvenENG.pdf.

(59) Stéphane Bernatchez and Guy Bourgeault, "La prise en compte de la diversité culturelle et religieuse à l'école publique et l'« obligation d'accommodement »," *Canadian Ethnic Studies*, Vol. 31, No. 1, 1999, p. 167.

(60) "Grande-Bretagne : Oui au foulard islamique," *La Presse*, 5 March 2004, p. A13.

education and to manifest her religious beliefs had not been violated in the particular circumstances of this case.(61)

Even in situations where some other countries have considered safety and security as justification for prohibiting headcoverings, England has proven broadly flexible. Both police officers and soldiers may wear religious headcoverings, and motorcyclists and construction workers have also been permitted to wear turbans.(62)

2. Denmark

Also tied to historical religious tradition, Denmark maintains the Lutheran Church as the state religion. The country's constitution protects freedom of religion and has been used to uphold the presence of religious symbols in the public sphere. Specifically, both teachers and pupils are permitted to wear religious headcoverings in the schoolroom.(63) However, recent case law is not entirely clear. Running contrary to a series of earlier cases upholding the presence of headscarves in the public sphere, a December 2003 High Court decision did quash a discrimination allegation by a supermarket cashier who was fired for wearing a headscarf contrary to a company policy that also banned other symbols such as prominent Christian crosses. The High Court held that Fotex Supermarkets was merely upholding its obligation to ensure equal treatment regardless of ethnic origin. The court particularly pointed out that the company employed a proportion of visible minorities that was comparable to the overall Danish population.(64)

3. Italy

In Italy, despite historically and geographically close ties to the Catholic Church, today there is official separation of church and state, and a constitution that guarantees freedom of religion in the country. The jurisprudence on religious symbols is similar to that established in North America and England. In particular, Islamic headscarves are permissible on school

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(61) "British Girl Loses Veil Challenge," *The Globe and Mail*, 15 June 2004; Kevin Ward, "Britain-Muslim-Dress," *Canadian Press Wire*, 20 June 2004.

(62) Bernatchez and Bourgeault (1999), p. 167; *La Presse*, 5 March 2004.

(63) Nielson (1995), p. 76; "To Ban or not to Ban," *Economist*, Vol. 369 (8347), 25 October 2003, p. 46.

(64) Clare MacCarthy, "Europe: Danish Muslim Dismissed for Wearing Headscarf Loses Court Case," *Financial Times*, 19 December 2003, p. 10.

property, provided that they do not threaten public order within the school.(65) However, recent debate over the crucifix does distinguish the Italian approach from that adopted in North America, where a number of courts have deemed its presence in public environments to be a constraint on freedom of religion. In 2000, the highest appellate court in Italy ruled that crucifixes should not be present at voting sites maintained by the secular state. Recently, however, the Italian government reaffirmed a 1924 law making the presence of a crucifix obligatory in all public schools and courts, on the grounds that the crucifix is a symbol of the values at the foundation of Italian society.(66) Where older countries of immigration strive to emphasize their neutrality in this regard – accepting all, but imposing none – Italy's stronger ties to the Catholic church influence its cultural and legal approach to its society's traditional religious values, even while making room for new symbols in the public sphere.

4. Netherlands

With a similarly strong history of Protestantism, the Dutch government also emphasizes the strict separation of church and state. Dutch secularism is interpreted as a place in which all religions have an equal right to manifest themselves in public, and freedom of religion is a constitutionally protected right.(67) In the Netherlands, this right has generally been interpreted broadly, reflecting the political culture of a country with a very strong progressive outlook on human rights, as protected through legislation, the court system, and an Equal Treatment Commission (ETC) whose decisions are not legally binding on parties.

The issue of headscarves has been a subject of particular debate in the Netherlands since 1985, when local authorities in a Dutch town forbade Muslim girls from covering their heads on public school property. Responding to the protest raised by the girls' parents, Parliament had the prohibitions revoked. A decision in 1989 on mixed-sex swimming in schools clarified the position on religious symbols by stating that broad principles of freedom of religion apply only to public schools, and can be limited in the private system.(68)

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(65) Le Tourneau, "La laïcité à l'épreuve de l'Islam en France," *Revue générale de droit*, Vol. 28, 1997, p. 303.

(66) *Le Parisien*, 28 November 2003.

(67) Nielson (1995), p. 61; Le Tourneau (1997), p. 304; Saharso (2003), p. 14.

(68) W. A. R. Shadid and P. S. van Koningsveld, *Religious Freedom and the Position of Islam in Western Europe: Opportunities and Obstacles in the Acquisition of Equal Rights*, Kok Pharos Publishing House, Amsterdam, 1995, p. 87.

Today, religious symbols rarely pose a problem in the public sphere. Both courts and the ETC have repeatedly stated that headscarves may be banned from the public sphere only on narrow grounds, such as security considerations or real inconsistency with official government uniform. In 1999, the ETC ruled in favour of teacher in training who wanted to wear a headscarf at school. In that case, the Commission held that constitutionally guaranteed freedoms of religion and philosophy of life must be protected, and that a prohibition on the headscarf is a form of direct discrimination because, for many Muslim women, *hijab* is one of the requirements that follow directly from the Islamic faith.(69) These principles were further clarified in March 2003 when the ETC upheld an Amsterdam school's ban on *burqas* in the classroom. While the headscarf usually in question in such debates covers only a woman's head and neck, the *burqa* is a long garment that covers a woman from head to toe, veiling her face and hands as well. The ETC held that in this case, open student-teacher interaction was more important than the right to wear a full *burqa*. In the work environment, the ETC has rebuked numerous employers who have objected to the headcoverings worn by their Sikh and Muslim employees.(70)

5. Germany

There is no strict separation of church and state in Germany, and the country is bound by principles of secular neutrality, rather than the strict forms of laïcité. Freedom of religion is guaranteed by the Basic Law – the 1949 Constitution.(71) In Germany, the headscarf debate achieved significant prominence in 2003, although it stretches back to a series of related incidents in the early 1980s. At that time, politicians ultimately adopted a position against the headscarf in the public sphere, despite the constitutional guarantee of freedom of religion.(72)

However, in September 2003, Germany's highest court issued a seminal decision on the issue of teachers and Islamic headscarves that has left states throughout the country

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(69) Saharso (2003), pp. 10-13; *Economist*, 25 October 2003, p. 46; "En Europe peu de tentation de légiférer," *Le Progrès*, 2 February 2004.

(70) United States Department of State, *International Religious Freedoms Report 2003*, available at: www.state.gov/g/drl/rls/irf/2003.

(71) Nielson (1995), p. 26; "Quel devoir de neutralité religieuse pour l'État allemand?" *Agence France Presse*, 5 January 2004; Bertrand Benoit, "Germans Must Shift Their Image of National Identity," *Financial Times*, 10 April 2004, p. 11.

(72) Shadid and Koningsveld (1995), p. 87.

rushing to create their own laws. The Federal Constitutional Court ruled that headscarves for teachers were permissible, as wearing headscarves did not in principle impede the values of the German Constitution, but that individual states were free to prohibit public school teachers from wearing headscarves as they saw fit within their own borders. Since then, two provinces – Bade-Württemburg and Lower Saxony – have passed their own legislation prohibiting teachers from wearing headscarves, while continuing to allow Christian or Jewish religious symbols because these Western cultural values and traditions correspond with the educational objectives of the state school. In June 2004, a federal administrative tribunal upheld a decision prohibiting a Muslim teacher in Bade-Württemburg from wearing her headscarf. The court upheld the state law, as it did not favour one religion over another, and was thus not discriminatory in nature.(73) However, contrary to an earlier move by that state to continue to allow nun's habits, an October 2004 federal court ruling held that nun's habits are to be banned from the classroom.(74)

Beyond the school system, German law generally allows employees to wear religious headcoverings at work. However, in the spring of 2004, the city state of Berlin did pass legislation prohibiting all religious symbols in the public service.(75)

While the headscarves debate has touched a political nerve in individual states because of the large flow of Muslim immigrants into Germany over the last 30 years (Germany has the second-largest Muslim population in Western Europe), an earlier Federal Constitutional Court case dealing with crucifixes in the classroom demonstrated the broad nature of federal German principles on freedom of religion in other contexts. In 1995, a Bavarian school ordinance required the display of a crucifix in every elementary school classroom. Parents of non-Christian students protested against this decree, claiming that the presence of the crucifix was both offensive to their religious beliefs and unconstitutional. The court held that schools must not proselytize on behalf of a particular religious doctrine, and that the display of crosses in the classroom exceeded the constitutionally established limits on freedom of religion, as the

(73) "Allemagne : la Basse-Saxe propose une loi interdisant le port du voile pour les enseignantes," *Associated Press*, 14 January 2004; Benoit (2004), p. 11; *L'Express*, 19 April 2004; "Allemagne : Pas de profs voilés au Bade-Wurtemberg," *Libération*, 29 April 2004; "Contre l'interdiction du voile," *La Presse*, 18 May 2004, p. Actuel 7; "Allemagne : Une enseignante déboutée de sa demande de réintégration," *Agence France Presse*, 24 June 2004.

(74) "Germany: Nuns Hit by Headscarf Ban," *The Gazette* [Montréal], 11 October 2004, p. A16.

(75) *Libération*, 29 April 2004; Michèle Ouimet, "Les eaux troubles de la tolérance," *La Presse*, 7 September 2004, p. A18.

crucifix is a core symbol of the Christian faith and was being displayed in a public school where attendance is mandatory.(76)

Thus, the German position on religious symbols in the public sphere is unclear. While the federal law apparently adopts a broad concept of freedom of religion, individual state application of the constitutional principles is strongly influenced by cultural traditions and local politics. In jurisprudence established by cases such as the crucifix case, courts have held that German principles of neutrality require the state to balance the affirmative freedom of worship with the negative freedom of those who are opposed to public professions of faith – striving for an acceptable compromise. In this sense, the German courts apply a proportionality approach that is very similar to the safety and public order justification used in other countries. Germany does not abide by strict rules of laïcité, but rather attempts a broad approach to freedom of religion that may be limited in specific circumstances. However, the September 2003 ruling on headscarves broke somewhat from this philosophy, in that it effectively allowed individual states to implement a blanket rule within their own borders, rather than seeking case-appropriate justification.(77) The importance of political culture and the influence of immigrant integration issues are key factors in the interpretation of freedom of religion and its application to religious symbols, as was emphasized by the Bade-Württemburg Minister of Education's public justification for imposing the ban in her state. Annette Schavan declared that "The veil, which is a *political symbol* as much as a religious one, has no place in schools" (emphasis added).(78)

6. Belgium

With a stricter policy on religious neutrality in the public sphere, Belgium's constitution guarantees freedom of religion for all.(79) In the last 15 years, there has been significant debate about religious symbols, particularly headscarves; however, there is little uniform policy or law on the issue. Both courts and the government have tended to deal with religious symbols on a case-by-case basis, often leaving decisions to local authorities, rather than establishing a broader policy on freedom of religion.

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(76) *Classroom Crucifix II Case* (1995) 93 BVerfGE1; David M. Beatty, *Comparative Constitutional Law – Religion (Vol. 1)*, July 2000 (University of Toronto, Faculty of Law class materials), p. 19 and pp. 79-87.

(77) Beatty (2000), p. 19.

(78) *Libération*, 29 April 2004.

(79) Nielson (1995), p. 70; "Belgique – Daniel Ducarme," *Le Soir*, 6 January 2004; *Le Nouvel Observateur*, 13 February 2004.

The first widely publicized case arose in the fall of 1989, when several schools near Brussels banned Islamic headscarves in the classroom. The next year, the Brussels appeal court invalidated that prohibition, using a 1959 Education Law as a justification for its decision. This law states that part of the neutrality policy in the school system relies on the freedom of a person to bear witness to his or her religion. However, following this decision and in response to right-wing activism in the country, the Belgian Minister of Education issued a statement clarifying the government's position. He emphasized that it is not government policy to set rules on religious symbols, and that such decisions must be left to local school authorities, who have an obligation to respect the Belgian principle of neutrality. Another government statement later declared that headscarves do not contradict the principle of neutrality, provided that they are not worn for purposes of religious or political provocation – essentially threatening public order.(80)

Then in September 1994, a Liège Civil Tribunal upheld a ban on the headscarf, ruling that *hijab* is not a religious obligation, but rather stems from a personal or family conviction, and is thus not protected by the guarantee of freedom of religion.(81) This last observation can be contrasted with the Canadian Supreme Court's decision in *Syndicat Northcrest* v. *Anselem* on succahs – a less absolute dictate of the Jewish faith than *hijab* in the Muslim faith – where the court rejected the argument that a person must prove that his or her religious practices are supported by a mandatory doctrine of faith. The Supreme Court held that freedom of religion in Canada must incorporate both subjective and objective obligations of faith.(82)

The result is that in Belgium, there is currently no central policy on headscarves in the classroom. This is strictly a matter left to the discretion of local authorities.(83) In reality, a number of schools do currently prohibit headscarves. Belgian courts have also dismissed a number of discrimination complaints, frequently holding that the principles of equality and neutrality in the state educational system must take precedence over freedom of religion.(84) The issue is not that freedom of religion does not encompass the right to wear a headscarf, but that principles of equality and secularism are often held to be paramount when it comes to religious

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(80) Shadid and Koningsveld (1995), pp. 88 and 92; Le Tourneau (1997), p. 302.

(81) Liège Civil Tribunal, réf, 26 September 1994, p. 831.

(82) *Northcrest* v. *Anselem*, para. 56.

(83) "Des sénateurs belges prônent une loi interdisant le voile à l'école," *Agence France Presse*, 5 January 2004; "Le voile divise la Belgique," *Le Nouvel Observateur*, 13 February 2004.

(84) *Case of Leyla Sahin* v. *Turkey*, European Court of Human Rights, Application No. 44774/98, 29 June 2004, para. 53.

symbols in the public sphere. This argument about the paramountcy of principles of secularism can be perceived as a significant broadening of the safety and public order justification. As such, "public order" is interpreted as extending well beyond the realm of judicial authority and national security, to the point where it encompasses deeply held political and cultural values of secularism in the public sphere.

E. France – *L'Affaire du foulard*

In France, the headscarves debate – or *l'affaire du foulard* – has taken on dramatic proportions due to the 2004 imposition of a country-wide ban on religious symbols in the classroom that sparked significant protest throughout the country. In marked contrast to the North American approach to freedom of religion, France's historically based strict policy of laïcité in the public sphere has been implemented within a political culture strongly influenced by reaction to the active presence of the largest Muslim population in Western Europe – approximately 5 million, or 11% of the French population.(85)

1. Freedom of Religion and French Laïcité

Of all states in the Western world, France's conception of secularism is the most rigidly defined, with strictly enforced policies that keep religion out of the public sphere. One of the crucial aspects of the French interpretation of the right to freedom of religion is that right's definition as a *liberté publique*, rather than as a civil right (as the term is understood in most other countries). In France, civil rights do not exist as natural rights that an individual may assert against the state; rather, they are "the natural right to enjoy freedoms defined and delimited exclusively" by state law.(86) Citizens must profess allegiance to the state first and religious institutions second; religion belongs to the private sphere, and freedom of religion exists within the confines prescribed by state laïcité. Clearly, recognition of freedom of religion within a laïc state is full of contradictory tensions, with the end result that although France may have very strong notions of negative freedom, positive freedoms can be significantly restrained.(87)

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(85) "Discrimination Positive," *Atlantic Monthly*, Vol. 293, No. 4, May 2004, p. 46; Lindsay Jones, "Doesn't Freedom of Expression Extend to Fashion Statements?" *The Daily News*, 30 May 2004, p. 20.

(86) Troper (2000), p. 1268.

(87) Robert Charvin and Jean-Jacques Sueur, *Droits de l'homme et libertés de la personne*, Litec, Paris, 1994, p. 172; Le Tourneau (1997), p. 277; Robert J. Pauly, *Islam in Europe: Integration or Marginalization?* Ashgate, Aldershot, 2004, pp. 42-43.

A number of different documents lay out the French conception of freedom of religion and state policy on laïcité. The *Declaration of the Rights of Man and of the Citizen* was established in 1789, inspired by the revolutionary zeal that inflamed the nation. This document exists as a complement to the French Constitution, laying out the groundwork of citizen freedoms. Article 10 sets out a negative notion of freedom of religion as restricted by the need to keep the peace and maintain public order: "No-one may be troubled due to his opinions, whether or not they are on religious issues provided that the expression of these opinions does not disturb the peace.[88]" This emphasis on public order is again emphasized in the law of 12 December 1905. Article 1 reads: "The Republic ensures freedom of conscience. It guarantees freedom of worship, subject only to the following restrictions in the interest of keeping the peace" [translation]. This law announces the state's refusal to recognize any specific religion, as well as the formal separation of the church and state; it is thus the basis of the laïc Republican tradition in France.[89] Finally, the French Constitution of 1958 (as amended) establishes the basic concept of state laïcité in Article 1, binding the concept of freedom of religion within its scope: "France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs."[90]

State laïcité essentially means that the state supports no belief or particular ideology and cannot discriminate based on religion.[91] This is a notion that fits well with France's policy of immigrant assimilation. While France may be open to newcomers, its policy is to insist on the homogeneity of French culture, with assimilation as a condition of membership.[92] The link between France's immigration policy and *l'affaire du foulard* was emphasized in a statement by former French prime minister Michel Rocard in 1989. Reacting to the public refusal of a number of girls to remove their Islamic headscarves in class, he said that

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(88) English translation taken from the French Ministry of Justice Web site at: http://www.justice.gouv.fr/anglais/europe/addhc.htm.

(89) Nielson (1995), p. 165; Troper (2000), p. 1276.

(90) English translation taken from the French National Assembly Web site at: http://www.assemblee-nat.fr/english/8ab.asp#TITLE%201.

(91) Eva Steiner, "The Muslim Scarf and the French Republic," *The King's College Law Journal*, Vol. 6, 1995/1996, p. 148.

(92) Mirian Feldblum, "Paradoxes of Ethnic Politics: The Case of Franco-Maghrebis in France," *Ethnic and Racial Studies*, Vol. 16, No. 1, 1993, p. 55; Joseph H. Carens, "Cultural Adaptation and Integration. Is Quebec a Model for Europe?" in Rainer Bauböck, ed., *From Aliens to Citizens*, Avebury, Aldershot, 1994, p. 181; Gilles Kepel, *Allah in the West: Islamic Movements in America and Europe*, Stanford University Press, Stanford, 1997, p. 210; Wayland (1997), p. 555; Singh (1999), p. 195.

France cannot be "'a juxtaposition of communities', it cannot follow the Anglo-Saxon models that allowed ethnic groups to live in geographical areas and cultural 'ghettos', and resulted in soft forms of apartheid."(93) Rather, he called for a policy of integration that relied on the recognition of mutual obligation and treatment of immigrants as if they were citizens. Significant to this analysis is the fact that although France has signed and incorporated the *International Covenant on Civil and Political Rights* into its domestic laws, the government has entered a reservation to article 27. France has refused to subscribe to this provision outlining protection of minorities, because of the nation's strong belief in the principle of equality laid out in the *Declaration of the Rights of Man*. In essence, France has no "minorities," as all its citizens are considered equal.(94)

This bounded notion of freedom of religion is tightly linked to a larger cultural and historical phenomenon in France, a country that revels in its revolutionary heritage as a secular republic. In a nation where the principle of laïcité is ingrained as an ultimate expression of French culture, freedom of religion will always be defined from within this framework. Partially inspired by the Enlightenment philosophy of glorified Reason doing battle against the corrupt influence of religion, France abides by a secular tradition which sees national republican identity as taking precedence over individual identity, with ethnic belonging and religious differences relegated to the private sphere.(95)

In the late 19th century, Jules Ferry laid out the principles of laïcité in the French school system. His philosophy saw laïcité as the elimination of human and material factors that block the emancipation of "l'âme de la jeunesse française."(96) The French educational system is essentially perceived as moulding citizens with equal rights and a shared set of values. The laïc public school system is a means of integration, leading ultimately to cultural assimilation. The current strong push among French feminist academics and activists who advocate the headscarf ban to protect young girls from the excesses of an oppressive religious regime is strongly linked to this interpretation of the school system. Laïc schools are seen as a place where equality reigns and where girls can be safe from the exigencies of their family and religion in order to become truly French.(97)

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(93) Feldblum (1993), p. 68; Singh (1999), p. 191.

(94) Poulter (1997), p. 47 and p. 52; Marie-Hélène Giroux, "La 'laïcité qui rassemble,'" *Le Devoir*, 25 February 2004, p. B4; *Atlantic Monthly*, Vol. 293, No. 4, p. 46.

(95) Poulter (1997), p. 50.

(96) Charvin and Sueur (1994), p. 115.

(97) Feldblum (1993), p. 55; Kepel (1997), p. 109; Wayland (1997), p. 552 and p. 556; *Le Monde*, 23 April 2004.

With such strong political and cultural roots, it is clear that principles of laïcité will not easily give way to the religious demands of immigrants. This is not racism or bigotry; rather, it is a fundamental notion of French identity that directs the state's entire policy. The common values of French citizenship and identity are currently being challenged by the rise in immigration and second-generation French Muslim girls rediscovering their cultural roots. The French government fears a form of multiculturalism that will destroy social cohesion as the country loses its soul.(98) Within this context, the concept of threats to public order provides a justification for setting limits on the constitutionally protected right of freedom of religion.

2. The Debate and Law

L'affaire du foulard began in October 1989 at a school in Creil, outside Paris. Three Muslim girls insisted on wearing Islamic headscarves to class in contravention of a school rule banning any overt expression of religion within the school. In addition to wearing headscarves, these girls were intensely religious – interrupting class for prayer, hysterical over the death of Khomeini in Iran, insulting Muslim students who did not wear *hijab*, not coming to certain classes, such as gym. When the girls were suspended for their refusal to remove their headscarves, a large number of other Muslim girls at the school began wearing their headscarves as a demonstration of support.(99)

When the media brought the story to the broader French public, there was immediate national uproar and debate among academics and politicians.(100) To resolve the conflict, Lionel Jospin, then Minister of Education, asked the Conseil d'État, the supreme administrative court in France, for an opinion on the issue.

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(98) Steven Vertovec and Ceri Peach, "Introduction: Islam in Europe and the Politics of Religion and Community," in Steven Vertovec and Ceri Peach, eds., *Islam in Europe: The Politics of Religion and Community*, St Martin's Press, New York, 1997, p. 7; Sandro Contenta, "Will the Headscarf Ban Backfire?" *Toronto Star*, 7 April 2004, p. F3.

(99) Jean-François Monnet, "A Creil, l'origine de 'l'affaire des foulards,'" *Hérodote*, Vol. 56, 1990, p. 52; Norma Claire Moruzzi, "A Problem with Headscarves: Contemporary Complexities of Political and Social Identity," *Political Theory*, Vol. 22, No. 4, 1994, p. 658; Le Tourneau (1997), p. 297.

(100) Moruzzi (1994), p. 658.

The Conseil published its *avis*[101] in November 1989, ultimately holding that although the French principle of laïcité was firmly established in the 1958 Constitution, wearing Islamic headscarves is not fundamentally incompatible with its broader ideals. The *avis* relied extensively on international human rights law and French statutory and constitutional provisions to indicate that although France is a secular state and its public service is regulated by the principle of laïcité, any discrimination based on religion is unconstitutional. However, the Conseil did note that France's international obligations are not absolute and that there will be situations where it is valid to impose limitations on freedom of religion.[102] In a statement that would be taken as the driving force of the *avis* and reiterated in the many cases to follow, the Conseil laid out the scope of the right and its limitations:

> In educational institutions, students' wearing of symbols that indicate their religious beliefs is not in itself incompatible with the principle of laïcité, to the extent that the wearing of such symbols constitutes the exercise of freedom of expression and freedom to express religious beliefs. Such freedom does not, however, extend to permitting students to wear religious symbols that – whether because of their nature, or the circumstances in which they are worn either individually or collectively, or their conspicuous character, or because they are a symbol of protest – would constitute an act of pressure, provocation, proselytism or propaganda, or detract from the dignity or freedom of the student or other members of the educational community, or compromise their health or security, or interfere with teachers' activities and their role as educators, or disrupt the establishment or normal operation of the public service [translation].

The Conseil left limitations based on these factors to be applied on a case-by-case basis, stating that disciplinary matters should be governed by local school rules in light of local conditions.[103]

The Conseil d'État's *avis* was a landmark out-of-court ruling that informed the entire outcome of the ongoing *affaire du foulard*. It was used as the basis of a Ministry of Education circular published that December. Reiterating the *avis*' scope for freedom of religion within the larger context of laïcité, Jospin also indicated that religious symbols should not

(101) Conseil d'État, 27 November 1989, "Le principe de laïcité et les signes d'appartenance à une communauté religieuse dans les écoles," (1991) 3 *R.U.D.H.* 152.

(102) Vertovec and Peach (1997), p. 7.

(103) Poulter (1997), p. 59.

interfere with normal school activities such as gym or other practical courses.(104) As a guideline for schools to judge the nature of the religious symbol, he said that "the demonstrative character of the clothing or symbols may be assessed in light of the attitude or words of the students and their parents."(105) Looking at the role of teachers within this framework, he said that: "in carrying out their duties, teachers … must unequivocally avoid any sign of adherence to a specific philosophical, religious or political creed … ."(106) By means of this circular, Jospin was essentially allowing *foulards* within the school system in an attempt to ultimately phase out their use. His view was that it was only through attending state schools that Muslim girls might acquire the cultural resources necessary to break free from their families' isolationism.(107)

Faced with the guidelines' ambiguous nature, schools began to apply the limitations differently throughout the country. While some administrators felt that only a full *chador* would breach the restrictions, other schools used the definition of propaganda, proselytism, and protest to justify a larger number of exclusions.

In 1992, the Conseil d'État issued a ruling in *Kherouaa et autres*,(108) a new case in which three girls were excluded first from gym class and then from the entire school for their refusal to remove their headscarves. Reaffirming its 1989 *avis* in a courtroom setting, the Conseil also looked to the breadth of the school rule that prohibited headscarves. As this particular rule called for an absolute prohibition on the wearing of religious symbols, the Conseil determined that the rule was invalid due to an *excès de pouvoir* – the girls' freedom to wear their headscarves was upheld.(109)

Following this decision and in the midst of a wave of anti-Muslim sentiment in France, dozens more girls were barred from their classes in at least four French cities. Thousands of Muslim students began holding protests, using the exclusion of students as a symbol around which to mobilize French Muslims. Led by the right-wing political leader Le Pen, a large part of French society came to perceive the headscarf as a symbol of Muslim

(104) Shadid and Koningsveld (1995), p. 91.

(105) Le Tourneau (1994), p. 290.

(106) "Neutralité du service public, neutralité dans le service," *Le Dalloz*, No. 36/7001, 19 October 2000, p. 749.

(107) Poulter (1997), p. 58.

(108) *Kherouaa et autres*, (1993) *Recueil Dalloz Sirey*, 9ième cahier – Jurisprudence, p. 108.

(109) *Ibid.*, p. 109.

conspiracy and extremism. It was seen as a provocative symbol of Muslim identity in the neutral and secularized public sphere.(110)

In an effort to bring the issue under closer regulation, the new Minister of Education, François Bayrou, issued a circular in September 1994 that in many ways contradicted the wide scope offered by the Conseil's approach. Bayrou pointed out that school is a place for integration, a response to the French notion of creating a single people within a French Republic. Stressing that there must be no discrimination within the school system, Bayrou held that it would be impossible to allow the presence of conspicuous religious symbols, as this would effectively separate certain pupils from the general rules of communal life – the symbol itself would be an element of proselytism. Rather than pointing first to the public order justifications, the circular stated that schools should ban all conspicuous religious symbols that were not merely discreet representations of personal conviction.(111) Bayrou's annexed model read:

> Students' wearing of inconspicuous symbols, indicating their personal attachment to a religious belief, is permitted within the school establishment. But conspicuous symbols, which in themselves constitute elements of proselytism or discrimination, are prohibited. Also prohibited are provocative attitudes, disregard for requirements of attendance and security, and behaviour that is likely to put pressure on other students, interfere with teachers' activities, or disrupt order within the establishment [translation].(112)

The political result of this circular was to provoke 2,000 girls across the country to flout the prohibition and for schools across France to tighten their prohibitions.(113)

A new headscarf case, *Aoukili*,(114) came before the Conseil d'État in 1995. Because of a school rule that prohibited wearing religious symbols that impeded class participation or presented a safety hazard, two Muslim girls were suspended from their school for refusing to take off their headscarves in gym class. In anger, the girls' father and others

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(110) Anna Elisabetta Galeotti, "Citizenship and Equality: The Place for Toleration," *Political Theory*, Vol. 21, No. 4, 1993, p. 596; Kepel (1997), pp. 149-150, 223-226; Wayland (1997), p. 554; Vertovec and Peach (1997), p. 7.

(111) Steiner (1995/1996), p. 148; Poulter (1997), pp. 61-62; Le Tourneau (1997), pp. 293-294.

(112) Le Tourneau (1997), p. 293.

(113) Cynthia DeBula Baines, "L'Affaire des Foulards – Discrimination, or the Price of a Secular Public Education System?" *Vanderbilt Journal of Transnational Law*, Vol. 29, No. 2, 1996, p. 307; Poulter (1997), p. 62; Wayland (1997), p. 553.

(114) *Aoukili*, (1995) *Recueil Dalloz Sirey*, 26ième cahier – Jurisprudence, p. 365.

began a protest outside the school and distributed propaganda. The school administration responded by definitively expelling the girls. Turning away from the apparently wide scope afforded by their earlier decisions, the Conseil reiterated the right to wear a headscarf, but indicated that the restriction found in the school rules was fully compatible with these principles.(115) The restriction was not general in its purpose or effect, and the headscarf was incompatible with the gym program. The Conseil further justified its decision by pointing to the disruption to school activities provoked by the incident and the aggravation caused by the protestors. These were serious infractions of public order and could not be tolerated.(116) In a further case in 1999, the Conseil determined that students must wear clothing compatible with the proper functioning of the school program, particularly in gym and technology classes, even though the headscarves in question were not conspicuous or worn as an act of protest.(117) The public order argument based on proselytism had been essentially expanded to include a broader protection for the proper functioning of the school program/curriculum in a French laïc state.

The French religious symbol guidelines affected not only students, but school employees and teachers as well. In 2000, a Muslim *surveillante* (a type of student supervisor) was dismissed for wearing her headscarf to school. The Conseil d'État dismissed the complaint arising from this case, finding no violation of the woman's freedom of religion. As a member of the public service she benefited from freedom from religious discrimination when hired and must now equally respect the principle of laïcité, which prohibits the free expression of religion within the public service. To wear religious symbols at work, the Conseil stated, is a fundamental violation of one's duties in this French public service setting.(118)

In 2003, faced with ongoing popular and political unrest over the issue, President Jacques Chirac commissioned a study of the headscarves issue within the context of the burgeoning multi-ethnic presence in the school system and the French policy of laïcité. Published in December 2003, the resulting Stasi Report recommended a law that would ban all religious symbols from the classroom. Despite massive protest across the country – particularly from Muslims and some Sikhs – in March 2004, the French National Assembly passed a law banning all conspicuous religious symbols from public primary and secondary schools, thus

(115) Steiner (1995/1996), p. 146; Le Tourneau (1997), p. 284.

(116) *Aoukili*, pp. 365-367.

(117) "Les limites à la liberté d'expression religieuse des élèves dans les collèges et lycées," *Le Dalloz*, No. 11/6976, 11 March 2000, p. 253.

(118) "Neutralité," *Le Dalloz*, p. 747; "Éducation : une surveillante d'établissement scolaire ne doit pas porter le foulard durant l'exercice de ses fonctions," *Le Monde*, 9 May 2000.

providing a strong signal across the country that would reinforce principles of laïcité in the school system.(119)

This law holds that:

> The prohibited symbols and clothing are those that, when worn, are immediately recognized as indicating a specific religious belief, such as the Islamic veil, by whatever name it is called, the kippa, or an excessively large cross … The law prohibits a student from invoking the religious nature of such objects as a justification for, e.g., refusing to conform to the rules that apply to students' behaviour in the establishment [translation].

The law does not, however, prohibit more discreet religious symbols, such necklaces with a cross, Star of David, or hand of Fatima. The guidelines established under the law would also allow Muslim girls to wear non-religious bandanas in those schools that allowed them, and would allow Sikh boys to wear a hairnet in all schools.(120)

To date, most schools in France have adopted the law's suggested model: "the wearing of symbols or clothing by which students *conspicuously* indicate their religious belief is prohibited" (emphasis added). Violation of this ban would be followed by a discussion with the student, parent, and a possible third party, while the student receives private tutoring. If the ban is still not respected, then the student would be expelled. However, a small number of schools have rejected this suggestion, opting for a more complete ban on all religious headcoverings in class, whether conspicuous or not.(121)

The new law seems to have had some effect. Whereas in 2003, 1,500 students caused disruptions because of their refusal to remove religious symbols, when schools reopened in September 2004, the numbers were significantly smaller. By 20 September 2004, only 101 students continued to defy the new law and entered into discussions with school officials. Most of these cases concerned Islamic headscarves, although two or three dealt with large crosses, and four Sikh turbans were also at issue.(122)

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(119) "La taille du foulard," *Le Monde*, 23 April 2004, p. 16.

(120) Elaine Ganley, "Turbans out, Hairnets in for Boys under French Law," *National Post*, 19 May 2004, p. A16.

(121) "Des cellules de veille au service des établissements," *Le Monde*, 1 September 2004, p. 10.

(122) "Girls Defy French Ban on Head Scarves," *The Globe and Mail*, 8 September 2004; "Loi sur la laïcité : M. Fillon satisfait malgré 101 cas 'problématiques,'" *Le Monde*, 21 September 2004, p. 12.

Although there is no similarly legislated direct ban on religious symbols in the public service, the same strict principles of laïcité apply. In the public service, principles of laïcité mean that there must be neutrality in the hiring process and in dealing with individuals both within and outside public institutions. Government employees may not wear religious symbols at work. A number of court cases involving the public service have upheld these ideals. The argument is that if employees benefit from freedom from discrimination in the hiring process, they must in turn respect the laïcité of the public service.(123) As one example of this approach, a Muslim employee of the City of Paris was suspended from her job in December 2003 for refusing to remove her headscarf or to shake men's hands.(124) However, outside the public service, the same does not necessarily hold true. In June 2003, a Paris Court of Appeal upheld a decision reinstating an employee in her job at a telemarketing firm that had dismissed her for refusal to remove her headscarf at work.(125)

Mirroring Canadian decisions upholding the right of a judge to enforce courtroom decorum, in November 2003, France's Justice Minister replaced a female juror who wore her headscarf to court, on the grounds that this action was necessary in order to ensure a fair trial. However, while the Canadian decisions were based on public order/administration of justice concerns about the protection of judicial independence and immunity, the French decision relied on perception of bias in its argument concerning protection of the administration of justice. The Minister removed the juror with a headscarf because, "when in a court … someone outwardly shows a religious, philosophical or political conviction, that can be a sign that his decision as a juror will be influenced."(126)

Finally, the issue of headscarves at civil weddings – another aspect of the French public sphere – has also arisen in a number of individual circumstances. As one example, in November 2003, the mayor of a suburb of Paris banned Islamic headscarves at civil weddings in his jurisdiction.(127)

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(123) Shadid and Koningsveld (1995), pp. 129-130.

(124) "Chirac Wants Law Banning Religion in Schools," *The Globe and Mail*, 17 December 2003.

(125) *International Religious Freedom Report 2003*.

(126) "French Juror Dismissed from Duty for Wearing Muslim Head Scarf in Court," *Associated Press*, 25 November 2003.

(127) Shahina Siddiqui, "A Question of Religious Freedom," *Winnipeg Free Press*, 7 January 2004, p. A11; "Une mairie interdit à une femme voilée d'être témoin de marriage," *Le Monde*, 27 September 2004, p. 9.

F. Implications for European Policy and Law

The widespread nature of the religious symbols debate, and the various political and cultural factors influencing interpretations of freedom of religion in European countries, give rise to the question of how these national differences will shape the scope of freedom of religion within European human rights law at the regional level. In June 2004, the European Court of Human Rights (ECHR) issued its first full chamber decision on the headscarves issue. The decision was based on a case arising in Turkey, a predominantly Muslim country with a history of laïcité rivalling that established in France. This decision may provide a touchstone for how similar issues will be dealt with in the future.

1. European Human Rights and National Secular Policies

Under the European Convention, article 9(1) protects freedom of thought, conscience and religion:

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

However, subsection (2) permits certain restrictions on the manifestation of belief:

> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The ECHR accordingly grants State Parties a "margin of appreciation" to assess those needs, allowing them to balance the religious freedoms of one group against those of others. The court has proven less willing to uphold religious freedoms when the impugned beliefs are expressed through conduct that has an adverse effect on the interests of others. The margin of appreciation means that the ECHR will always play a subsidiary role, as, in principle, national authorities are better placed than an international court to evaluate local needs and conditions. Thus, decisions

made by local authorities are granted some leeway, but are ultimately subject to review by the court for conformity with the requirements of the European Convention.(128)

Where the relationship between religion and the state is at stake, the role of the national decision-making body must be given particular importance. Each state's attitude towards religion is, at its core, a political issue, and generally a product of historical tradition and the social circumstances in each country. The ECHR recognizes the need for a fair balance among all of the interests at stake – the rights and freedoms of others, the need to avoid civil unrest, threats to public order, and policies of pluralism. The margin of appreciation is especially important in discussions of religious symbols in the educational system, as policy on this issue will vary widely depending on national traditions, and because there is no uniform conception of the requirements of "the protection of the rights and freedoms of others."(129)

The European Convention is ultimately a secular instrument that has to be applied in a manner that will promote the democratic values which underlie it. As a result, the emphasis of article 9 is on pluralism and tolerance of the views of others, rather than on the protection of individual beliefs which sometimes conflict with the demands of a secular democratic society.(130) Because of the dominance of the margin of appreciation when dealing with this freedom, it is likely that the ECHR would give significant weight to the values underlying French laïcité in the school system were the issue ever to come before the court.

2. Religious Symbols

Some years before its first full chamber decision on the headscarves issue in 2004, the European Commission for Human Rights had rejected the applications of two Turkish students in the 1990s who had been refused diplomas because the photographs they submitted depicted them wearing *hijab*.(131) The Commission ruled that this prohibition was justifiable as a reasonable limit to the right to follow one's religious convictions. By applying to secular universities, these women had effectively accepted the conditions of those universities, in which religious requirements could not be expected to be unconditionally safeguarded. The

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(128) Stanley Naismith, "Religion and the European Convention on Human Rights," *Human Rights & UK Practice*, Vol. 2, No. 1, 2001; Human Rights Watch, *Turkey: Access to Higher Education for Women who Want to Wear the Headscarf*, June 2004, available at: www.hrw.org/backgrounder/eca/turkey/2004/6.htm.

(129) Javier Martinez-Torron and Rafael Navarro-Valls, "The Protection of Religious Freedom under the *European Convention on Human Rights*," *Revue générale de droit*, Vol. 29, 1999, p. 311.

(130) Naismith (2001).

(131) *Bulut* v. *Turkey*, Application No. 18783/91, and *Karaduman* v. *Turkey* (1993), 74 *Comm. Eur. D.H.D.R.* 93.

Commission held that in a country with a majority Muslim population, such a visible token of religion could result in non-Muslim students being put under pressure. The ban on headscarves was necessary to protect public order and the rights and freedoms of others. Additionally, the Commission pointed out that the impugned photographs were for identification purposes only, and could not be seen as a constitutionally protected means of manifesting one's religion.

In the 2004 *Case of Leyla Sahin* v. *Turkey*,(132) a medical student was barred from writing her university exams because she wore a headscarf in violation of university rules and Turkish law. The case was pursued through the national court system and ultimately brought to the ECHR, which found no violation of article 9. Although the university's headscarf ban clearly interfered with Ms. Sahin's right to manifest her religion, the ECHR ruled that it was a justified and proportionate interference. Not only was there a strong legal basis for the prohibition in Turkish law, the ban also served the legitimate aim of protecting the rights and freedoms of others and of protecting public order. The court recognized that there were significant Islamic influences in Turkey, and that this prohibitive measure was needed in order to protect other women from pressure to wear the headscarf, and to avoid fomenting heated political debates that could aid the cause of Muslim extremists in the country. Essentially, the ban was necessary interference to protect secularism and (gender) equality in a democratic Turkish society. This decision was also aided by the ECHR's use of the margin of appreciation, which confined the court to determining whether the reasons Turkey gave for the interference with freedom of religion were relevant and sufficient, and whether the measures taken at the national level were proportionate to the aims pursued.(133)

Finally, in 2002, the ECHR issued another decision dealing with a teacher who was prohibited from wearing her headscarf in a Swiss primary school. In *Dahlab* v. *Switzerland*,(134) the ECHR upheld the Swiss government's right to require a Muslim teacher to remove her headscarf because the ordinance did not target the complainant's religious beliefs, but rather aimed to protect the freedom of others as well as public order. This was particularly true given that the very young children in Ms. Dahlab's classes would be more open to influence than older children. In this case, the court held that the Swiss government had not exceeded its margin of appreciation. The measures were justified given the complainant's role as a teacher who exercised educational authority as a representative of the state.(135)

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(132) European Court of Human Rights, Application No. 44774/98, 29 June 2004.

(133) *Case of Leyla Sahin* v. *Turkey*, paras. 100-103.

(134) Application No. 42393/98, 15 February 2001.

(135) Human Rights Watch (2004).

CONCLUSION

What becomes clear from this analysis is that while issues of freedom of religion are being debated in courts throughout the world in a variety of different contexts, strictly secular and laïc states have a unique approach to the question of religious symbols in the public sphere. Stemming from a religious source with few roots in Western European society, the Islamic headscarf – a symbol that has gained particular prominence in this debate – has provoked a cultural identity crisis in many European countries that has in many ways served to reinforce the strength of policies of laïcité. In recent countries of immigration where minorities tend to live a more marginalized or stigmatized existence (note that most of the French cases occurred in the poorer outskirts of large cities), young women are reacting to the negative stereotyping of Islam by defiantly emphasizing their religious identity through wearing the headscarf.(136) In an attempt to guard society from the complexities of multiculturalism, many states are turning to secularism as a protective shield, effectively preventing the broad expression of a right that is guaranteed in international and domestic constitutional laws.

In countries such as Canada and the United States, the question of religious symbols has produced significantly less of an identity crisis, as these two nations were built upon the foundations of immigration and have needed to accept difference in order to survive as a nation.(137) As a result, both Canada and the United States have a political and constitutional climate that has allowed their government and courts to interpret freedom of religion in its broadest form, adopting an approach of neutral accommodation. Stemming from this political and social culture of multiculturalism in North America, Canadian commentators reject the more absolute feminist argument heard in France that advocates liberating young women from the headscarf. Rather, the Canadian argument moves away from strict principles of equality and focuses on the right of the woman to choose.(138) In a similar vein, Ontario is currently examining the possibility of establishing Islamic sharia courts to settle family and civil law disputes in the province. Jewish family law also operates in tandem with provincial and federal legislation.

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(136) Saharso (2003), p. 10.

(137) Wayland (1997), p. 556.

(138) Bosset (1995), p. 39.

Essentially, each country in the Western world provides a very similar guarantee of freedom; however, more recent countries of immigration have different interpretations of its scope. A very similar constitutional proportionality test is applied by the courts and through the legislation; it is based on strong principles of freedom of religion, as limited by issues such as safety and public order. However, that test is applied differently depending on each country's historical traditions and its social and political culture, which have a profound influence on legal arguments concerning safety, security, and public order.