

Published in: Titia Loenen and Jenny Goldschmidt (eds): Religious Pluralism and Human Rights in Europe: Where to Draw the Line? Intersentia, 2007

Headscarves in Schools: European Comparisons

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1. INTRODUCTION: 'HIJAB VS. GENDER EQUALITY'

This article discusses one of the most controversial issues concerning accommodation of religious pluralism in Europe today: the accommodation of Islamic dress codes for girls and women in public educational institutions. Two rulings by the European Court of Human Rights, '*Dahlab versus Switzerland*' (2001), on a teacher's right to wear the religious headscarf and '*Sahin v Turkey*' (2004/2005), on a student's right to wear the headscarf, concluded that such expressions of the right to religious manifestation might legitimately be restricted by member states.¹ In *Dahlab*, the Court upheld the judgment of the Swiss court that gave priority to the right of pupils to receive education in a religiously neutral context over the teacher's freedom to manifest her religion. In *Sahin*, the Court accepted the reasons for the Turkish ban on wearing religious symbols in institutions of higher education, including the constitutionally grounded principle of secularity, and the strong political significance of religious symbols in the Turkish context. Leyla Sahin left Turkey to finish her education in Austria. Her case was tried also by the court Grand Chamber, and has, in spite of Turkey's claims to unique context, the probable implication that states might (anyhow) be given a large margin of appreciation on the issue of religious attire in public schools. There is, according to the court, no minimum standard observable in Europe for the accommodation of such religious manifestations. Neither will the court, apparently, contribute to establish it.²

In controversies over girls' and women's religious attire, a range of liberal principles are activated: state neutrality, gender equality, religious freedom, multicultural accommodation. Controversies are played out on a number of societal arenas: in schools,

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¹ ECtHR 15 February 2001, *Dhalab v Switzerland* and ECtHR 10 November 2005 *Sahin v Turkey*; all decisions by the ECtHR can be accessed through its website: www.hudoc.echr.coe.int/

²cf. T.LOENEN, 'Women caught between religion and equality? Developments in international and European human rights law', To appear in: S.CABBIBIO and K.E. BØRRESEN(eds.) *The Impact of Cultural and Religious GenderModels in the European Formation of Socio-Political Human Rights*. (Rome- Herder, 2006). It seems that the Court will be reluctant to get in the way of the national authorities' assessment whether a ban is 'necessary' or not, which then will mean that the decision on the limits put on religious manifestations is left largely at the national level.

work places, public offices – in parliaments and in courts. Through its headscarf rulings, the ECtHR has taken a stance in these general political debates. This is because the court through its rulings also sanctions a general perception of the headscarf controversy as one of a clash between antagonistic value systems: the religious gender hierarchy within Islam versus secular gender equality rights. Wearing a headscarf appears ‘to be imposed on women by a religious precept that is hard to reconcile with the principle of gender equality’, the court maintains. This juxtaposition, which was also used by the Turkish state in the *Sahin* case, seems to be repeating a remark first made by the Swiss Federal Court in the *Dahlab* case:

‘It must also be acknowledged that it is difficult to reconcile the wearing of a headscarf with the principle of gender equality... which is a fundamental value of our society enshrined in a specific provision of the Federal Constitution (Article 4 § 2) and must be taken into account by schools.’³

But many European countries, with expressed commitments to gender equality and legal protections against gender based, ethnic and religious discrimination, have not identified the issue of religious attire similarly – that is, as an issue of conflicting rights. In this article, the ‘value conflict’ assessment sanctioned by the ECtHR is critically discussed in section 2 and 3. Section 4 outlines state approaches to religious attire in the public classroom in different European countries, concentrated on regulations concerning pupils’ and students’ religious dress, mainly based on information provided in *Sahin*. The VEIL project, a new EU financed research project on religious attire, identifies three main categories of state approaches: established restrictive bans, soft, selective regulations, and no restrictive regulations.⁴ I use these categories to evaluate the claim of the ECtHR that regulations on religious attire vary widely across Europe, which is one of the stated premises for the acceptance of national restrictions. This evaluation actually points in the opposite direction. The standard approach in European member states is to allow headscarves worn by pupils and students.

Furthermore, in section 5, I present an example of a headscarf ban assessment which runs contrary to the ECtHR’s general evaluation of the relationship between religious headscarves and gender equality. This example addresses use of hijab in the work place. It does not address educational institutions and teaching situations as such. But it specifically addresses the issue of gender equality values. In Norway, the Gender Equality Ombud has found bans of headscarves in two private enterprises to be in violation of the indirect discrimination clause in the Gender Equality Act. In clear contrast to the approach taken by the ECtHR, the right to wear the headscarf to work is here treated as an issue of parallel and ‘intersecting’ equality rights: women’s equal rights to religious manifestation and to non discrimination in the work place. Finally, section 6 investigates some new developments in national policies on pupils’ religious attire, where basically liberal approaches to religious dress in public schools nevertheless differentiate between headscarves on the one hand, and full body covering which includes face veils on the other hand. The new drawing of a demarcation line for ‘acceptable’ religious manifestations by pupils and students, still presents a soft, selective form of regulation compared to blanket bans on religious dress. Through this kind of differentiated approach, a more sensible compromise might be found on the continued controversies over religious dress policies in public schools.

2. ACCOMMODATION OF RELIGIOUS PLURALISM

³ *Sahin*, supra note 1, 111.

⁴ VEIL – Values, Equality and Difference in Liberal Democracies. Debates about Female Muslim Headscarves in Europe. Proposal, EU research arena 7.2.1., Birgit Sauer and Siegelinde Rosenberger, April 2005.

State policy on religious pluralism is often held to be dependent on national state – church relations. On the issue of religious attire for pupils in schools and work places, we see how the Turkish and French restrictive legislation is justified with reference to the organising principle of secularism, while traditional Dutch accommodating policies is explained for instance with reference to the organising structure of pillarisation. In Norway, the official state religion and constitutionally grounded privileges of the state church, is similarly held to implicate a particular state responsibility to accommodate/ facilitate minority religions. With respect to the wearing of religious attire in schools, the very existence of a Christian intention clause for educational institutions makes it unacceptable to deny the expression of other religious beliefs, public authorities regularly explain. Only one political party in Norway favours a restrictive policy on religious attire in schools. This is the Progressive Party, a member of the rightist-populist party family in Europe. The Progressive Party has proposed to ban the headscarf in primary and secondary schools on the grounds that one cannot ‘tolerate that girls in such a young age are systematically indoctrinated to accept that women are subordinate and can be suppressed as adults’. It has also argued that the headscarf works to exclude children from the school community when they are dressed in a way that will ‘stigmatize’ them.⁵

On church – state relations, there is obviously no common European model, and none on the general accommodation of religious pluralism. Yet state support for church institutions, respect for the self-determination of religious communities and the extension of privileges to a growing circle of religious organisations, is now held ‘to be the norm in most countries’.⁶ In a broad European comparison, Zsolt Enyedi observes a kind of European standardisation, and at the same time, that domestic factors seems to be less and less able to account for the dynamic of church and state relations. International organisations are major players in shaping national patterns particularly on issues related to discrimination among churches. Enyedi refers to legislative drafts in countries like Georgia, Russia, Estonia and Romania which aimed to restrict the rights of religious minorities, and how these all were – in the end – withdrawn, modified or vetoed, largely as a result of international pressure. But the contributions of the European Court of Human Rights in this process of standardisation Enyedi holds to be modest, leaving wide margins for member states: the court is regularly shown to tolerate establishment, differential treatment of mainstream and peripheral churches, the denial of church status to certain religious groups.⁷

With regard to larger politics of multiculturalism, it is also a quite general observation that pluralism has been accommodated more easily with regard to religious than to ethno-cultural rights. This holds true even as policies and ideologies of multiculturalism is seen to be in decline on, largely, a cross European scale. But the growing fear of political Islam has put new pressure on this most familiar / least controversial dimension of minority accommodation. And much political debate is now constructed in terms of the (i)reconcilability of Islam with democratic values.

To this debate, the European Court of Human Rights has made its distinctive contributions. In the headscarf decisions, gender equality principles are seen to collide with prescribed religious duties. The court also sanctions perceptions of the headscarf as a

⁵ Apparent from private bill proposals in parliament, dok. 8:93 (2003-2004).

⁶ Z.ENYEDI, ‘Conclusion: Emerging Issues in the Study of Church-State Relations’, (2003) 2, in *West European Politics*, 219-232.

⁷ The court’s approach to restrictions on the wearing of religious attire in public education could possibly be seen as a confirmation of this general approach. Still peculiar, however, is the court’s more subtle interventions on the headscarf issue, as this is observed when one of the court’s judges, in a secret session, met with the Stasi commission which prepared the ban on religious symbols in French schools. The judge here presented the court’s views on what were acceptable exemptions under article 9 of the ECHR. This way, he actually advised the commission on how to design a bill which, in the case of a future complaint, could pass the scrutiny of the court. Cf. J.KLAUSEN, *The Islamic Challenge*, (Cambridge: Cambridge University Press, 2006), 175.

‘powerful external symbol’. This in turn contributes to remove the issue from one of (assessment of) the legitimacy of restrictions of individual rights to (assessments of) the illegitimacy of religion as collectivistic pressure politics.

The court’s reasoning on this issue in *Sahin*, is cited in length below:

‘Consequently, it is established that institutions of higher education may regulate the manifestation of the rites and symbols of a religion by imposing restrictions as to the place and manner of such manifestation with the aim of ensuring peaceful co-existence between students of various faiths and thus protecting public order and the beliefs of others (see, among other authorities, *Refah Partisi and Others*, cited above, § 95). In the *Dahlab* case, which concerned the teacher of a class of small children, the Court stressed among other matters the ‘powerful external symbol’ which her wearing a headscarf represented and questioned whether it might have some kind of proselytising effect, seeing that it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality. It also noted that wearing the Islamic headscarf could not easily be reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society should convey to their pupils.’⁸

The evaluation of the Islamic headscarf as a threat to democratic messages thus echoes the *Refah* decision’s core; on the fundamental opposition between Sharia regime ambitions, and democratic values and respect for human rights.

‘The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one’s respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of public and private life in accordance with religious precepts.’⁹

The decision in *Sahin* is, then, strongly influenced by the court’s general ambition to curb political Islam. That there is continued controversy over the form of this ambition is to put it mildly. Commenting on the *Refah* judgement, Martin Scheinin, a former member of the UN Human Rights Committee, criticises the court by stating that it is ‘sufficient’ to state that the court, in the above juxtaposition, made an ‘all too sweeping’ reasoning.¹⁰ A similar appreciation is actually also made by the dissenting judge in *Sahin*, here on the assessments of the relationship between headscarves and gender equality. The court had made an unsubstantiated claim, a purely abstract weighing of concerns: ‘However, what, in fact, is the connection between the ban and sexual equality? The judgement does not say’.¹¹

3. MULTICULTURAL VULNERABILITIES

⁸ *Sahin*, supra note 1, 111.

⁹ EcrTHR 13 February 2003, *Refah Partisi v. Turkey*, 72.

¹⁰ M.SCHEININ, ‘How to resolve conflicts between individual and collective rights?’ in M.SCHEININ and R.TOIVANEN (eds.), *Rethinking Non-discrimination and Minority Rights*, (Åbo/Berlin: Institute for Human Rights, Åbo Akademi University/German Institute for Human Rights, 2004), 219-239.

¹¹ *Sahin*, dissenting opinion of Judge Tulken, 11.

This is not to deny that gender equality commitments regularly ought to prompt questions about women's minority-within-minorities status. A sharia rule of family law implements gender hierarchies which place girls and women in particularly vulnerable positions. But is there a 'paradox of multicultural vulnerability' present also in decisions about permitting or restricting the use of the religious headscarf?

One important strand of feminist concern with religion is tied to the citizenship status which might follow from particular accommodation politics. The problem has been coined in general terms by Aylet Shachar as a paradox of multicultural vulnerability: multiculturalism would actually present a threat to citizenship if pro-identity group policies, aimed at levelling the playing field among minority groups and the larger society, systematically allow the maltreatment of women, effectively annulling their citizenship status.¹² Shachar's primary concern is with religiously grounded family law and systems that allow formal legal pluralism in this respect. In the context of the present discussion, the parallel question would be whether accommodating attitudes to religious attire in public education, can be argued as a special protection of religious groups which in effect put restrictions on women's rights to equality.

This is clearly the viewpoint of the ECtHR, from two different angles. Firstly, as a view on the meaning of the headscarf itself as a submissive symbol; secondly, as view on proselytising effects and the rights and freedoms of others, where, in the court's opinion, the choices of some women, who wear the headscarf, may put undue pressure on other women, who would prefer not to wear it.

Discussing dilemmas of 'minorities within minorities', Anne Phillips distinguishes between three forms of accommodation policies: extensions, exemptions and autonomy. 'Extensions' covers policies which extend to minorities privileges previously enjoyed only by members of the majority – for example, extending a principle of state support for denominational schools to include 'new' religions. 'Exemptions' covers policies which exclude individual members of particular groups from requirements that are binding on other citizens – for example, allowing types of religious attire even when they breach with general dress regulations. 'Autonomy' covers policies where religious/ cultural communities retain authority in the regulation of certain aspects of property or family affairs, and citizens may come under different jurisdictions depending on their religious or cultural attachments. This is, Phillips notes, the category that has been thought to throw up the hardest cases, when resulting regulations put women at a disadvantage in relation to men.¹³

The point that she stresses, however, is that 'the judicial approach' to dilemmas of gender/culture/religion often risk to overcharge actual dilemmas. The judicial approach tends to treat (any) equality problem as related to fundamentally opposed principles of justice and fundamentally different value systems. But in many cases, there is no deep disagreement; no fundamentally opposed understandings of justice that have to be weighed, or balanced. When political theory engages with these dilemmas, hard cases are sometimes made harder than they are, in order to highlight the resolution.

In my opinion, this is a helpful way to address the controversial aspects of the ECtHR's headscarf evaluations. In its general assessment of 'conflicting values', the court can be argued to make the actual case harder than it is. It 'constructs' a decision situation of colliding rights – the right to religious manifestation versus the right to gender equality. At the same time, the court

¹² A.SHACHAR, 'The Paradox of Multicultural Vulnerability: Individual Rights, Identity Groups, and the State', in: J.JOPPE and S.LUKES (eds.), *Multicultural Questions*, (Oxford: Oxford University Press, 1999), 87-111.

¹³ A.PHILLIPS, 'Dilemmas of gender and culture: the judge, the democrat and the political activist', in: A.EISENBERG and J.SPINNER-HAVEL (eds.), *Minorities within Minorities. Equality, Rights and Diversity* (Cambridge: Cambridge University Press, 2005), 113-134.

sanctions the enlargement of the issue from individual religious rights to collective religious ambitions.

In making these enlargements, I'm quite sure that the court has also weighed another risk; that it might provide legitimacy to hostile sentiments in the general public towards accommodation of religious minorities. This could still be an (unintended) effect, which would run counter to the court's stated ambitions for a religiously tolerant Europe, as expressed also in *Sahin*:

'Pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society'. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position... Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society.'¹⁴

As an apropos to the discussion in this section, I will briefly report on some severe anti-pluralist sentiments which are recently captured in two attitudinal surveys in Norway and Sweden. Only to a modest degree, are these attitudes seen to distinguish between organised and individual aspects of religious pluralism.

The surveys are on 'Attitudes towards integration', and - in terms of religious pluralism - particularly focus on integration of Islam. Both surveys reveal strong popular resistance to public forms of religious manifestations. About organized forms, the attitudes are somewhat less restrictive in Sweden than in Norway. About individual expressions, which concentrate on religious attire, attitudes are shown to be quite similar.

In the Norwegian survey, 80 percent disagreed with a general statement that 'the practice of the Muslim religion' should be facilitated ('made easier'). A mere 9 percent answered affirmatively. Approximately the same percentage was opposed to 'education of imams in Norway'. 50 percent were opposed to 'the construction/building of mosques', and no more than approximately 15 percent were positive to this. About 60 percent were opposed to the use of headscarves in schools and public employment, while a similar 15 percent expressed a positive attitude to this. The only public space where headscarves meet more indifference than resistance is 'the street'. (40 percent are indifferent, 37 percent opposed)

In the Swedish survey, 65 percent disagreed that the practice of the Muslim religion should be facilitated. Approximately 70 percent were opposed to education of imams in Sweden. 37 percent were opposed to building mosques. About the same percentage were here indifferent, only 16 percent in favour. 57 - 54 percent were opposed to headscarves in schools and public employment, while a similar 16 percent expressed a positive attitude. Attitudes to the use of headscarves in 'the street' are identical with the pattern shown in Norway. The Swedish report interprets this greater acceptance of 'the street' as support for a more 'private' expression of religious belief. This report compares attitudes towards the scarf with those mapped in a French survey from 2003. The general conclusion is that popular attitudes towards the headscarf are largely similar, despite clear differences in French and Swedish state approaches to secularism and religious pluralism.¹⁵

¹⁴ *Sahin*, supra note 1, 108

¹⁵ Integrationsverket (2005) Integrationsbarometer 2004. Integrationsverkets skriftserie V, Integrerings- og mangfoldsdirektoratet (2006) Integreringsbarometeret 2005 (www.imdi.no)

In both Norway and Sweden, clear majorities support the opinion that ‘Islam is not compatible’ with basic societal values. The people behind the Swedish report bluntly sum up: the survey tells us that there is no recognition of Islam as naturally belonging within the religious diversity of society. There would clearly be little inter-religious tolerance manifested, if popular opinion were to set the standard alone.

4. RELIGIOUS ATTIRE IN THE PUBLIC CLASSROOM: EUROPEAN VARIATIONS

The VEIL project will investigate policies on religious attire in public settings in eight European countries; Austria, Denmark, France, Germany, Greece, Netherlands, Turkey and the UK. The project proposal groups France, Turkey and Germany in a category of state policies of: ‘*established restrictive bans*’. The Netherlands and the UK are placed within a category of: ‘*soft, selective regulation*’, while Austria, Denmark and Greece are countries with: ‘*no restrictive regulation*’. The research group of the VEIL project also underscore the differences between western and eastern European countries with respect to actual controversy over Islamic dress codes. *Sahin* provides a more extensive overview of current (2005) European regulations. The major points of this overview, concentrated on regulations concerning pupils in primary and secondary schools, and students in universities, is repeated below.

Turkey, Azerbaijan and Albania are the only member states to have introduced regulations on wearing the Islamic headscarf in universities.

In France, legislation was passed on 15 March 2004 regulating the wearing of signs or dress manifesting a religious affiliation in State primary and secondary schools. The legislation inserted a new Article L. 141-5-1 in the Education Code which provides: ‘In State primary and secondary schools, the wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited. The school rules shall state that the institution of disciplinary proceedings shall be preceded by dialogue with the pupil.’ The Act applies to all State schools and educational institutions, including post-baccalaureate courses (preparatory classes for entrance to the *grandes écoles* and vocational training courses). It does not apply to State universities. In addition, as the circular of 18 May 2004 makes clear, it only concerns ‘... signs... such as the Islamic headscarf, however named, the kippa or a cross that is manifestly oversized, which make the wearer’s religious affiliation immediately identifiable.’

In Belgium there is no general ban on wearing religious signs at school. In the French Community a decree of 13 March 1994 stipulates that education shall be neutral within the Community. Pupils are in principle allowed to wear religious signs. However, they may do so only if human rights, the reputation of others, national security, public order, and public health and morals are protected and internal rules complied with. Further, teachers must not permit religious or philosophical proselytism under their authority or the organisation of political militancy by or on behalf of pupils. The decree stipulates that restrictions may be imposed by school rules.

In Austria, Germany, the Netherlands, Spain, Sweden, Switzerland and the United Kingdom, the State education authorities permit Muslim pupils and students to wear the Islamic headscarf.

In Finland and Sweden the veil can be worn at school. However, a distinction is made between the burka, the term used to describe the full veil covering the whole of the body and the face, and the niqab, a veil covering all the upper body with the exception of the eyes. In

Sweden mandatory directives were issued in 2003 by the National Education Agency. These allow schools to prohibit the burka and niqab, provided they do so in a spirit of dialogue on the common values of equality of the sexes and respect for the democratic principle on which the education system is based.

In the Netherlands, a non-binding directive was issued in 2003: schools may require pupils to wear a uniform provided that the rules are not discriminatory and are included in the school prospectus and that the punishment for transgressions is not disproportionate. A ban on the burka is regarded as justified by the need to be able to identify and communicate with pupils.

In a number of other countries, counting the Czech Republic, Greece, Hungary, Poland and Slovakia, the issue of the Islamic headscarf does not yet appear to have given rise to any detailed legal debate.

Applying the VEIL categories to this extended overview of countries for regulations of students'/pupils religious attire, the '*established restrictive ban*' category can then be seen to cover the following countries: Albania, Azerbaijan, Turkey, and France. The '*soft, selective regulation*' category would cover the Netherlands, Finland, and Sweden, with UK possibly moving in this direction. The '*no regulation*' category would cover UK, Austria, Germany, Netherlands, Spain, Switzerland, The Czech Republic, Greece, Hungary, Poland and Slovakia. If this categorization is reliable, it leaves us with an obvious conclusion: in most countries, manifestations of religious pluralism in the public classroom are, with regard to pupils /students' religious attire, mainly permitted. When the ECtHR states that, 'the role of the national decision-making body must be given special importance... in view of the diversity of approaches taken by national authorities on the issue'¹⁶; its own overview actually tells us differently. Only four countries rule the headscarf out of schools. Three countries has recently drawn a new line, at the face veil and fully covering clothing. The rest – here counting 12 countries - have not at all, through national guidelines, restricted the use of religious attire for pupils / students.

5. HIJAB IN THE WORK PLACE: HEADSCARF BANS AS ILLEGAL GENDER DISCRIMINATION

The information in *Sahin* is concentrated on regulations for pupils / students. In general, both religious based and gender based work place discrimination would be prohibited in national anti-discrimination legislation and disputes over headscarf ban will thus be decided by national ombuds and commissions and by the courts. The *Dahlab* case, which the ECtHR ruled 'inadmissible', concerned a Swiss primary school teacher who converted to Islam and wore the headscarf for three years before being instructed by Swiss school authorities to remove it when teaching. The Swiss Federal Court accepted the interference with her freedom to manifest her religion as justified by the need to protect the right of State school pupils to be taught in a context of denominational neutrality, even though there had been no complaints from pupils or parents, either about her religious attire or her teaching. In turn, the ECtHR also accepted the remarks made by this court on the relationship between Islamic dress codes and principles of gender equality. In *Dahlab*, this is formulated as follows:

'It cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing

¹⁶ *Sahin*, supra note 1, 109

of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.’¹⁷

In *Sahin*, references are further made to the German Constitutional Court ruling, in the *Ludin* case (2003), that a lack of any express statutory prohibition means that teachers are entitled to wear the headscarf. Fereshta Ludin was rejected from a teacher job in Baden-Württemberg based on her refusal to remove the headscarf when teaching. The majority of judges took the standpoint that the German federal states should be entitled to regulate the permission or prohibition of religious attire. The decision emphasized the diverse interpretations concerning headscarves made by women wearing them, but also stressed the potential, if ‘abstract’, dangers of pupils being confronted with religious arguments contrary to their will. The minority of judges held that there was already a legal basis for the prohibition of headscarves worn by teachers. They also took the opportunity to echo some general gender equality concerns expressed by other courts: a headscarf is a symbol of subordination of women and therefore unconstitutional.¹⁸

According to Berghahn and Rostock, seven Länder have now passed regulations which prohibit religious headscarves worn by teachers, in four other, drafts are being discussed in legislative assemblies. These legislative efforts have, however, been met with (cautious expressed) concern from the committee which supervises the UN Convention on the Right of the Child. Interestingly, this committee’s perspective is clearly contrary to the dominant ‘neutrality versus proselytizing’ perspective which first appeared in the *Dahlab* case:

‘The Committee (...) is concerned at laws currently under discussion in some Länder aiming at banning school teachers wearing headscarves in public schools because it does not contribute to the child’s understanding of the rights to freedom of religion and to the development of an attitude of tolerance, as promoted in the aims of education under article 29 of the convention.’¹⁹

In Norway, the use of headscarves in work places is generally viewed to be protected by the new act which forbids ethnic and religious discrimination.²⁰ But headscarf bans have also been held in breach of the prohibition against indirect discrimination in the Gender Equality Act. The cases do not specifically address educational institutions. But they specifically address the interpretation of gender equality principles. The Norwegian Ombud and Appeals board’s assessments can thus be seen to run counter to the generally phrased, decisive statements about “colliding rights” in the ECtHR headscarf decisions.

A large hotel in the Oslo area had practised an employee uniform code which the hotel management claimed was not reconcilable with the use of head coverings. The appeals board agreed with the Ombud in her evaluation that this prohibition mainly would have negative consequences for women employees using hijab. The uniform code – although gender neutral in wording – could thus be seen to produce gender specific discriminatory effects. The

¹⁷ *Dahlab*, supra note 1.

¹⁸ Based on S.BERGAHN and P.ROSTOCK, ‘Cultural Diversity, Gender Equality: The German Case’. Paper for the conference: Gender equality, cultural diversity: European comparisons and lessons. (Amsterdam, June 2006)

¹⁹ L.SMITH, ‘Barnerett og foreldrerett’, in N.HØSTMÆLINGEN(ed), *Hijab i Norge. Trusel eller menneskerett?* (Oslo: Abstrakt forlag, 2004) 207-219.

²⁰ R.CRAIG, The religious headscarf (hijab) and access to employment under Norwegian antidiscrimination laws. Lecture for the the dr.juris. degree, February 2006. To appear in: ‘Islam in Europe: Emerging Legal Issues’ .Eds: W. C. Durham and T. Lindholm.

Ombud compared such restrictions to accommodating uniform regulations within the military services (i.e. turbans). She reasoned that for women who wear the hijab because of religious reasons, it is a part of the personal integrity. Many of these women would not accept to work if they could not use the headscarf - a prohibition would thus entail significant disadvantages for these women.²¹

A more recent case concerns a large furniture store where the management demanded 'scarf off' for one of the employees, again with reference to internal dress code regulations. In correspondence with the Ombud, the employer also stated that they established the dress code from a desire to secure value neutrality. The Ombud found that the promotion of a common profile was a legitimate aim, but that the attainment of such aims by forbidding the use of the hijab was a disproportionate infringement upon the woman affected, given that the headscarf was a part of her personal integrity. Although the Ombud could envision that value-neutrality sometimes could be used to legitimize a ban against the hijab, she stated that the facts would have to show that the specific workplace had some special need for signaling value-neutrality. The Ombud found that the furniture store had no such special need. The employer was thus in violation of the prohibition against indirect gender discrimination.²²

6. A NEW DEMARCATION LINE: THE HEADSCARF VERSUS THE FACE VEIL

The overview of national policies on pupils' and students' religious attire showed how three European countries, the Netherlands, Sweden and Finland, through national guidelines recently have drawn a line at religious attire which implies covering parts of the face and full body covering clothing. In Norway, a recent controversy over the niqab has similarly contributed to produce new policies on religious attire in schools. Otherwise, official state policy has in general underscored a 'no restrictive regulation' formula: 'There are no national guidelines concerning the use of Muslim scarves and veils. Nor are initiatives planned in this respect. The Education Act regulates conditions in primary and secondary education, and contains no regulations about students' dress at school. This must be decided by each school / school owner.'²³

In the autumn of 2005, two girls at the secondary level (11. -13. grade) in Oslo came to school wearing the niqab, the veil which covers the head and lower part of the face. The controversy which followed is illustrative of controversies in many local school contexts in different European countries, and is therefore presented in some detail here. First, the school's rector asked the municipal authorities for advice on how to approach the problem, which was perceived to create specific educational problems, and also much 'tension' in the school environment. Municipal authorities answered that it was possible to adopt school specific regulations imposing a ban on the niqab. But the local school authorities did not want to adopt

²¹ Security, health and hygiene may still provide legitimate reasons for justifying a workplace prohibition against the religious headscarf. The Norwegian Labour Inspection Authority ('Arbeidstilsynet') has provided written guidance to employers on headscarf policies which for example states that an employer can require that the hijab be fastened in a specific way for security reasons, that criteria regarding the hijab's color, design and material fabric might be issued etc. See R.CRAIG, The religious headscarf (hijab) and access to employment under Norwegian antidiscrimination laws. Lecture for the dr.juris. degree, February 2006. To appear in: 'Islam in Europe: Emerging Legal Issues' .Eds: W. C. Durham and T. Lindholm, and K. MILE, 'Diskriminering av kvinner', in: N. HØSTMELINGEN (ed): *Hijab i Norge – trussel eller menneskerettighet?* (Oslo: Abstrakt forlag, 2004), 220-230.

²² Note that the furniture store decision differs on several accounts from the decision by the Danish Supreme Court in the *Føtex case* about religious discrimination, from January 2005. The Supreme Court ruled in favour of the store chain's uniform code, which prohibited any type of head covering and, more generally, all forms of religious and political symbols.

²³ e mail from the Directorate for Education, 29.03.06.

school specific regulations, because such would, in case of continued dispute, eventually lead to expulsion of the students. This far, the school would not go on its own. Negotiations between the school, municipal authorities and the state educational directorate dragged on. Only after nearly a year of negotiations, did the municipality finally receive a state sponsored 'go ahead' for a ban on face veils in municipal schools. This decision of course also implies that other municipalities might follow suit. Yet there is no national ban imposed.

During the period of high controversy in 2005, the Islamic Council in Norway, an umbrella organisation for the major mosques and Islamic centres, demanded to be part of the negotiations over the niqab, and also issued a press release stating that 'use of the niqab is not obligatory in Islam'.²⁴ The council wanted such problematic cases solved by 'dialogue not prohibition', and deplored the fact that school authorities had not contacted the council for an 'early solution'. According to the Islamic Council, then, it is the religious leaders who represent the authoritative voices in matters of proper religious dress for Muslim girls. The press release was accompanied by a picture of girls wearing the hijab and the niqab. The text under the picture of the hijab read 'obligatory', the text under the niqab read 'voluntary'.²⁵

This Norwegian case echoes the *Luton School case* in England, as described for instance by Moira Dustin and Anne Phillips.²⁶ This famous dispute was between the school and a Muslim pupil wishing to wear the jilbab, where the school – where close to 80 percent of the pupils were Muslim - had adopted a uniform which permitted girls to use headscarves, but not by this a religious dress that completely covers the body. The girl lost two years of schooling before she was accepted at another school that allowed jilbab. The court ruling held that the school had not recognized her right to manifest her religion, as protected by the Human Rights Act, and had not offered any justification for the restriction its uniform policy imposed on this right. The court indicated sympathy for the school's stance, but stressed that sincerely held religious beliefs cannot be dismissed without consideration – 'it is not for the school authorities to pick and choose between religious beliefs or shades of religious belief'.²⁷ Quite like the niqab controversy in Norway, however, imams of local mosques and scholars of Islam willingly provided interpretations as to what was the appropriate dress code for Muslim girls. But nationally, such were by no means uniform. The school appealed to the House of Lords, which concluded in 2006 that there had been no interference with the girl's right to manifest her beliefs in practice, because there was nothing to stop her from going to an alternative school which permitted this kind of dress.

Baukje Prins and Sawitri Saharso have described a similar case in the Netherlands, when four Muslim students of the Amsterdam Regional Education Centre, in spring 2003 came to school wearing the niqab.²⁸ The school board did not accept this, as they considered such dress to be a severe hindrance for communication and identification in the educational situation. The girls complained to the Commission on Equal Treatment, maintaining their religious duty to hide from the gaze of men, adding that they would remove the niqab when they worked, as kindergarten and school teachers, with children. The commission weighed the concerns in favour of the school, and the verdict was used by other schools to adjust their dress regulations.

7. SOFT DRAWINGS OF THE LINE – A VIABLE POLICY SOLUTION

²⁴ <http://irn.no/cms/index2.php?option=com>

²⁵ <http://irn.no/cms/index2.php?option=com>

²⁶ M.DUSTIN and A.PHILLIPS, 'Gender equality and cultural diversity: the UK experience', Paper for the conference: Gender equality, cultural diversity: European comparisons and lessons. (Amsterdam, June 2006)

²⁷ Cited from Dustin and Phillips, *ibid.*

²⁸ B.PRINS and S.SAHARSO, 'Cultural diversity, Gender equality: the Dutch case', Paper for the conference: Gender equality, cultural diversity: European comparisons and lessons (Amsterdam: June 2006).

In controversies over girls' and women's religious attire, a range of liberal principles are activated: state neutrality, gender equality, religious freedom, multicultural accommodation. Through its headscarf rulings, the ECtHR has taken a stance in the general political debates which now are raging across Europe. As shown in this article, the court sanctions a general perception of the headscarf controversy as one of a clash between antagonistic value systems: the religious gender hierarchy within Islam versus secular gender equality rights.

Many European countries with expressed commitments to gender equality and legal protections against gender based, ethnic and religious discrimination have not identified the issue of religious attire similarly – that is, as an issue of conflicting rights. In Norway, rulings by the Gender Equality Ombud, on hijab in the work place, have held headscarf bans in breach of the prohibition against indirect discrimination in the Gender Equality Act. The cases do not specifically address educational institutions. But they specifically address the interpretation of gender equality principles. Importantly, in this setting religious dress is treated as an issue of parallel and intersecting equality rights: women's equal rights to religious manifestation and to non-discrimination in the work place.

Concentrated on the issue of headscarves worn by pupils and students, the standard approach in European member states largely seems to allow such religious attire. At the same time, recent examples from school situations in the Netherlands, UK and Norway, of students wearing the niqab, or the jilbab, all point towards a new possible demarcation line. This also includes Swedish and Finnish policy making, where new developments in national guidelines for policies on religious attire more clearly differentiate between 'acceptable' and 'unacceptable' forms of religious dress in public schools. A softer line than the 'blanket ban' is being drawn; that is, at the full covering versions of religious dress. The arguments for drawing this new line, however, mainly stress gender and religion neutral aspects and rely on educational prerequisites and communication needs. In such instances, religious pluralism is accommodated and religious symbols accepted in public schools, but still, only the more 'discrete' expressions of belief.

Such variants of 'soft, selective' policies may take the form of national guidelines, or be left to the discretion of municipality decision making. Either way, they will, principally speaking, disregard the girls', the parents', or else the imams', understandings of exactly what the religious duties imply in terms of dress. These selective regulations do not solve the problem of potential withdrawal of pupils from public schools. When decided locally, they do not solve the problem of disparity in regulations across school districts. But in my view, formal guidelines which are sanctioned by secular authorities still have the clear advantage of preventing religious authorities from intervening in local school situations to negotiate at will about the proper dress for Muslim girls. In more standardized political consultation processes, the voices of the priesthoods must then, eventually, be heard among many others.

This soft, selective approach still represents a clear contrast to for instance the French Stasi Commission's stated concerns about the state's obligation to protect children's and young girls' individual choice – where the chosen response to this obligation, the blanket ban in primary and secondary schools, turned out to leave no space for individuals' choice at all.

For religious minorities there would be many straight forward, non offensive, grounds to accept such limited, selective, guidelines or regulations. Either way, such solutions would be greatly preferable to the decisive, but still largely off hand, remarks that are made by politicians and judges alike, in parliaments and courtrooms across Europe, on girls' and women's religious dress symbolizing the clash of antagonistic value systems. Their rhetorical effect is to deprive any 'Muslim woman' - as such - of individual choice and autonomy, while maintaining the irreconcilability of 'Muslim religious dress' to 'European gender equality'.