Human Rights and the Islamic Headscarf

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Abstract

In 2004 a law banning all religious affiliation in public schools in France came into force. This started a heavy debate in the whole of Europe on whether this law is a violation of human rights law on the basis on freedom of religion and the freedom to manifest his/hers religion or belief in worship. This had the greatest impact on Muslim girls wearing the Islamic headscarf. This is a study of the legal framework of the law in the light of human rights perspective. It is also a semi comparison between the French and the United Kingdom way of approaching the issue with the Islamic headscarf in public schools.

Keywords: religion, Islam, Islamic Headscarf, human rights, France, United Kingdom, gender equality
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1. INTRODUCTION

The Islamic headscarf debate has become a challenged issue in Europe, especially with the French legislation prohibiting ‘all religious symbols’ from public schools. This attracted attention worldwide. Due to the increasing tensions between ‘the West’ and ‘Islam’ as for instance manifested in the September 11 attacks, the wars in Iraq and Afghanistan, and the Danish cartoon crisis, the issue seems to have become symbolic of Western approaches to Islam. The Islamic headscarf is a visually strong manifestation of religion and because of that is thought to jeopardise the term neutral and open educational environment which the state has to guarantee to pupils of public schools, so as to give full respect to all religions and beliefs, including atheistic ones. One could argue that it is not just headscarves that pose problems, but equally Sikh turbans or Jewish Kippas. Thus, the French legislation, which was adopted in 2004, bans all ostentatious religious symbols in French public schools. But then again, this issue did not arise around the debates whether, for example, a Jewish person wishing to wear a Kippa to school but whether the Islamic headscarf should be allowed or not. Islamist extremist sometimes argue that this is a way to curb the expression of Islam in the western society. Banning religious symbols in public schools is not just about guaranteeing the denominational neutrality of schools, but about how the majority of the society perceives and reacts to the position of its immigrant minority groups of non-Western heritage. Is this non-Western, immigrant identity allowed to be seen and to express itself in the public sphere, or is it to remain hidden in the private sphere only? The ban on religious symbols in public schools does not just raise the question whether it is a justified infringement of religious freedom in general, but also whether it would constitute (indirect) discrimination on the basis of religion and/or race. The degree of recognition for Muslim communities and their practices has varied from country to country. I’m going to focus on France, and I chose to compare this subject with United Kingdom because both countries have witnessed wave of immigration and accommodated a sizeable number of migrants. And also, of the difference that France

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1 Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics (1), English translation is available on: http://translate.googleusercontent.com/translate_c?depth=1&hl=en&ie=UTF8&oe=UTF8&prev=/language_tools&rrurl=translate.google.com&u=http://www.legifrance.gouv.fr/affichTexte.do%3Bjsessionid%3D0F54974893B1714178FC8E6FA3542AF8.tpdjo15v_1%3FcidTexte%3DJORFTEXT000000417977%26dateTexte%3D20130513&usg=ALkJrhgg56bOGsN2xV3sJecvV3U0F7pA
2 From the selected works of mukul saxena (2007) p. 8.
has long tradition of secularism, whereas the United Kingdom’s Church is not separated from the State.

1.1 Purpose and problem formulation

The purpose of this study is to shine light to the problems concerning the Islamic headscarf occurring when the French legislation, which laid restrictions on religious affiliation in schools, colleges and public schools (les écoles, les colleges et les lycées publics),\(^3\) came into force. Furthermore, I will analyze whether the French legislation is in accordance with international human rights law. I will do a semi-comparative study with France and United Kingdom, but my main focus will be on France and the French legislation.

I will do this by

- Examining and comparing the right to wear an *Islamic headscarf*, how and if this is being restricted or regulated in French law and UK law,

- further I will examine the extent to which the vision of the right to wear the *Islamic headscarf* as a human right or a religious obligation may affect the regulation of this right?

1.2 Method

The resources of the French legislation have to a large extent been difficult to obtain, since French legislation is in French, a language which I do not master. In an attempt to obtain French legislation in English, I was in contact with the Swedish Parliamentary library. However, that did not generate any results, since the majority of the French legislation is not translated into English or any other language. I have also sought advice from the French department of Linneaus University on how to approach this matter, again without a positive outcome. Eventually, I came into contact with the French embassy in Sweden, which referred me to the French governments’ website (www.legifrance.gouv.fr) where I could after some effort find some French legislation is translated into English. Therefore, in addition I have chosen to use literature of relevance and scientific articles where alternative translations are

\(^3\) LOI n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics (1), English translation is available on: [http://translate.googleusercontent.com/translate_c?depth=1&hl=en&ie=UTF8&langpair=fr%7Cen&oe=UTF8&prev=/lang...](http://translate.googleusercontent.com/translate_c?depth=1&hl=en&ie=UTF8&langpair=fr%7Cen&oe=UTF8&prev=/lang.../initRechTexte.do%3Bjsessionid%3D5308BF0C27A9238D2D416C298526F6D5.tpdjo05y_2&usg=ALkJrhh7CIXHB28kJQz5yWNXbFdEO9OmvwA)
provided. I have been using the French legislation of 2004-228 of 15 March, which bans all religious symbols in primary and secondary state schools. Furthermore, I have studied the tradition of Laïcité- secularism in France and United Kingdom. I have also chosen to emphasize the importance of 1989 Opinion of Conseil d’Etat which has had a significant part in the practice of laïcité along with ECHR (European Convention on Human Rights) and ICCPR (International covenant on Civil and Political Rights).

My primary source for scientific articles was the library of Linneaus University and its search engine, oneselect. Regarding human rights, my primary sources were the relevant conventions which were easy to access through www.europa.eu. Since Linneaus University has a limited amount of material concerning my subject of choice, articles and literature was ordered from other universities such as Södertörns Högskola.

In my pursue of relevant law case, I came across two cases of interest: Leyla Sahin v Turkey and Shabina Begum v The Headteacher and Governors of Denbigh High School, which are of relevance from the human rights perspective. These I could find in HUDOC, which is the database of European Court of Human Rights, and UKs parliamentary website House of Lords. These cases are of significance in the interpretation of the conventions of human rights.

2 Legal framework

2.1 French Law on religious symbols in schools

Law n 2004-228 of 15 March 2004, pursuant to the principle of secularism, the wearing of symbols or clothing denoting religious affiliation in schools, colleges and public schools.4

On 17 March 2004, Law 2004-228 was published in the Official Journal of France to regulate, in educational establishments (les écoles, les colleges et les lycées publics), the wearing of symbols that express religious adherence. The law prohibits symbols that manifest a particular religious belief. This was one recommendation of the report of the Stasi Commission6

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4Legifrance.gouv.fr translations of French law to English – access to full translation visit this website: [http://translate.googleusercontent.com/translate_c?depth=1&hl=en&ie=UTF8&langpair=fr%7Cen&oe=UTF8&prev=/language_tools&rurl=translate.google.com&u=http://www.legifrance.gouv.fr/affichTexte.do%3FcidTexte%3DJORFTEXT000000417977%26dateTexte%3D%26categorieLien%3Did%3Dur%3Did&usg=AlkJrhr725G_U5ry5-1dptr9O1EZKzPYQ](http://translate.googleusercontent.com/translate_c?depth=1&hl=en&ie=UTF8&langpair=fr%7Cen&oe=UTF8&prev=/language_tools&rurl=translate.google.com&u=http://www.legifrance.gouv.fr/affichTexte.do%3FcidTexte%3DJORFTEXT000000417977%26dateTexte%3D%26categorieLien%3Did%3Dur%3Did&usg=AlkJrhr725G_U5ry5-1dptr9O1EZKzPYQ)

5it means: in schools, colleges and public schools

6The French commission Stasi is a commission set up to reflect upon the application of the laïcité principle
(published in December 2003) after the question of wearing headscarves in French public schools became a site of controversy for the third time in 15 years.7

Article 1 states:

“In schools, colleges and public schools, the wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited. The internal regulations stipulate that the implementation of a disciplinary procedure is preceded by a dialogue with the student”

The law itself does not prohibit the Islamic headscarf in particular; it prohibits all conspicuous signs of a particular religious belief. The law concerns, along with the Islamic headscarf, also the Jewish kippah, Sikh turban, and large crosses hanging visibly around the neck. Furthermore, it is explained what is not regarded as religious affiliation; discrete signs, such as small crosses, the Star of David, Fatimas hand or a small Qur’an.8 The entire law is very summarizing, containing only four short articles, yet it has provoked a vibrant debate within France and in the international media. Whilst the law deals with religious symbols in general, the public debate was mostly concerned with the Islamic headscarf.

In present day Europe where there is a growing sense of ‘islamophobia’ towards Muslims the headscarf has a stronger symbolic load than for instance the Jewish Kippah or a Sikh turban, and it is as a result of this symbolic overload that the debate has touched questions of identity, community, cultural diversity, religious freedom and tolerance, as well as state-church relations in form of secularism, Islam in Europe, and, not least, gender relations.

2.2 The Stasi Commission

On 3 July 2003, President Jacques Chirac gathered a Commission de Réflexion sur l’Application du principe de Laïcité dans la République9, to examine the debate around the Islamic headscarf, and also the contemporary meaning of laïcité as it applies to France in the here and now. The Commission was led by Bernard Stasi, therefor it became known as the Stasi Commission. The obligation of the Commission was to have a comprehensive look at

7Feminist Legal Studies 12: 333-345, 2004
8Wallach Scott Joan, (2007), Slöjans Politik
9Translates into: Commission of Reflection on the Application of the principle of secularism in the Republic
laïcité and examine it in the light of public spaces including hospitals, prisons and schools.\textsuperscript{10} The Commission held over 60 hearings, public and private, during a 4 month period. The members of the Commission were drawn from a range of professions, who all gave their opinion on how this matter should be resolved. The Stasi Commission’s Report, which was published by the French Assembly on 11 December 2003, described difficulties of accommodating different races, cultures and religions while maintaining the principle of secularism. It acknowledged that it was necessary to find a balance between national unity and respect for diversity.\textsuperscript{11} The Report continues and put forward that, the European Union, which is not founded on a religious premise, does not uphold one vision of the relationship between church and state; the specific model of church-state relations is chosen by each state in the light of its particular social history. Testimonies given to the Commission stated that pre-teen girls were sometimes forced to wear headscarves by their fathers, and how some women in urban ghettos were forced to cover up and lower their eyes before men, otherwise they were stigmatized as ‘whores’. It was felt by the Commission members that the problem of the Islamic headscarf demanded a national solution.\textsuperscript{12} The Commission concluded that; “Basic rights of women are today scorned on a daily basis in our country. Such a situation is unacceptable.”\textsuperscript{13}

The Stasi Commission Report contained a broad ranging of analysis and 25 recommendations; one of them goes as follows:

- Recognition of the most important Jewish and Islamic holy days as national holidays in the school and workplace calendars.

The French government did not accept this proposal on holidays, even though, out of ten national holidays in France, five are Christian holiday. President Chirac explained that he did not:

Think it necessary to add new national holidays to the school calendar, which already has many. Moreover, that would create several difficulties for parents who work on that on those days. Nevertheless, and as is already widespread custom, I want no pupils to have to apologize for absence justified by a major religious festival like Yom Kippur or Aid el Kebir, provided that their schools have been informed beforehand. It also goes

without saying that no important tests or examinations must be held on those days. And the Minister of National Education will be giving instructions to this effect to chief education officers.\textsuperscript{14}

Other recommendations from the Commission, listed that,

- The French State fully respects the freedom to build mosques,
- That a national school for Islamic studies be established,
- Businesses and schools should better accommodate the wishes of believers to attend religious ceremonies.\textsuperscript{15}

It was in this more positive context that the specific recommendation for a prohibition of ‘conspicuous’ religious symbols the Stasi Commission’s Report was accepted. Within three months of the Report being published a law on banning all conspicuous religious symbols had been drafted and passed by a decisive vote in the National Assembly.\textsuperscript{16}

\textbf{2.3 United Kingdom Regulation}

The UK is a parliamentary democracy, based around the core principle of parliamentary sovereignty. It has neither a written constitution nor a deep-rooted constitutional bill of rights but an extensive set of constitutional conventions which establish what has been described as an unwritten constitution. Traditionally, the UK has very limited space in law for preferential treatment for disadvantaged groups, but since 2000 a series of positive duties have been imposed upon public authorities to promote equality of opportunity on the grounds of race, ethnicity, disability and gender. The first introduction of anti-discrimination legislation in the UK was introduced in the field of race/ethnicity in the 1960s. It mainly consists of civil law provisions but there are in addition some criminal offences such as incitement to racial and religious hatred. Since the UK has no written constitution, legislation is the primary tool for establishing anti-discrimination law. The UK has ratified all the major International Human Rights Treaties and the main Council of Europe Human Rights Instruments, including the ECHR, the Charter on Minority Languages and the Convention on Minority Rights. International treaties are not directly applicable in UK law unless it is incorporated by an Act of Parliament, although they can be used to interpret legislation in certain circumstances. The

\textsuperscript{14} Chirac speech, rewritten in McGoldrick D. p 87.
\textsuperscript{15} McGoldrick D. 2006 p. 89.
Human Rights Act 1998, gives effect to the ECHR in UK law, can provide valuable protection in some contexts against discrimination.\(^{17}\)

2.3.1 The Equality Act 2010

The Equality Act came into force on 1 October 2010. It replaced the *Employment Equality Religion or Belief Regulations 2003*\(^{18}\) which were introduced in order to comply with the EU Directive 2000/78/EC. The new Equality Act brings together over 116 separate pieces of legislation into one single Act. Collectively, they make up a new Act which provides a legal framework to protect the rights of individuals and advance equality of opportunity for all; it includes the *Employment Equality Religion or Belief Regulations of 2003*. The Act made a series of changes to equality and discrimination law, it now prohibits direct and indirect discrimination, harassment, victimization and instructions to discriminate because of race, sex, disability, sexual orientation, religion and belief and access to education and the performance of public functions.\(^{19}\) The provisions of the Equality Act 2010 are compatible with the requirements of the 2000 Directives, even though its range is extensively broader. The legislation prohibits discrimination on “racial grounds”, which are defined as to include colour, nationality, and ethnic and national origins.\(^{20}\) Religion and belief, are not defined in detail in the Equality Act 2010, however, section 10 of the Act does provide that “Religion means any religion and a reference to religion includes a reference to a lack of religion” and that “Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief”.\(^{21}\)

2.3.2 School Uniform

There are no national rules in the UK regarding school uniforms, but governors of schools must bear in mind sex and race discrimination when creating school policies on uniforms. The School Uniform Guidance advises in part that:

-“A school should ensure that its school uniform policy is fair and reasonable…
- consider how the proposed uniform policy might affect each group represented in the school

\(^{17}\) Country Report UK 2011 on measures to combat discrimination, European network of legal experts in the non-discrimination field, McColgan A.


\(^{19}\) http://www.ed.ac.uk/schools-departments/equality-diversity/legislation-policies/legislation


\(^{21}\) Equality Act 2010 part two section 10 <http://www.legislation.gov.uk/ukpga/2010/15/part/2/chapter/1>
Consider the concerns of any particular groups of parents/pupils about the proposed policy, and whether the proposed policy amounts to an interference with the right to manifest a religion or belief, and whether that is discriminatory.\footnote{Department for Education- Guidance for Head Teachers, Governing Bodies, Academy Trusts, Free Schools and Local Authorities on School Uniform and Related Policies <http://media.education.gov.uk/assets/files/pdf/s/school%20uniform%20guidance%202012.pdf>}

School governing bodies are responsible for deciding whether their school should have a uniform policy, and if so, what it should consist of. Although pupils must follow a school’s uniform policy, schools must also be sensitive to the needs of different cultures, races, and religions. Schools are expected to accommodate these needs within a general uniform policy. The School Uniform Guidance advises further:

- Consider carefully, once the uniform/appearance policy has been agreed, any request that is made to vary the policy, in particular to meet the needs of any individual pupil to accommodate their religion or belief, ethnicity, disability or other special considerations. Even a rule which is imposed for a good reason may constitute unlawful indirect discrimination if it is imposed in a way which never allows for exceptions to meet special circumstances.\footnote{Department for Education- Guidance for Head Teachers, Governing Bodies, Academy Trusts, Free Schools and Local Authorities on School Uniform and Related Policies <http://media.education.gov.uk/assets/files/pdf/s/school%20uniform%20guidance%202012.pdf>}

2.4 EU standards

The European Commission, the Council and the European Parliament adopted the \textit{Charter of Fundamental Rights of the European Union} in Nice on 7 December 2000.\footnote{Charter of Fundamental Rights of the European Union (2010/C 83/02 ) Official Journal of the European Union} The Charter lays out all of the Civil, Political, Social, and economic Rights of all residents and citizens of the member countries of the European Union. These rights include the rights to dignity, freedom, equality, solidarity, justice and the rights of citizens. It is the first document to provide a unified declaration of the rights of all persons living in the European Union. State regulation to the Islamic headscarf may be challengeable by reference to EU standards. The Charter refers to freedom of religion in several places. It provides protection for freedom of thought, conscience and religion, the right of parents to ensure that education is in agreement with their religious beliefs, the principle of non-
discrimination on grounds of religion or belief, and respect for religious diversity.\textsuperscript{25} However, the capacity of the Charter is limited to action by the European Institutions and to member states when implementing the European Union law. Religious freedom has long been recognised as a general principle of Community law by the European Court of Justice, and is consequently binding on the institutions and member states acting within the scope of the Treaty. In 2000 the European Community enacted two anti-discrimination directives. \textit{Directive 2000/43/EC, of 29 June 2000}, concerns implementing the principle of equal treatment in respect of racial and ethnic origins.\textsuperscript{26} The provisions of the Directive were to be implemented into national law by the EU Member States by 19 July 2003. The Directive prohibits direct and indirect racial and ethnic discrimination in employment and occupation, but also in relation to the provision of goods and services by private and public sectors, including education. The phrase ‘race or ethnic origin’ could be used in the context to protect religious groups, in groups who share the same racial or ethnic origins. \textit{Directive 2000/78/EC} of 27 November 2000 is concerned with establishing a general framework for equal treatment in employment and occupation. It prohibits discrimination with respect to age, disability, orientation and religion.\textsuperscript{27} The provisions in respect of religious discrimination were to be brought into force by the EU Member States by 2 December 2003.

\textbf{2.4.1 Resolution 1464 (2005) on Women and Religion in Europe}

In 2004 the Parliamentary Assembly of the Council of Europe put forward \textit{Resolution 1464 (2005) on Women and Religion in Europe}.\textsuperscript{28} The resolution is very clear and states that it is the duty of the member states of the Council of Europe to protect women against violations of their rights in the name of religion and to promote and fully implement gender equality. It goes on and urging all member states, amongst other things, to:

\begin{quote}
“ refusing to recognise foreign family codes and personal status laws based on religious principles which violates women’s rights
\end{quote}

\begin{quote}
… take a stand against violations of women’s human rights
\end{quote}

\begin{footnotesize}
\begin{enumerate}
\item CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION(2010/C 83/02 ) Official Journal of the European Union See Article 10, 14 and Articles 21 and 22
\item Resolution 1464 (2005) on Woman and Religion in Europe, Council of Europe: Parliamentary Assembly
\end{enumerate}
\end{footnotesize}
justifies by religious or cultural relativism … ensure that freedom of religion and respect for culture and tradition are not accepted as pretexts to justify violations of women’s rights, including when underage girls are forced to submit to religious codes (including dress codes) … where religious education is permitted in schools, ensure that this teaching is in conformity with gender equality principle”. 29

The Resolution clearly condemns all form of discrimination of women which has footing from Religion, that states must not accept any religious or cultural relativism of women’s human rights. It continues to say that, this means that freedom of religion is limited by human rights 30.

This resolution differs a lot from the previous recommendations of the European Council from 1993 (Recommendation 1202) and 1999 (Recommendation 1396). The recommendations from -93 and -99, portrays a more open-minded and understanding vision of cultures that differs from the western society, with Christian dominated heritage. The member states are requested to have a positive approach for different religious customs (for example in dress, eating and observance of holy days), 31 “and facilitate, within the limits set out in Article 9 of the European Convention on Human Rights, the observation of religious rites and customs, for example with regard to marriage, dress, holy days”. 32 The general observation is that the tone set out of the Resolution is placing gender equality before religious freedom, and the Recommendations is that in the -90’s are more accepted of the differences of the cultures and religions. Also, another significant difference is that the Resolution of 2005 is basically binding, where the Council of Europe calls on the member states to stop the discrimination of women in the name of Religion, whereas the previous Recommendations are just recommendations. 33

30 Resolution 1464 (2005) on Woman and Religion in Europe, Council of Europe: Parliamentary Assembly Para 7.1.1
31 Recommendation 1202 (1993) Religion tolerance in a democratic society Para 16.2
3. Human rights and the Islamic headscarf

In Europe numerous countries have large population of Muslim citizens. In France, Islam is the second largest religion, after Roman Catholic.\(^\text{34}\)

The perspectives on integration and assimilation in Europe have varied considerably between different European states. There can also be differences in what the aim(s) are in the different countries and what these terms mean to different states but also how this should be approached and what policies are needed to affect them.

Regardless what the definitional and policy differences may be, there is largely widen apprehension in several European states, that Muslim communities are not integrated enough, and by some, the Islamic headscarf is evidence of the failed integration and adaptation of immigrants.

“It has been argued that the use of Islam ‘as a scapegoat is a disturbing and destructive feature of contemporary European politics and political debate’ ”\(^\text{35}\) Many Muslims in Europe live most of their lives in ghettos which causes exclusion and poverty. This causes fear of groups being radicalised into violent and even terrorist activity and some even see the Islamic headscarf as part of a threat to the Judeo-Christian character of Europe that needs to reaffirm itself. Additionally, it is also well-known that Muslim immigrants should do more to integrate themselves and in this context, wearing the headscarf can be understood not only as a cultural and religious manifestation but also as reluctance to adapt to the western society. However, the UK and France have acknowledged that they need to take more positive measures to help integrate Muslims institutionally, politically, substantively, economically and culturally.\(^\text{36}\)

3.1 The Headscarf- definition, meaning and significance

“The veil is a complex symbol of many meanings. Emancipation can be expressed by wearing the veil or by removing it. It can be secular or religious. It can represent tradition or resistance”.\(^\text{37}\) To understand a certain thing sometimes one has to try to understand the language it is spoken in. The headwear— Islamic headscarf has several translation and meanings. Normally when we hear that specific word headscarf one thinks of a woman who is covered, hidden or maybe even suppressed. Although, to think that the decision of a

\[^{35}\text{McGoldrick — Human Rights and Religion: The Islamic Headscarf Debate in Europe p. 19}\]
\[^{36}\text{McGoldrick D. Human Rights and Religion: The Islamic Headscarf Debate in Europe p.15-21.}\]
\[^{37}\text{McGoldrick D. Human Rights and Religion: The Islamic Headscarf Debate in Europe p.6.}\]
Muslim woman to cover her hair is evidence that she is being oppressed, is not more correct than to think that a Shikh man’s turban is evidence that he is being oppressed. But Muslims are seen as different, sometimes people fears the things that are different to us, or unknown

A headscarf is a form of veiling or covering. But veiling can be much more wide-ranging, it can cover just the hair on the head or/and also the face and parts of the body. It can also reflect on the social, economic and political status of a woman in the existing society, depending on what kind of veiling one is wearing. The more extensive forms of veiling can also be consistent with extensive legal and societal restrictions on women in terms of work, education, social and political activities and access to health.\(^{38}\)

The headscarf, which is a common term for headwear of Muslim women, has several names and different significance. The most commonly used English terms like headscarf, veil and the French expressions foulard, voile and chador are not always accurately translated or precise enough in the terms of use.

‘Hijab’ means curtain and barrier; this is an important part of its meaning. It does not in any way mean headscarf (the Arabic word for that is khimar). Hijab is commonly used to mean Muslim dress and refers to both the head covering traditionally worn by Muslim women and modest Muslim styles of dress in general.\(^{39}\) In the Koran, the term hijab is used to refer to a spatial curtain which divides or provides privacy. One of the texts from Koran, which is of a more specific modern initiative of the headscarf, says as follows:

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“And say to believe in woman
That they should lower
Their gaze and guard
Their modesty; that they
Should not display their
Beauty and ornaments except
What (must) ordinarily appear
Thereof; that they should
Draw their veil over
Their bosoms and not display
Their beauty except,
To their husbands, their fathers, . . .
Their sons . . . Their brother . . .
Or their women . . .”\(^{40}\)
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\(^{39}\) D. McGoldrick- Human Rights and Religion: The Islamic Headscarf Debate in Europe p. 4

This kind of text is so wide and open and can be interpreted in many ways. Indeed, the headscarf and veil has been interpreted differently, both by different culture and diverse people both outside the Muslim society and within Muslim society.

The most extreme form of veiling is the burqa and niqab. This type of veiling is a loose garment kind of like a dress, and can sometimes consist of several layers which totally hide the female body form, the hair and the face. It hides everything except for the hands and, if it is a niqab, it shows the eyes but if it is a burqa it has a panel or slit for the eyes.41

3.2 The Islamic headscarf a Fundamental Right or Religious Obligation?

Through the eyes of the western civilization, the Islamic headscarf is habitually seen as a way in which Muslim women are oppressed and unequal men in the society under Islam. There is no arguing with that the veil openly/obviously is an identity marker, where the Muslim women can be recognized as Muslim but where men are recognizably as just men.42 There is a diversity of opinions about whether the Islamic headscarf is compelled by the religion of Islam or if it merely prohibits immodesty. The wide range of views goes from it being strictly required in all Muslim countries (Dar al-Islam (House of Islam) to not being obligatory or mandatory at all.43 One of the fundamental aspects of the human rights freedom of religion is that every individual or group has the freedom to choose their belief and interpret their religious texts, and then follow the derived meaning of it. The European Court of Human Rights has in the cases of Hasan and Chaush v Bulgaria and Metropolitan Church of Bessarabia and Others v Moldova, stated that:

in principle the right to freedom of religion for the purpose of the Convention excludes assessment by the State of the legitimacy for religious beliefs or the ways in which those beliefs are expressed.44 . . . but for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.45

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44 Metropolitan Church of Bessarabia and Others v Moldova, Application NO 45701/99, para 117 <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59985#itemid:001-59985>
45 Hasan and Chaush v Bulgaria, Application NO 30985/96, 34 (2002) para 78
So, as mentioned before, there are different views on the Islamic headscarf and other aspects of dress, undoubtedly among Islamic scholars and in the modern Muslim world in general. For example, in Islamic countries like Tunisia and Morocco, the States in both countries determined it is not required to wear the Islamic headscarf under Islamic law. The state of Uzbekistan has a long and deep Islamic tradition, however, conventionally the women have not veiled.46 For some observers and states the Islamic headscarf is a political symbol and indicator of religious extremism and not at all a religious obligation for Muslim women. In Leyla Sahin v Turkey the Turkish government submitted that:

*The situation in Turkey and the reasoning of the Turkish courts showed that the Islamic headscarf had become a sign that was regularly appropriated by religious fundamentalist movements for political ends.*47

Wearing or not wearing the Islamic headscarf can be a symbolic and political statement. In the past the headscarf was used as symbol for colonial resistance in Algeria and Egypt, and of communist resistance in Afghanistan. Maybe, Muslim woman in todays’ western societies are using the Islamic headscarf as a means to make a statement, as a rejection to the values of the society in which they are living in. In an Islamic country where the headscarf is the norm, a woman simply blends in with the rest of women who all are wearing the headscarf. But, as Chahdortt Djavann wrote in her book ‘Bas les voiles’, in western societies women, wearing the headscarf is a way of which they can use to stand out and attract attention, seeking attention and wiling to be objectified as sexual objects.48 Others think that veiling of such character as the Islamic headscarf or burqa is totally wrong and unacceptable in any 21st century Western country whose history, outlook and ways of life are rooted in “European thought.

### 3.3 The human right to freedom of religion

Freedom of religion is a fundamental human right. Its protection in early treaties from the 16th century onwards was characteristic of the fact that religious freedoms were frequently oppressed. In modern times freedom of religion exists in national constitutions, bills of

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47 Leyla Sahin v Turkey (2005), Application no. 44774/98 part 3 Para. 35.
48 Djavann Chahdortt, (2003), Bas les voiles, översatt till svenska Ner med slöjan.
rights and in a wide range of international human rights instruments. There have been controversies over some aspects of freedom of religion, for example concerning conversion, and changing religion. The debateable issue of freedom of religion, particularly during the Cold War, was that it was difficult to agree on a specific focus and that United Nations Convention could not agree on its protection. In 1981, the General Assembly adopted a Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. The United Nations Human Rights Commission’s Special Rapporteur on Freedom of Religion or Belief reviews implementation of the Declaration.

3.3.1 Article 18 of the International Covenant on Civil and Political Rights
Nevertheless some controversies, the core of freedom of religion is not disputed. It is essentially clear from the text of the major international human rights instruments. The universal and regional texts are very much similar, though there are some important differences. Article 18 ICCPR (1966) is the most widely accepted text, it provides:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one should be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one’s religion or beliefs may be subject to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure he religious and moral education of their children in conformity with their own convictions.

50 The United Nations Commission on Human Rights appointed further to resolution 1986/20 a “Special Rapporteur on religious intolerance”. In 2000, the Commission on Human Rights decided to change the mandate title to “Special Rapporteur on freedom of religion or belief”
51 International Covenant on Civil and Political Rights (1966)
Article 18 ICCPR makes it clear that freedom of religion has a community dimension, ‘individually or in community with other’. Nonetheless, it is an individual right, not a group one. The article also includes the right to manifest a religion ‘in public or in private’. In that Comment it stated, ‘The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings’. The principal focus of attention when states seek to compel or prohibit the wearing of the headscarf would be on Article 18(2) and (3). In practice, it is the second paragraph that is central. A state party has to show that limitations on headscarves are ‘prescribed by law’ and are ‘necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others’. These are the grounds of limitation that are normally raised in support of restrictions on headscarves, the protection of ‘public order’ and of the ‘fundamental rights and freedoms of others’.

3.3.2 Article 9 of the European Convention on the Human rights (ECHR)
Provides:

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

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

Article 9(2) of the ECHR is very much alike to Article 18(3) ICCPR. There are almost endless varieties of political orders which fluctuate through religiously based states, states with established or recognized religions, secular states and anti-religious states. And, International Law has to function in aspects to both religion and culture. International human rights conventions basic idea is that a selection of orders exists which are capable of guaranteeing human rights. Article 2 of the International Covenant on Civil and Political Rights (1966) makes express reference to the implementation of rights through the constitutional processes of states. The national

53 http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx
organization of church-state relations is infinitely variable and complicated, therefore, to ascertain the real position of religion in law and practice, it has to be studied.\textsuperscript{54}

3.3.3 Positive and negative freedom of religion

Article 9 of the European Convention on human rights states (as shown above) the right to enjoy religious freedom in form of the right to freedom of thought and freedom to religion. This is called positive freedom of religion. However, the article also includes the opposite. Meaning, the right to freedom of thought, conscious and religion and the right to not have a religion, freedom from religion and the freedom to not be exposed to others religious manifestations. This is called the negative freedom of religion.\textsuperscript{55}

The expressions positive versus negative freedom of religion is unfortunate, since this gives the impression that “positive” can be perceived as something good and meaningful, but “negative” can be perceived as something bad and less meaningful. This is though not the intention with the phrases. Balance should be between the two freedoms of religion.\textsuperscript{56}

In the case of Leyla Sahin v Turkey (see below), one of the reasoning of the courts’ decision is that of the negative freedom of religion. Where the court clearly states that ‘religious freedom is also a precious asset for atheists … and the unconcerned’. But since the decision of the court was not in favor for Leyla Sahin, I guess in this case the court favored the freedom to not have a religion before the freedom to manifest the religion. One could argue that the law of 2004-228 had the same reasoning.

3.4 Leyla Sahin v Turkey

This case concerns a Muslim woman who wished to wear her headscarf to the University of Istanbul, even though the University had issued a regulation which prohibited students from covering their heads or sporting beards.\textsuperscript{57} She was refused to take part in classes and examinations for the reason that she declined to take her headscarf off. In 2004 she took her case to the European Court of Human Rights, on the grounds that her right to freedom of

\textsuperscript{54} McGoldrick, Human Rights and Religion: The Islamic Headscarf Debate in Europe p. 22.

\textsuperscript{55} Fahlbeck, R. Bed och Arbeta, Om Religionsfrihet i Arbetsliv och Skola, 2011. P. 145-147.

\textsuperscript{56} Fahlbeck, R. Bed och Arbeta, Om Religionsfrihet i Arbetsliv och Skola, 2011. P. 148-149.

\textsuperscript{57} Leyla Sahin v Turkey application no 44774/98 Para. 15 and 16.
religion of Article 9 of the Convention, had been violated. Due to the measures prescribed by Turkish domestic law, the Grand Chamber of the ECHR found no violations of Article 9, and upheld the principle of secularism and equality, and that it was proportionate to the aim it sought. The applicant contested the Chamber’s findings, she stated; “that the Contracting States should not be given a wide margin of appreciation to regulate students dress ... that students were discerning adults who enjoyed full legal capacity and were capable of deciding for themselves what was appropriate conduct.” Sahin argues that her decision to wear the headscarf is due to religious convictions. The Court agreed that religious freedom is one of the foundations of a democratic society within the meaning of the Convention, “one of the most vital elements ... but it is also a precious asset for atheists, agnostics, sceptics and unconcerned.”

The European Court of Human Rights states that equality is one of the key principles which the Conventions is founded on and that it should be implemented by all the states under the Convention. The Court also upheld a gender-perspective, where it imposed a question which stated: is the Islamic headscarf an expression of religious freedom or discrimination of women, oppression of women? In this case the court expresses that a prohibition of the Islamic headscarf could fulfil the means for women’s rights in that sense to protect the right to not wear the Islamic headscarf as well as the protection and freedoms of “others”.

Furthermore, the Court underlined the importance of the ‘States role as the neutral and impartial organiser of the exercise of various religions … and stated that this role is conductive to public order… in a democratic society.’ At the same time the Court held that ‘the role of the national decision-making body must be given special importance …when it comes to regulating the wearing of religious symbols in educational institutions.

“Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. Accordingly, the choice of the extent and

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58 Leyla Sahin v Turkey application no 44774/98 Para. 98, 99, 100 and 104.
59 Leyla Sahin v Turkey application no 44774/98 Para. 100 and 101
60 Leyla Sahin v Turkey application no 44774/98 Para. 104.
61 Leyla Sahin v Turkey application no 44774/98 Para. 115
62 Fahlbeck. R. Bed och Arbeta, om religionsfrihet i arbetsliv och skola. P.218-220
63 Leyla Sahin v Turkey application no 44774/98 Para. 107.
form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context.  

4 France and religion

4.1 Secularism- Laïcité

Laïcité is a concept symbolizing the absence of religious involvement in government affairs as well as absence of government involvement in religious affairs. It is difficult to translate the word laïcité, since it means many things. The English translation secularism, gives a part, but not the entire meaning of the word since the principle of secularisation can have several meanings and perceptions as well. Laïcité is meant to be a system of public order (l’ordre public) under which religious freedom can flourish. An aspect of laïcité, as understood in France, is that it is meant to provide protection. The principle of laïcité has a central place in the French national identity. Laïcité à la française is much more than a system of separation of state and church, it is a fundamental conception of citizens and society, within French Republicanism. ‘Libertés publiques’ are not rights against the state, as human rights are often perceived, but they are the rights granted by the state. The law of 9 December 1905 is often considered to be the starting point for the principle of laïcité for the reason that it concerned the separation of the church from the state. It is also referred to as the “Law of separation”.

To understand the French view on the wearing or banning headscarves and burqas it is important to go way back in history to discover the meaning and significance of the term of secularism and of the French word laïcité. The impact it has had on the French State historically, and furthermore, what role it has in modern politics in France. Secularism and the principle of laïcité is a strong culturally belief and has a central place in the French national identity. However, the modern French approach to religion did not appear just by recognizing the value of freedom of religion, nor did it come easily. It evolved through centuries of bitter and often violent state-church conflict. The Catholic Church played a very dominant political role in which resulted in a series of Religious Wars between the

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64 Leyla Sahin v Turkey application no 44774/98 Para. 109.
65 Laïcité à la francaise translates into – secularism of the French
66 Libertés publiques’ translate into: civil liberties or freedoms
67 Feminist Legal Studies 12: 333-345, 2004
68 state secularism and religious neutrality
years 1562-98. Furthermore, one of the intentions of the French Revolution (1789-95) was to decrease the Roman Catholic Church’s social, cultural influence and political powers. The Constituent Assembly stated in 1789 that, the property of Catholic Church from now on would belong to the nation. During the late 1790’s and early 1800’s a declaration was made which dissolved all fundamental vows and a Civil Constitution was adopted. Under it state authority was no longer derived from godly authority but from the people, it also introduced a partial separation of church and state in the spheres of marriage, health and education. The Church was brought under state guidance where the state paid the salaries of the clergy, selected the Catholic bishops and required Catholic priests to swear allegiance to the French Government. Following, as long the Church limited itself to religious and spiritual substance it was not troubled, until the Law of separation of 1905 where the battles continued regarding the Catholic religions place within the state. At this time the Catholic Church still had great power through the schools and also they infiltrated the political elections by using their assets and also their authority to excommunicate and preach.\textsuperscript{70} However, there is rising debates on how the principle of laïcité should be interpreted into today’s perspective and if it is functioning as a barrier for the integration of immigrant in general, and of Muslims in particular.

4.2 ‘Affair du voile’

In September 1989 three girls were expelled from the Collège Gabriel-Havez de Creil (junior high school in Creil) for wearing the headscarf.\textsuperscript{71} This is referred to as ‘affair du voile’. The principal of the school argued that, the headscarf was a form of propagation in an attempt to try to convert others to their religion, in an ethnical diverse atmosphere, and that it brought more focus on the differences between students rather than similarities. This expelling ignited controversy for the reason that about 50% of the schools pupils at that time was of Arab immigrants.\textsuperscript{72} The principle justified the expelling of the girls by referring to the principle of religious neutrality.

Before these incidents, it had been considered acceptable to wear the headscarf to school, but not in the classroom, the custom was that the girls who wore the headscarf would drop them to their shoulders when entering the classroom. However, a number of girls started to insist on wearing it during class as well. After the initial suspensions, there were negotiations between

\textsuperscript{70}D. McGoldrick- Human Rights and Religion: The Islamic Headscarf Debate in Europe p.34-41
\textsuperscript{71}Melanie Adrian (2009): France, the Veil and Religious Freedom, Religion, State and Society, 37:4, 345-374
the school, parents, and Islamic religious leaders, which eventually led to the girls returning to
school and the previous practice of dropping the headscarf while entering the classroom. However, these events started up a controversial national political debate concerning issues of secularism, identity, immigration, citizenship and the fear of Islamic fundamentalism. “The National Front argued that the headscarf was a threat to France and its Christian heritage. It was evidence of a reverse cultural and religious colonisation. Immigrants should respect French cultural traditions or leave France.”

4.3 The 1989 Opinion of The Conseil d’État

Conseil d’État is the highest administrative jurisdiction in France. On 25 October 1989, the Minister of Education announced that even students who wore the headscarf had to be allowed to attend school because their enforced absence would destroy their possible integration and limit their social ability. They could be counselled against wearing them but they were not to be expelled. This interpretation of laïcité was somewhat controversial and was criticised from all political direction, so he asked for an opinion from the Conseil d’État. Conseil d’État dealt with three questions:

- Was the wearing of religious symbols compatible with principle of laïcité?
- If so, under what conditions was regulation of such wearing permissible?
- Could refusal to follow such regulation result in the expulsion of the offending student from the school?

The Conseil d’État’s opinion referred to inter alia the Law of Separation of 1905 and all the international human rights treaties including ECHR and ICCPR which were ratified by France and were therefore part of French law. The Opinion advised:

The wearing of signs by which they intend to demonstrate their belongings to a religion is not in itself incompatible with the principle of secularism, in so far as it constitutes the exercise of the freedom of expression and of demonstration of religious belief.

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75 Social Compass 2009 56: 202, Neutrality of the State and Regulation of Religious Symbols in Schools in Quebec and France, David Koussens
76 McGoldrick p. 68 from journal officiel
Though, the opinion clearly stated that the wearing of the Islamic headscarf was not exactly incompatible with the principle of laïcité but an exercise of the freedom of expression and a demonstration of religious belief, it also laid down limitations on the exercise of the freedoms. The freedom does not permit students to constitute an act of provocation or propaganda which would damage the dignity or liberty of the educational community. And that the pupils could not refuse to attend courses on the basis that it would be against their religious convictions.  

5. UK and religion

UK sees itself as a successful multicultural society with a positive respect for cultural diversity, who uses policies which presents equal possibilities in the spirit of mutual tolerance and anti-racism. A Home Office Paper on Improving Opportunity, Strengthening Society stated:

“In a diverse society, inevitably there will be differences in values and ambitions. Our respect for freedom means that no one set of cultural values should be privileged more than another. With the expectation of the values of respect for others and the rule of law, including tolerance and mutual obligations between citizens, which we consider are essential elements of Britishness, differences in values and customs need to be resolved through negotiation.”

This being said, there are certain ethnic minorities who suffer from high rates of unemployment, social exclusion and poverty. Media campaigns against asylum-seekers and native Traveller communities, has contributed to even greater hostility towards these particular groups. The events of 11 September 2001 and the London suicide bombings in July 2005 have had a similar impact upon British Muslim community.

5.1 State – Church Traditions

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79 Home office (2005), Improving Opportunity, Strengthen Society: The Government’s strategy to increase race equality and community cohesion, Chapter 4, Para 4, page 41
The English, Welsh, Scots and Irish have historically been regarded as the four major ethnic groups in the UK, but the UK has always been a country of migration. The increase in the size and variety of different ethnic groups since the late 1940s has added to the constant influx of migrant labour from EU and non-EU states and has made the UK a multicultural state.\textsuperscript{81} In the United Kingdom there are two official state recognised Christian denominations; the Church of England\textsuperscript{82} and the Presbyterian Church of Scotland. The Queen is both head of state and Supreme Governor of the Church of England. There are 26 bishops of the Church of England who sit in the House of Lords and have influence in laws that affect the whole United Kingdom.\textsuperscript{83} In the UK religion is taught in schools as part of the basic syllabus and even though the curriculum includes the teaching and practice of religions represented in the UK, every syllabus must reflect the fact that the religious traditions are in the main Christian.\textsuperscript{84}

5.2 The Begum Case

In June 2004, in \textit{R (on the application of Begum Shabina (Respondent) v The Headteacher and Governors of Denbigh High School (Appellant)}}\textsuperscript{85} The High Court in the UK considered a challenge to restrictions on wearing Muslim clothing based on the European Conventions on Human Rights. In 2002, Shabina Begum (from now on referred to as SB), was a 14 year old female Muslim pupil at Denbigh High School, Luton, who wished to start wearing the Jilbab\textsuperscript{86} to school. The school uniform for Muslim, Sikh and Hindu female pupils was the shalwar kameez\textsuperscript{87}, if they wished also the headscarf in school colours, which SB had been wearing for two years to school but no longer thought it was appropriate for a young Muslim woman who had reached puberty. The school informed SB that she could not enter the school without her school uniform. SB decided to stay home from school rather than wearing the school uniform, but she was never formally excluded from the school. Several negotiations took form to try to persuade SB back to school failed, it led to that SB missed two years of school. Before the High Court SB contends that the appellants excluded her from that school,

\textsuperscript{81}Country Report UK 2011 on measures to combat discrimination < http://www.non-discrimination.net/content/media/2011-UK-Summary%20country%20report%20LN_final.pdf>  
\textsuperscript{83}House of Lords see http://www.parliament.uk/business/lords/work-of-the-house-of-lords/what-the-lords-does/  
\textsuperscript{85}http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060322/begum-1.htm  
\textsuperscript{86}This is a long plain dress with sleeves which reaches the ankles, looks like a coat; it effectively conceals the shape of a woman’s arms and legs.  
\textsuperscript{87}This is a traditional dress in two peaces, the shalwar are loose trousers adn kamezee is a long shirt like a tunica.
unjustifiably limited her under the article 9 of the European Convention on Human Rights to manifest her religion or beliefs and violated her right not to be denied education under article 2 of the first protocol to the Convention. The ruling of the Court for judicial review at first instance rejected all these contentions. Since SB had not been excluded from the school, but had a choice to wear the school uniform; there had not been a violation of article 2 of the ECHR. Subsequently, since there were already appropriate school uniform, intentionally designed with consideration for Muslim, Sikh and Hindu female pupils, the shalwar kameez, the Court laid down that there was no breach of Article 9 of the ECHR, unlawfully denying SB the right to manifest her religion.

In March 2005, SB appealed to the Court of Appeal. Technically her appeal was successful; however, the Court of Appeal did not give a definite answer to the issue whether the school could lawfully maintain its school uniform policy.

6. Analysis and Discussion

The western society’s human rights norms, which are natural for western people, seem to become more difficult to define when becoming more influenced by other cultures and norms. When investigating the human right ‘freedom of religion’ a state party has to show that limitations on headscarves are necessary ‘to protect public safety, morals and the rights and freedoms of others’. Is it the safety of ‘others’ that is being protected here, or is the motive behind it something else, maybe the fear of losing western morals and Christian of importance? For instance, are not Muslim woman who see the headscarf as a religious obligation and live in the western society, accounted for in ‘the others’ that need to be protected?

6.1 Stasi Commission

In the Stasi Commission’s evaluation, the Report listed 25 recommendations of which one of them suggested that France should establish Jewish and Muslim holy days in the calendar. This was rejected by President Chirac on the account that there are already enough holidays and that this would be difficult to incorporate with the working schedule of parents. This

89 McGoldrick — Human Rights and Religion: The Islamic Headscarf Debate in Europe p. 183-193
implies that these holidays would only regard school children and the not the working world. But Christmas is a holiday where both pupils and parents have days of from school and work, respectively. On the other hand, the Stasi Commission also suggested that ‘Businesses and schools should better accommodate the wishes of believers to attend religious ceremonies’. This suggests that pupils could take a day off from school to attend religious ceremonies. Although this is a very nice gesture, what about those who are atheists or of no belief, should they never have a day off? Even though here is suggested that schools should try to accommodate wishes of believers to attend religious ceremonies, if this is not a regulation, then it is not a certainty that it will be implemented.

6.2 Differences of approach France and UK

In France, where the tradition of secularism is long and profound, it strikes me as odd that the tolerance for religious symbols in schools is lower than it is in the UK, where the state and church are not separated. Even though, there are no national rules about school uniforms in the UK, the school uniform guidance advises that governor of schools should consider how the proposed uniform policy might affect each group represented in the school. As presented in the Begum Case, even though Ms Begum was not allowed to wear the Jilbab to school, the case shows that the UK have met the cultural differences more open minded than France, in that sense that the school uniform can be altered and include shalwar kamezee and the Islamic headscarf. However, when the Islamic country of Turkey met the challenge of the headscarf, Leyla Sahin was not permitted to attend classes at the University of Istanbul wearing a headscarf. European Court of Human Rights, case of Leyla Sahin v Turkey, the Grand Chamber of the ECHR found no violations of Article 9, and upheld the principle of secularism and equality. The Court underlined the importance of the ‘States role as the neutral and impartial organiser of the exercise of various religions … and stated that this role is conductive to public order… in a democratic society. With this case in mind, one could question why western societies should be so accepting of the wearing of the Islamic headscarf in schools, when Turkey an Islamic democratic country, is not.

When the law of 2004-228 of 15 March first came into consideration, it seemed like the media, on purpose, chose to blow it out of proportion by not shedding light on any of the investigation of the Stasi Commission’s Report, or on the various other positive aspects from
which the law became a fact. For example, the many recommendations form the Commission about where there are room for religious customs that are not of the Christian variety, such as establishing a national school for Islamic studies, and that the French State fully respects the freedom to build mosques.

From this perspective, one can argue that there is room for Islamic traditions in France, and that the media did not give a fair view of religious freedom in France. In France, the objective is to not differentiate between people based on cultural differences and this law is to be considered a positive step in the integration of Muslim immigrants and towards viewing everyone as equal in the society. On the other hand, is it not preferable to accept one another’s differences rather than obliterate them? From the human rights perspective: to curb ones religious traditions, such as wearing the Islamic headscarf, is to violate that individual’s human right to manifestation of religion. Obviously, the European Court of Human Rights alongside with France considers freedom of religion is something that can be altered with ‘for the rights of others.

UK is in several ways contrasting to France and therefore makes good subjects to compare. In both France and United Kingdom, religions still plays a vital role in the basis of social institutions and political parties. Yet France is since centuries back a secular state and the in the United Kingdom the church and state are not separated. In the UK, where the church is not secular from the state, religion is taught in school as standard part of the curriculum. Even though Christianity is being underlined as the major and traditional belief, other religions like Islam are also part of the syllabus. Again, where the UK is perhaps expected to be less open-minded, because of the state-church relation, it surprisingly is more radical than France.

According to article 1 of the law of 2004-228 15 March, “In schools, colleges and public schools, the wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited”. The headscarf is prohibited accordingly, however smaller religious symbols such as small crosses or the hand of Fatima are allowed. If a pupil should choose to wear one of these smaller symbols, can it not be seen as a way of propagating their religion, and for that matter, do you need symbols to propagate something at all?

National systems display different degrees of separation and cooperation. Church-state relations can be reflected in a wide range of national and international laws. The end result in human rights cases, concerning freedom of religion and of religious manifestation, is that there has to be a balance between conflicting rights and the rights of others.
6.3 Religion and gender equality

Religious freedom versus gender/sex discrimination has become a controversial and comprehensive debate in the western societies. This is because in some aspects when exercising a religion, women and men are perceived and treated different. According to the Resolution (2005) Women and Religion in Europe, women’s rights are often limited and violated in the name of religion. And religiously motivated gender stereotypes has endowed men a sense of superiority which has led to the discriminatory treatment of women by men, and even violence from their side.90

This seems to be most striking when it comes to Islam and Muslim women where the woman is expected to wear the Islamic headscarf or in some more extreme cases the burqa, as part of their religious obligation. In the case Leyla Sahin v Turkey, (as I mentioned in part 3.4), The Court upheld a gender-perspective, where it imposed a question which stated: is the Islamic headscarf an expression of religious freedom or discrimination of women, oppression of women? And the Court stated that it is not denied that the Islamic headscarf is a religious obligation from the Koran, however, it is difficult to unite this principle with the principle of gender equality, and the court stressed out that promotion of equality between the genders is a substantial goal for the member states, and that this means that it is necessary to put forward heavy reasons for different treatments on the basis of gender, for it to be considered as consistent with the convention.91

In this case it seems clear that the European Court of Human rights gives gender equality priority over the form of religiously motivated manifestation. But it does not say why gender equality should be preferred before religious freedom.

The Resolution (2005) seeks to give protection and status of gender equality to women who are oppressed. In this case women/girls who are forced to wear the Islamic headscarf. However, if looked at another angle, what about the women who wish to wear the Islamic headscarf as their fundamental freedom and right to manifest their religion? How should they be protected from oppression and discrimination, in that sense that they are forced to take the Islamic headscarf off?

91 Leyla Sahin v Turkey application no 44774/98 Para. 111. (“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”)
The answer is that these are two fundamental human rights which collide with one another, *(gender)*equality and religious freedom. The situation is confusing or puzzling because the collision is not between persons of opposite sex, but focuses only on the female person and the piece of clothing which she wears on her head. Clothing per say, has normally nothing to do with religion, gender or gender oppression, in that sense all clothing are religious- and gender neutral. However, since the Islamic headscarf can be seen as a way of oppression of women, it is not neutral\(^{92}\) nor is it gender neutral because only women wear them.

However, if a person (of either sex) freely wants to wear a piece of clothing, should law really be able to prohibit them that right? The even more puzzling question is; what will it lead to? And, which human right should “win” over the other?

The truth is that I do not have an answer to these questions. This is a heavily debated issue which only grows for every thought that is contributed to the matter. But at this point all the evidence seem to point at one direction, gender equality before religious freedom.

Since the law of 2004 came into force, the debate about Islamic clothing has continued to reach new grounds. In 2010 another law was passed through in France, this concerns the Islamic *burqa* and *niqab*. This clothing is now forbidden to be worn in public spaces.\(^ {93}\) The debate around this mean that the burqa and niqab are also signs of gender inequality.

### 7. Conclusion and thoughts

To answer my posing questions at the beginning of this thesis, yes! There are laws which put limitations on wearing religious symbols in schools both in France and the UK. However, in the UK the law enables the wearing of religious clothes, amongst others, Islamic religious clothes, trough the incorporation of these in the existing school uniform regulations.

However, in the diverse society which the western world has become, it is needed to show more tolerance for growing cultures and human laws initial essence should not be forgotten, and alteration with human rights laws should be created with caution. If new laws keep popping up which regulate what clothes some people can/cannot wear, the thought of what it could lead to is frightening.

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\(^{92}\) Fahlbeck, R. *Bed och Arbeta, Om Religionsfrihet i Arbetsliv och Skola*, 2011. P. 224

Nonetheless, it goes without saying that women rights and the fight for gender equality needs to be a priority in our societies. But I think that the question to be asked is; can we sacrifice one human right for another? And should we? For a long time religion has been the cornerstones of our societies, maybe the time has come for the next step for the secular states, where religion has no place to dictate our lives. Or maybe the change is already here. Either way this is still a burning topic and probably only the beginning of what is yet to come.

REFERENCES

LITTEHATURE

Scott Wallach J, 2007, Slöjans Politik, Tankekraft Förlag, Hägersten


Djavann C, (2003), Ner med slöjan, Sekwa förlag, Helsingborg


Hydén H, 2002, Rättssociologi som rättssvetenskap, Studentlitteratur, Lund

Ellis E, 2005, EU Anti-Discrimination Law, Universitypress, Oxford

ARTICLES


McCulgan A, Country Report UK, 2011 on measures to combat discrimination, European network of legal experts in the non-discrimination field

WEBSITES

1 LOI n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics (1), English translation is available
Department for Education - Guidance for Head Teachers, Governing Bodies, Academy Trusts, Free Schools and Local Authorities on School Uniform and Related Policies, 2012

http://www.ed.ac.uk/schools-departments/equality-diversity/legislation-policies/legislation


Equality Act 2010 part two section 10 < http://www.legislation.gov.uk/ukpga/2010/15/part/2/chapter/1>

Department for Education - Guidance for Head Teachers, Governing Bodies, Academy Trusts, Free Schools and Local Authorities on School Uniform and Related Policies


International Covenant of Civil Political Rights (1966) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

El Hamel C. (2002) 'Muslim diaspora in Western Europe: the Islamic headscarf (hijab), the media and Muslims’ integration in France’, Citizenship Studies, 6 ,3, pp. 293-308. <http://www.academia.edu/2034430/Muslim_diaspora_in_Western_Europe_The-Islamic-headscarf_hijab_the_media_and_Muslims_integration_in_France>
Home Office (2005), Improving Opportunity, Strengthen Society: The Government’s strategy to increase race equality and community cohesion

Country Report UK, 2011, on measures to combat discrimination

Human Rights Council Resolution 6/37. Elimination of all forms of intolerance and of discrimination based on religion or belief

Resolution 1464 (2005) on Women and Religion in Europe

Recommendation 1202 (1993) Religion tolerance in a democratic society

Recommendation 1396 (1999) Religion and Democracy

CASES

Metropolitan Church of Bessarabia and Others v Moldova, Application NO 45701/99, para 117
<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59985#w=001-59985>

<http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#"Hasan and Chaush v Bulgaria","documentcollectionid2":"GRANDCHAMBER","CHAMBER"},"itemid":"001-58921"}>

Leyla Sahin v Turkey (Application no. 44774/98
<http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#"Leyla Sahin v Turkey","documentcollectionid2":"GRANDCHAMBER","CHAMBER"},"itemid":"001-70956"}>

Judgments - R (on the application of Begum (by her litigation friend, Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School (Appellants)
<http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060322/begum-1.htm>