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# The Wearing of Religious Symbols at the Workplace in Sweden

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# Contents

<b>CONTENTS</b> .....	<b>2</b>
<b>SUMMARY</b> .....	<b>1</b>
<b>PREFACE</b> .....	<b>2</b>
<b>ABBREVIATIONS</b> .....	<b>3</b>
<b>1 INTRODUCTION</b> .....	<b>4</b>
1.1 SUBJECT AND PURPOSE .....	4
1.2 DELIMITATIONS .....	5
1.3 METHOD AND MATERIAL.....	5
1.4 OUTLINE.....	6
<b>2 DOMESTIC SWEDISH REGULATIONS AND CASES</b> .....	<b>8</b>
2.1 LEGISLATION ON FREEDOM OF RELIGION.....	8
2.1.1 The Constitutional Protection of Freedom of Religion.....	8
2.1.2 The Act on Religious Communities .....	8
2.2 ANTI-DISCRIMINATION LEGISLATION .....	9
2.2.1 The Constitutional Protection against Discrimination.....	9
2.2.2 Penal Law .....	9
2.2.3 Anti-Discrimination Legislation within Working Life .....	10
2.2.3.1 Anti-Discrimination Legislation within Working Life until 2009.....	10
2.2.3.2 A New Legislation against Discrimination.....	11
2.2.4 Other Laws and Principles Regarding the Labour Market .....	17
2.3 CASES REGARDING THE WEARING OF RELIGIOUS SYMBOLS.....	18
2.3.1 Cases Settled in Domestic Courts.....	18
2.3.2 Conciliations by the Ombudsman against Ethnic Discrimination / Equality Ombudsman.....	23
<b>3 THE EUROPEAN CONVENTION ON HUMAN RIGHTS</b> .....	<b>25</b>
3.1 THE LEGAL STATUS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN SWEDISH LAW .....	25
3.2 FREEDOM OF RELIGION IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS .....	25
3.3 ANTI-DISCRIMINATION REGULATIONS IN THE ECHR .....	32
3.3.1 Article 14 .....	32
3.3.2 Protocol 12 .....	34
3.4 CASES SETTLED BY THE EUROPEAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COMMISSION OF HUMAN RIGHTS .....	34
3.4.1 Cases regarding the Wearing of Religious Symbols .....	34
3.4.2 Cases on Manifestation of Religion at the Workplace not regarding Religious Symbols .....	43
<b>4. CONFLICTING VALUES</b> .....	<b>46</b>
4.1 POSITIVE FREEDOM OF RELIGION VERSUS NEGATIVE FREEDOM OF RELIGION.....	46
4.2 SECULARISM. RELIGION AS A PRIVATE OR A PUBLIC MATTER? .....	49
4.3 MAJORITY VERSUS MINORITY - PROTECTION OF PLURALISM .....	53
4.4 GENDER EQUALITY VERSUS FREEDOM OF RELIGION .....	57
4.5 CONTRACTUAL OBLIGATIONS VERSUS FREEDOM OF RELIGION .....	64
<b>5. THE SWEDISH CONTEXT</b> .....	<b>71</b>
<b>6 CONCLUSION</b> .....	<b>76</b>
<b>BIBLIOGRAPHY</b> .....	<b>78</b>

TABLE OF CASES .....	82
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# Summary

The wearing of religious symbols at the workplace and in schools has been a much debated topic in Sweden and other European countries in recent years. Although headscarves and other religious symbols are quite a common sight at many workplaces in Sweden today, the matter is not uncontroversial. This thesis deals with the legal aspect of the wearing of religious symbols at work. Which legislation is applicable, and which principles are used when balancing the competing rights at stake?

Sweden has an extensive legislation against ethnic and religious discrimination, and legislation which protects freedom of religion. Few cases on religious symbols at work has however been decided based on this legislation, and consequently few conclusions can be drawn from domestic case law.

The European Court of Human Rights has dealt with several cases regarding religious symbols, but none of them with Sweden as respondent state. The conclusions drawn are however applicable on Sweden as well but with bearing in mind the differences between Swedish society and the societies in the respondent countries. In the two most significant cases, *Dahlab v. Switzerland* and *Şahin v. Turkey*, the Court approved the right of the state to prohibit a woman to work as a teacher when wearing a headscarf respectively expelling a woman wearing a headscarf from university.

Looking at the principles that are discussed by the ECtHR, one can see the balancing between different rights when deciding if there is a right to wear religious symbols at work or not. These principles and what the outcome would have been likely to be in the Swedish context, are discussed in the thesis. Considering the character of Swedish society, it is probable that religious symbols are allowed at the workplace in most cases, since the employee's right to freedom of religion and non-discrimination in most cases would prevail over the counterpart's rights and interests, and since health and security matters in most cases are not prevailing.

# Preface

I would like to thank my supervisor Kjell Å. Modéer for his always positive attitude and patience.

I would also like to thank DO, particularly Anders Bergstrand, for supplying me with useful material.

Furthermore, I would like to express my appreciation to my friends in Sweden and abroad for good advice and for always encouraging me. Special thanks to Elisabeth Larsson for proof reading my thesis and Marie Gaillard for IT-support.

Last but not least I would like to express my gratitude to my parents for always supporting and helping me. I am so sorry my Dad left during the journey and is not here to see the final result.

# Abbreviations

DO	The Equality Ombudsman / The Ombudsman against Ethnic Discrimination
ECHR	European Convention on Human Rights
ECmHR	European Commission of Human Rights
ECtHR	European Court of Human Rights

# 1 Introduction

## 1.1 Subject and Purpose

The wearing of religious symbols at the workplace and in schools has in recent years become a topic of much debate in Sweden as well as in other European countries. In Sweden, it is particularly the headscarf worn by Muslim women that has been in focus. Some examples found in the Swedish press considering the labour market: In 2002, a woman was stopped from leading the TV-program “Mosaik” in Swedish television because she was wearing a headscarf. Swedish Television (SVT) later withdrew their decision, and currently all TV-moderators except the newscasters are allowed to use headscarves.<sup>1</sup> In 2006, a young woman applying for a holiday work at Liseberg amusement park was denied employment because she was wearing a headscarf. The employer later changed his mind, designed a headscarf suitable with the work clothes and hired the woman.<sup>2</sup> The same year, the police announced that police officers were allowed to wear religious headgear.<sup>3</sup>

The European Court of Human Rights, whose case law Sweden is obliged to follow, has recently decided on some cases considering the wearing of religious symbols at work and in universities. Of particular interest are two cases regarding the wearing of the headscarf. In *Dahlab v. Switzerland*<sup>4</sup>, a Swiss woman was dismissed when she refused to take off her headscarf while teaching young children at school. In *Şahin v. Turkey*<sup>5</sup>, a university student was expelled for the same reason.

Sweden has extensive legislation against ethnic and religious discrimination, and legislation which protects freedom of religion. People wearing headscarves, turbans and other kinds of religious symbols are a common sight at the labour market. Still the matter of wearing religious symbols at work does not seem to be uncontroversial. It happens that people get denied work because they wear religious symbols and it is not rare to see debate articles in which the author asks for a prohibition on the wearing of religious symbols, especially headscarves. Looking at the case law of the European Court of Human Rights, the Court has approved the prohibition of wearing religious symbols in certain cases.

The purpose of my thesis is to look into the regulations in Swedish domestic law as well as the regulations in the European Convention on Human Rights to see how far-reaching rights an employee has to wear religious symbols at work, which exemptions that can be made to these rights and how these exemptions are motivated. Since there is

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<sup>1</sup> TT in *Aftonbladet* 2002-12-13.

<sup>2</sup> Nihlén in *HD* 2006-07-08; [http://www.do.se/t/Page\\_\\_\\_\\_1765.aspx](http://www.do.se/t/Page____1765.aspx) (2009-03-10).

<sup>3</sup> Wising in *Tidningen Svensk Polis* 2006-03-09.

<sup>4</sup> *Dahlab v. Switzerland*, App. No. 42393/98, Admissibility Decision of 15 February 2001.

<sup>5</sup> *Şahin v. Turkey*, App. No. 44774/98, Judgement of 10 November 2005.

almost no domestic case law, I will particularly look into the underlying principles found in the case law of the ECtHR to see which competing rights and interests that are at conflict, and discuss what would be the most likely outcome when balancing these rights and interests against each other in the Swedish context.

## **1.2 Delimitations**

I will limit my thesis to the wearing of religious symbols at the workplace in Sweden. Accordingly I will not go deeper into the subject of wearing religious symbols at universities, in schools or in other sectors of society. Some case law regarding the wearing of religious symbols by university students and some religious matters in general at the workplace will however be presented since it contributes to the general discussion. The conclusion drawn however will only regard the workplace.

Furthermore, my thesis is limited to the situation at the workplace in Sweden. Cases ruled by the ECtHR regarding other countries are presented since the case law of the Court is binding in Sweden, but the main focus is Sweden and the conclusion will only regard the Swedish situation.

## **1.3 Method and Material**

The method used in my thesis is the legal method. I am analysing legislation, case law and literature. However, since Swedish domestic case law, as well as the case law from ECtHR specifically dealing with religious symbols at the workplace is scarce, I will to a certain extent deal with principal discussions and interpretations regarding the legal situation.

The thesis is based on a wide range of material, including legislation, case law, books and articles on Swedish domestic law and the ECHR.

Regarding domestic Swedish law, I have been studying Swedish legislation on freedom of religion and ethnic and religious discrimination, government bills and case law from Swedish courts. For comments on Swedish discrimination law I have used the book “Diskrimineringslagen” by Håkan Gabinus Göransson, Stefan Flemström and Martina Slorach. In 2002 Reinhold Fahlbeck, professor emeritus of labour law at the University of Lund, published “Ora et labora -on freedom of religion at the workplace in Sweden”, in which both domestic law as well as the case law of ECHR are discussed thoroughly. I have used this article for the thesis.

Furthermore, the European Convention on Human Rights and the case law of the European Court of Human Rights have been used as



sources. The case law from the ECtHR is more abundant than the one from Swedish Courts, although there are only a few cases dealing specifically with religious symbols at the workplace. I have therefore not limited my research to just these cases, but also looked at cases on the wearing of religious symbols at other places than work and at issues of freedom of religion at the workplace in general. Important sources were a book and an article on freedom of religion under the ECHR by Associate Professor Carolyn Evans. Furthermore, two articles by Professor Emeritus Reinhold Fahlbeck on freedom of religion at the workplace discussed with the ECHR as a starting point, and a wide range of articles by different scholars commenting on freedom of religion under the Convention have been used. With the exception of Fahlbeck's articles, none of these sources focuses specifically on the Swedish situation.

Newspaper articles have been used to illustrate the present debate. These do not have the same academic weight as the other sources, but they give a good idea of the current situation.

Finally, electronic sources have been used, such as the homepage of the Ethnicity Ombudsman and the HUDOC database, where the case law of the ECtHR is found.

Regarding Swedish laws translated into English, I have used the translations that can be found at the homepage of the Swedish Government. The majority of these translations are however unofficial, and some notions are not always translated in the same way in different laws. Regarding Government bills it has not been possible to find any translations and I therefore had to translate them myself. Key notions will be written in Swedish in footnotes to at least make clear to Swedish readers which notion that is meant.

## **1.4 Outline**

Chapters two and three are descriptive chapters entailing a legal review of relevant sources of law and case law. In chapter two, Swedish domestic law and case law are presented, as well as some of the settlements made by the Equality Ombudsman. In chapter three, the rights in the European Convention on Human Rights and the case law of the European Court of Human Rights are introduced.

When discussing the wearing of religious symbols and the manifestation of religion in general, one has to strike a balance between competing rights and interests. In chapter four some of these conflicts between different rights and interests are presented more thoroughly, both how they were dealt with by the ECtHR as well as how different scholars have commented on them.

Chapter five encompasses an analysis of the Swedish situation. In the lack of any clearly guiding case law, it will be discussed what right there is to wear religious symbols at work looking at the legislation and taking into account the conflicting rights and interests at stake. How is a

balance most likely to be struck between the competing rights and interests in a Swedish context?

Finally, in chapter six, a conclusion is presented.

## 2 Domestic Swedish regulations and cases

### 2.1 Legislation on Freedom of Religion

#### 2.1.1 The Constitutional Protection of Freedom of Religion

Freedom of religion is regulated in the Instrument of Government<sup>6</sup>, Chapter 2, Article 1, Section 6. The provision guarantees every citizen the freedom of religion, defined as the freedom to practise one's religion alone or in company with others. According to Article 12 of the Instrument of Government, freedom of religion cannot be subject to restrictions, it is absolute, whereas the other rights and freedoms referred to in Article 1<sup>7</sup> may be restricted by law. It is, however, to some extent misleading to consider freedom of religion as an absolute right since it is stated in the Government's bill that what is actually protected from restrictions are those aspects of freedom of religion that are not linked to any of the other regulations regarding rights and freedoms. When e.g. freedom of speech, freedom of assembly or freedom of association or any other right or freedom referred to in Article 1 is used in a religious context, restrictions can be made. Furthermore, general restrictions in the citizen's conduct are also applicable when freedom of religion is concerned.<sup>8</sup> Freedom of religion can consequently not be invoked to support e.g. slaughter methods that are not in accordance with the regulations in the Animal Welfare Act or polygamy.<sup>9</sup>

In Chapter 2, Article 2 of the Instrument of Government *e contrario* the negative freedom of religion, i.e. freedom from religion, is protected. It is stated that every citizen shall be protected in her or his relations with the public administration from all coercion to divulge an opinion in any religious connection and from all coercion to belong to a religious community.

#### 2.1.2 The Act on Religious Communities

On 1<sup>st</sup> January 2000 the Act concerning Freedom of Religion<sup>10</sup> from 1951 was replaced by the Act on Religious Communities<sup>11</sup>. Contrary to the Act concerning Freedom of Religion, which contained regulations on both the

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<sup>6</sup> Regeringsformen (1974:152).

<sup>7</sup> The rights and freedoms referred to in Article 1 are freedom of expression, freedom of information, freedom of assembly, freedom to demonstrate and freedom of association.

<sup>8</sup> Prop 1975:76:209 p. 48 and p. 115.

<sup>9</sup> Strömberg and Lundell p. 88.

<sup>10</sup> Religionsfrihetslag (1951:680).

<sup>11</sup> Lag (1998:1593) om trossamfund.

right to positive and negative freedom of religion, there are no regulations on freedom of religion in the Act on Religious Communities. Section 1 of the Act states that provisions about freedom of religion are contained in the Swedish Instrument of Government and in the European Convention on Human Rights.

## **2.2 Anti-discrimination Legislation**

### **2.2.1 The Constitutional Protection against Discrimination**

One of the basic principles of the form of government in Sweden is expressed in Chapter 1 Article 2 of the Instrument of Government

“Public power shall be exercised with respect for the equal worth of all and the liberty and dignity of the private person. [---] The public institutions shall promote the opportunity for all to attain participation and equality in society. The public institutions shall combat discrimination of persons on grounds of gender, colour, national or ethnic origin, linguistic or religious affiliation, functional disability, sexual orientation, age or other circumstance affecting the private person. Opportunities should be promoted for ethnic, linguistic and religious minorities to preserve and develop a cultural and social life of their own.”

According to Chapter 1 Article 9 courts, administrative authorities and others performing tasks within the public administration shall have regard in their work to the equality of all before the law and shall observe objectivity and impartiality. It is stated in Chapter 2 Article 15 that no act of law or other provision may imply the unfavourable treatment of a citizen because he or she belongs to a minority group by reason of race, colour, or ethnic origin. Furthermore, no act of law or other provision may be adopted which contravenes Sweden’s undertakings under the European Convention on Human Rights (Chapter 2 Article 23).

### **2.2.2 Penal Law**

In the Swedish Penal Code there is one section directly taking aim at discrimination, Chapter 16 Section 9. According to this Section, a businessman who in the conduct of her or his business discriminates against a person on grounds of that person’s race, colour, national or ethnic origins or religious belief by not dealing with that person under terms and conditions normally applied by the business man in the course of his business with other persons, is guilty of committing *unlawful discrimination*, and shall be sentenced to a fine or imprisonment for at most one year.

## **2.2.3 Anti-Discrimination Legislation within Working Life**

### **2.2.3.1 Anti-Discrimination Legislation within Working Life until 2009**

Until 1<sup>st</sup> January 2009, Swedish legislation on discrimination consisted of several different laws grouped according to discrimination grounds and field of society. Regarding discrimination in working life due to ethnic background, religion and religious belief, the applicable law was the The Act on Measures against Discrimination in Working Life on Grounds of Ethnic Origin, Religion or other Belief (1999:130). This law was introduced in 1999, together with laws against discrimination in working life on grounds of disability respectively sexual orientation.<sup>12</sup> Changes of the law were made in 2000<sup>13</sup>, 2003<sup>14</sup>, due to directives adopted by the EU Council of Ministers, and in 2005<sup>15</sup>. These laws were supervised by three ombudsmen: the Ombudsman against Ethnic Discrimination, the Disability Ombudsman<sup>16</sup> respectively the Ombudsman against Discrimination on grounds of Sexual Orientation.<sup>17</sup>

In 2000, the EU Council of Ministers adopted two directives concerning discrimination, Directive (2000/43/EC) Implementing the Principle of Equal Treatment between Persons Irrespective of Racial and Ethnic Origin, and Directive (2000/78/EC) Establishing a General Framework for Equal Treatment in Employment and Occupation. Both directives had to be implemented by member states during 2003. In Sweden, these directives were mainly implemented through some amendments to existing laws against discrimination and through a new Act prohibiting discrimination. The Act introduced in 2003, the Prohibition of Discrimination Act<sup>18</sup>, regarded discrimination related to ethnic origin, religion or other belief, sexual orientation or disability in other areas than work, conditions of employment and other conditions of work since that area was already covered by the laws from 1999. The Act did, however, apply to some areas connected to work: labour market programs, starting or running a business, occupational activity, membership, participation in and benefits from organisations of workers or employers or professional organisations, and unemployment insurance. In addition, it applied to goods, services and housing, social services, local and national transport services for disabled people and housing adaptation allowances, social insurance and related transfer systems and health and medical care and other medical

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<sup>12</sup> The Prohibition of Discrimination in Working on grounds of Disability Act (1999:132) and the Prohibition of Discrimination in Working Life because of Sexual Orientation Act (1999:133).

<sup>13</sup> SFS 2000:762.

<sup>14</sup> SFS 2003:308

<sup>15</sup> SFS 2005:477

<sup>16</sup> Handikappombudsmannen.

<sup>17</sup> Ombudsmannen mot diskriminering på grund av sexuell läggning (HomO).

<sup>18</sup> Lag om förbud mot diskriminering (2003:307).

services (Sections 5-13). This law has, with some adjustments, been incorporated into the new Act. In 2002, a parliamentary committee was appointed by the Government to consider if there was need for a coherent legislation against discrimination that encompassed all discrimination grounds and all fields of society. Furthermore, the committee was to investigate if Sweden fulfilled all the requirements of the EC-law. The committee's work resulted in a new Act on discrimination on 1<sup>st</sup> January 2009.<sup>19</sup>

### **2.2.3.2 A New Legislation against Discrimination**

On 1<sup>st</sup> January 2009, a coherent legislation on discrimination came into force. A new Act (2008:567) replaced the previously existing seven Acts<sup>20</sup>, and a new agency, the Equality Ombudsman<sup>21</sup>, is responsible for compliance with the new Act. The Act encompasses the former discrimination grounds sex, ethnicity, religion or other belief, disability and sexual orientation as well as two new ones: transgender identity or expression, and discrimination on grounds of age. It applies to most areas of society such as working life, education, goods, services and housing, social services, the social insurance system and health care, regarding all discrimination grounds except age. Some new areas of society are included: public employment, national military service and civilian service, all parts of the education system, public meetings and public events. Within the area of working life, prohibitions against discrimination of trainees and of temporary or hired labour have also been introduced. The previously four ombudsmen<sup>22</sup> have been replaced by one ombudsman: the Equality Ombudsman. The following description of the Act will focus on discrimination on grounds of ethnicity or religion or other belief within the area of working life.

#### *Purpose of the Act*

The purpose of the Act is to combat discrimination and in other ways promote equal rights and other opportunities regardless of sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age (Chapter 1, Section 1). In the Government's bill, ethnicity is defined as national or ethnic origin, colour of skin or other similar

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<sup>19</sup> Göransson, Flemström and Slorach, p. 19.

<sup>20</sup> The Equal Opportunities Act (1991:433), the Act on Measures against Discrimination in Working Life on Grounds of Ethnic Origin, Religion or other Belief (1999:130), the Prohibition of Discrimination in Working Life on grounds of Disability Act (1999:132), the Prohibition of Discrimination in Working Life because of Sexual Orientation Act (1999:133), the Equal Treatment of Students at Universities Act (2001:1286), the Prohibition of Discrimination Act (2003:307), and the Act Prohibiting Discriminatory and Other Degrading Treatment of Children and Pupils (2006:22).

<sup>21</sup> Diskrimineringsombudsmannen.

<sup>22</sup> The Equal Opportunities Ombudsman, the Ombudsman against Ethnic Discrimination, the Disability Ombudsman and the Ombudsman against Discrimination because of Sexual Orientation

circumstances. The term race is no longer used in Swedish legislation after 1997, since there is no scientific ground that different races exist. The legislation presupposes that all human beings belong to the same race. The notion is however still present in older legislation and is also used in several UN conventions.<sup>23</sup> Religion or other belief is not defined in the law or in the Government's bill. Some examples mentioned are Buddhism, atheism and agnosticism. Ethic or philosophical views, which are not related to religion, and political opinions, fall without the scope of the law. The discrimination grounds ethnicity and religion or other belief complement each other. A cultural or traditional kind of behaviour will usually fall under the notion ethnicity if there is no relation to religion or other belief. These two discrimination grounds cover a waste field, and in practice it ought to be of less importance which ground that is invoked in court.<sup>24</sup>

The first chapter of the law contains definitions and other introductory provisions. The second chapter contains provisions on prohibitions against discrimination and reprisals. The third chapter contains provisions on active measures, and the fourth one contains provisions on supervision. The fifth chapter contains provisions on compensation and invalidity, whereas the sixth chapter contains provisions on legal proceedings (Chapter 1, Section 2). A contract or agreement that restricts someone's rights or obligations under the Act is of no legal effect in that regard (Chapter 1, Section 3).

#### *The Concept of Discrimination*

The concept of discrimination, as it is used in the new law, has its origin in EC-law.<sup>25</sup> The Act prohibits both direct and indirect discrimination. Furthermore, harassment and instructions to discriminate against an individual are defined as discrimination and therefore covered by the prohibition of discrimination (Chapter 1, Section 4).

Direct discrimination means that someone is disadvantaged by being treated less favourably than someone else is treated, has been treated or would have been treated in a comparable situation, if this disadvantage is associated with e.g. ethnicity or religion or other belief (Chapter 1 Section 4 Bullet 1). A necessary requirement for direct discrimination is that someone has been disfavoured, e.g. was not called to an employment interview, did not receive a rise in salary when the colleagues with similar work tasks did, or was not promoted.<sup>26</sup>

In order to determine if a person has been disfavoured, a comparison shall be made. It must be investigated how the person who claims to have been discriminated against is treated, has been treated or would have been treated compared to another person or persons. Discrimination has only occurred if the comparison shows that another person in a comparable situation is, was or would have been treated differently. If possible, the comparison is made with a real person e.g. a co-

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<sup>23</sup> Prop. 2007/08:95 pp. 117-120.

<sup>24</sup> Prop. 2007/08:95 pp. 120-122.

<sup>25</sup> Prop. 2007/08:95 p. 96.

<sup>26</sup> Göransson, Flemström and Slorach p. 38.

worker or another job applicant. However, the comparison can also be made with a hypothetical person if no real person is at hand.<sup>27</sup>

The definition of indirect discrimination is that someone is disadvantaged by the application of a provision, a criterion or a procedure that appears neutral but that may put people of a certain ethnicity or a certain religion or other belief at a particular disadvantage, unless the provision, criterion or procedure has a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose (Chapter 1, Section 4, Bullet 2.) As for direct discrimination, a necessary requirement for indirect discrimination is that someone has been disfavoured, and a comparison must be made between the group the person belongs to and other groups. If a comparison shows that it is more difficult for persons from the group to which the individual belongs to fulfil a certain criteria, it is a case of indirect discrimination. Hypothetical persons are not used to determine if indirect discrimination has occurred.<sup>28</sup> It is, however, in certain cases allowed to use provisions that might disfavour people from the groups protected by anti-discrimination law. A balance has to be struck between competing interests. In order for a provision that typically has negative effects for a certain group to be allowed, two criteria must be fulfilled. Firstly, the provision must have a legitimate purpose. Secondly, the means used must be appropriate and necessary. If there are other, non-discriminatory means to reach the same purpose, these should be used instead.<sup>29</sup>

Harassment refers to conduct that violates a person's dignity and that is associated with one of the grounds of discrimination e.g. ethnicity, religion or other belief (Chapter 1, Section 4, Bullet 3). If an employer who becomes aware that an employee considers that he or she in connection with work has been subjected to harassment by someone performing work or carrying out a traineeship at the employer's establishment, the employer is obliged to investigate the circumstances surrounding the alleged harassment and where appropriate take the measures that can reasonably be demanded to prevent harassment in the future (Chapter 2, Section 3).

The term instructions to discriminate refers to orders or instructions to discriminate against someone who is in a subordinate or dependent position relative to the person who gives the orders or instructions or to someone who has committed herself or himself to performing an assignment for that person (Chapter 1, Section 4, Bullet 5).

The specific regulations on working life are found in Chapter 2, Sections 1-4. In Section 1 it is stated that an employer may not discriminate against a person who, with respect to the employer,

1. is an employee,
2. is enquiring about or applying for work,
3. is applying or carrying out a traineeship, or
4. is available to perform work or is performing work as temporary or borrowed labour.

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<sup>27</sup> Prop. 2007/08:95 pp. 98-101.

<sup>28</sup> Göransson, Flemström and Slorach pp. 43-44.

<sup>29</sup> Göransson, Flemström and Slorach p. 45.



A person who has the right to make decisions on the employer's behalf shall be equated with the employer according to the same Section. The prohibition in Section 1 does not prevent differential treatment based on a characteristic associated with one of the grounds of discrimination if, when a decision is made on employment, promotion or education or training for promotion, by reason of the nature of the work or the context in which the work is carried out, the characteristic constitutes a genuine and determining occupational requirement that has a legitimate purpose and the requirement is appropriate and necessary to achieve that purpose (Chapter 1, Section 2, Bullet 1). If an employer becomes aware that an employee considers that he or she in connection with work has been subjected to harassment or sexual harassment by someone performing work or carrying out a traineeship at the employer's establishment, the employer is obliged to investigate the circumstances surrounding the alleged harassment and where appropriate take the measures that can reasonably be demanded to prevent harassment in the future. This obligation also applies with respect to a person carrying out a traineeship or performing work as temporary or borrowed labour (Chapter 1, Section 3). If a job applicant has not been employed or selected for an employment interview, or if an employee has not been promoted or selected for education or training for promotion, the applicant shall, upon request, receive written information from the employer about the education, professional experience and other qualifications that the person had who was selected for the employment interview or who obtained the job or the place in education or training (Chapter 1, Section 4).

#### *Prohibition of Reprisals*

An employer may not subject an employee to reprisals because the employee has

1. reported or called attention to the fact that the employer has acted contrary to this Act,
2. participated in an investigation under this Act, or
3. rejected or given in to harassment or sexual harassment of the employer.

The prohibition also applies in relation to a person who, with respect to the employer,

1. is enquiring about or applying for work,
2. is applying for or carrying out a traineeship, or
3. is available to perform work or is performing work as temporary or borrowed labour.

A person who has the right to make decisions on the employer's behalf in matters concerning someone referred to in the first or second paragraph shall be equated with the employer (Chapter 2, Section 18).

#### *Active Measures*

Employers and employees are to cooperate on active measures to bring about equal rights and opportunities in working life regardless of sex, ethnicity, religion or other belief, and in particular to combat discrimination in working life on such grounds (Chapter 3, Section 1).

Employers are to conduct goal-oriented work to actively promote equal rights and opportunities in working life regardless of sex,

ethnicity, religion or other belief, and shall implement such measures as can be required in view of their resources and other circumstances to ensure that the working conditions are suitable for all employees regardless of sex, ethnicity, religion or other belief. (Chapter 3, Sections 3-4). Further, employers are to take measures to prevent and hinder any employee being subjected to harassment (Chapter 3, Section 6). Employers are to work to ensure that people have the opportunity to apply for vacant positions regardless of sex, ethnicity, religion or other belief (Chapter 3, Section 7).

Regarding ethnicity and religion or other belief, there are a number of areas where the employer might need to implement active measures. Some examples of appropriate active measures are the possibility to have time-off during other feasts than the Christian ones, flexible working hours to facilitate studies of Swedish, and manuals and safety regulations in several languages. According to statements from DO, in most cases employees have the right to wear religiously motivated garments such as headscarves and turbans.<sup>30</sup>

### *Supervision*

Chapter 4 encompasses the provisions on supervision. The Equality Ombudsman is to supervise compliance with the Act. The Ombudsman is to try in the first instance to induce those to whom the Act applies to comply with it voluntarily (Section 1). The Ombudsman may bring a court action on behalf of an individual who consents to this (Section 2). A natural or a legal person who is subject to the prohibitions of discrimination and reprisals, the obligation to investigate and take measures against harassment or the provisions on active measures in the Act, is obliged to, at the request of the Ombudsman,

1. to provide information about the circumstances in their activities that are of importance for the supervision exercised by the Ombudsman,
2. to provide information about qualifications when the Ombudsman is assisting in a request from an individual under Chapter 2, Section 4.
3. to give the Ombudsman access to workplaces and other premises where the activities are conducted for the purpose of investigations that may be of importance to the supervision exercised by the Ombudsman, and
4. to attend discussions with the Ombudsman (Section 3).

A natural or a legal person who does not comply with a request under Section 3 may be ordered by the Ombudsman to fulfil her or his obligation subject to a financial penalty (Section 4). The Chapter further contains provisions on the board against discrimination and appeals (Sections 6-17).

### *Compensation and Invalidity*

Chapter 5 contains supervisions on compensation and invalidity. A natural or a legal person who violates the prohibitions of discrimination or reprisals, or who fails to fulfil her or his obligations to investigate and take measures against harassment shall pay compensation for discrimination for the offence resulting from the infringement. When compensation is decided,

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<sup>30</sup> Göransson, Flemström and Slorach p. 89; Sandén in *Sydsvenskan* 2007-03-08.

particular attention shall be given to the purpose of discouraging such infringements under the Act. The compensation shall be paid to the person who has been offended by the infringement. An employer who violates Chapter 2, Section 1, first Paragraph or Section 18 shall also pay compensation for the loss that arises. However, this does not apply to a loss that arises in connection with a decision concerning employment or promotion. If there are special grounds, the compensation can be reduced to zero (Section 1). If someone is discriminated against by a provision in an individual contract or in a collective agreement in a manner that is prohibited under the Act, the provision shall be modified or declared invalid if the person discriminated against requests this. If the provision is of such significance for the contract or the agreement that it cannot reasonably be demanded that the contract or agreement shall apply in other respects without material changes, the contract may also be modified in other respects or be declared invalid in its entirety. If someone is discriminated against by termination of a contract or agreement or by some other such legal act, the legal act shall be declared invalid if the person discriminated against requests this. If someone is discriminated against by a rule or similar internal provision at the place of work, the provision shall be modified or declared without effect if the person discriminated against requests this (Section 3).

#### *Legal Proceedings*

Cases concerning the application of Chapter 2, Sections 1-3 or 18 shall be dealt with under the Labour Disputes Act<sup>31</sup> (Section 1). The Equality Ombudsman, or a non-profit organisation may bring an action, as a party, on behalf of an individual who consents to this. In cases under Section 1, first Paragraph, the Ombudsman's action is brought before the Labour Court. When an employee's organisation has the right to bring an action on behalf of the individual under the Labour Disputes Act, the Ombudsman or association may only bring an action if the employee's organisation does not do so (Section 2).

The burden of proof is drafted in Section 3. If a person who considers that he or she has been discriminated against or subjected to reprisals demonstrates circumstances that give reason to presume that he or she has been discriminated against or subjected to reprisals, the defendant is required to show that discrimination or reprisals have not occurred.

#### **2.2.3.4 Act Concerning the Equality Ombudsman**

As mentioned previously, there is an Ombudsman to supervise the Discrimination Act. The Act concerning the Equality Ombudsman<sup>32</sup> regulates the work of the Equality Ombudsman (DO) in addition to the provisions contained in the Discrimination Act. The Ombudsman shall work to ensure that discrimination associated with all the discrimination grounds in the Discrimination Act does not occur in any areas of the life of society. The Ombudsman shall also work to promote equal rights and opportunities

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<sup>31</sup> Lag (1974:371) om rättegången i arbetstvister.

<sup>32</sup> Lag (2008:568) om diskrimineringsombudsmannen.

regardless of sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age (Section 1). The Ombudsman shall provide advice and other support so as to help enable anyone who has been subjected to discrimination to claim their rights (Section 2). Further, within her or his sphere of activities, the Ombudsman shall

- inform, educate, discuss and have other contacts with government agencies, enterprises, individuals and organisations,
- follow international development and have contacts with international organisations,
- follow research and development work,
- propose legislative amendments or other anti-discrimination measures to the Government, and
- initiate other appropriate measures (Section 3).

## **2.2.4 Other Laws and Principles Regarding the Labour Market**

In the field of employment law there are some more laws and principles than those mentioned above that concern discrimination.

According to Section 7 of the Employment Protection Act<sup>33</sup>, notice of termination by the employer must be based on objective grounds, and according to Section 18 an employee may be summarily dismissed only if he has grossly neglected her or his obligations towards the employer. Where notice of termination is given without objective grounds, the notice shall be declared invalid upon the application of the employee, and where an employee has been summarily dismissed under circumstances that would not constitute grounds for a valid notice of termination, the summary dismissal shall be declared invalid upon the application of the employee (Sections 34-35).

The principle of “good labour market practice”<sup>34</sup> is an unwritten legal principle within Swedish labour law. It represents a certain level of standard and a certain level of work ethics and general morals. Contracts, work conditions or other legal acts that are contrary to the principle of “good labour market practice” are invalid. Consequently, legal acts that are discriminatory can be declared invalid or adjusted according to the principle.<sup>35</sup> The principle was used by the Labour Court in a discrimination case where employees who spoke only Finnish were, according to the collective agreement, supposed to be dismissed before other employees. The Labour Court held that this kind of agreement was contrary to the principle of “good labour market practice” since the employer had not been able to prove that it was based on grounds of fact, and adjusted the agreement.<sup>36</sup>

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<sup>33</sup> Lag (1982:80) om anställningsskydd.

<sup>34</sup> Principen om god sed på arbetsmarknaden.

<sup>35</sup> Prop. 2007/08:95 p. 72.

<sup>36</sup> AD 1983:107.

Regarding what kind of clothes to wear at work, there are no general legal regulations. The only regulations existing in a law or in a collective agreement concern the obligation to wear protective equipment (the Work Environment Act Chapter<sup>37</sup> 2 Section 7) and that certain categories of profession have to wear special clothes, e.g. uniforms. The employee's appearance and behaviour do partly fall under the employer's prerogatives, e.g. requirements of a certain dress code within service occupations. In general, the employee is free to dress as he or she wishes. If the employer cannot show objective reasons, directions by the employer about what to wear would probably be contrary to "good labour market practice".<sup>38</sup>

## 2.3 Cases Regarding the Wearing of Religious Symbols

### 2.3.1 Cases Settled in Domestic Courts

Case law from domestic courts is scarce. Four cases will be presented. Two of them concern Sikh men working within the public transport sector. When they were settled, a different legislation than the current one and the one from 1999 was applicable. The third case concerns a Muslim woman wearing a headscarf when applying for work, and it was tried under the previous legislation against discrimination in working life from 1999. The fourth case, which also concerns Muslim women, does not actually concern a workplace but a public indoor pool, and the Court's decision is based on the Prohibition of Discrimination Act (2003:307) which has now been replaced. The reasoning of the Court is interesting although the case does not concern the workplace, and although it is ruled under the previous legislation since that legislation is similar to the current one.

#### *The Swedish Labour Court 1986:11 - a Tram Driver Wearing a Turban*

In 1986 the Swedish Labour Court tried a case on discrimination due to religious clothing.<sup>39</sup> The case concerned a Sikh man, Inderjit Singh Parmar (the applicant) working as a tram driver in Gothenburg. When he declared that he intended to wear a turban instead of the prescribed cap since his religion obliged him to do so, he was told that he could no longer work as a tram driver, and that he was going to be replaced to the technical department. The applicant refused, and negotiations between the employer and the trade union took place. The employer withheld that the applicant could not work as a tram driver as long as he was wearing a turban. The trade union agreed with the employer that the applicant had an obligation to work at the technical department according to the collective agreement. The applicant refused to work at the technical department, and was consequently

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<sup>37</sup> Arbetsmiljölagen (1977:1160).

<sup>38</sup> Fahlbeck (2002) p. 539.

<sup>39</sup> AD 1986:11.

dismissed because of non-excused absence. In its judgement, the Labour Court discussed classical questions of labour law, but did not even mention the religious aspect. The Court held that it was bound by the mutual interpretation by the employer and the trade union about the significance of the collective agreement regarding the obligation to work at another department. Thereafter the Court discussed if the applicant had an obligation to work at the technical department, and came to the conclusion that he was obliged to do so. His refusal to accept the work at the technical department was therefore a just cause for dismissal. The religious aspect and aspects of discrimination were not discussed.

*The Stockholm District Court, 11<sup>th</sup> June 1987 – a Ticket Collector Wearing a Turban*

In June 1987 another case concerning a Sikh man wearing a turban was tried, this time by the Stockholm District Court. Bhag Singh (the applicant) was working as a ticket collector at the Stockholm underground.<sup>40</sup> He started to wear a turban and was then told by his employer that he was not allowed to wear one. The reason given by the employer was that the regulations of the underground prescribed that the ticket collectors for reasons of order must wear working clothes that the company provided. All employees had to wear the same outfit: a blue jacket or shirt with the emblem of the company. No headgear was prescribed. The applicant had proposed to wear a blue turban with the emblem, but the employer refused. He was replaced to a workplace where specific working clothes were not compulsory. The parties of the collective agreement agreed that the replacement was correct according to the agreement. The applicant opposed the replacement and the District Court of Stockholm settled the case on 11<sup>th</sup> June 1987.

The Court stated that the mutual understanding about the significance of the collective agreement by the parties of the agreement was binding as a starting point. However, it is presupposed that all collective agreements are based on the idea that the parties should omit actions that are against the law or good labour market practice. The collective agreement can interfere with other important values, in this case freedom of religion, which is a fundamental right according to Chapter 2, Article 1 of the Instrument of Government. This kind of fundamental right shall be taken into consideration also at the labour market and it is necessary to strike a balance between the conflicting rights. In this case, the applicant's religious interest had to be weighed against the interest given by the employer: that the public quickly and easily should be able to distinguish who is working for the company. The applicant had proposed to wear a blue turban with the emblem of the company. The Court stated that there was little risk that people would not understand the position of a ticket collector dressed in that way. Furthermore, the Court continued, Swedish society can afford to show the broad-mindedness that is connected to this minor risk. Accordingly, the collective agreement should be given the interpretation that the applicant cannot be replaced as decided. In this case, as in the other turban case,

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<sup>40</sup> Stockholms tingsrätt 1987-06-11, case nr T 3-107-86.

traditional labour law was used. However, contrary to the Labour Court, the Stockholm District Court discussed and took the religious aspect into consideration, and the case had the opposite outcome.

*The Swedish Labour Court 2003 nr 63: Woman Wearing a Headscarf Applying for a Job*

In 2003 the Swedish Labour Court tried a case on discrimination due to religious clothing.<sup>41</sup> The Ombudsman against Ethnic Discrimination (DO) represented Christel Dahlberg-Kamara (the applicant) against the employer, DemÅPlock i Göteborg AB (the company). In May 2002, the applicant contacted the company by phone. She was interested in working for the company which hires people to demonstrate food in supermarkets. The regional supervisor told her that there were vacant positions during the coming weeks, and they made an appointment to meet next day in the morning at a supermarket where a demonstration was going to take place. The applicant did not inform the supervisor that she was a practising Muslim and wore a headscarf. When she met the supervisor the following day, she was told that "I don't care what religion people have, but you can unfortunately not wear those clothes while you are demonstrating, because you are supposed to represent the company towards the customers". The applicant then asked the supervisor if she did not think that people's attitudes were changing, and the supervisor answered that it will probably take 100 years before people will think that way. Furthermore, the supervisor told the applicant that she lived in Malmö where Mohammad is one of the most common names nowadays, that she was used to meeting people from all over the world and had full acceptance for all religions. The applicant felt shocked and humiliated by what she was told, but thanked the supervisor for the meeting and left the place. Thereafter, she contacted the Ombudsman against Ethnic Discrimination (DO) who asked the company for information about the employment procedure. The company claimed that another person had been given the job before the meeting between the supervisor and the applicant, and therefore the employment procedure was ended already before the applicant met the supervisor. The company claimed that the supervisor had tried to contact the applicant in the morning without success in order to tell her that the position was no longer vacant. Furthermore, the company maintained that they never had the time to explain to the applicant that they have a special dress code and that all employees should wear special clothes and caps when they demonstrate their products.

DO brought the case before the Labour Court and claimed that the employment procedure had been terminated as a result of the way the applicant was dressed and her Muslim faith, and subsequently not because the position was no longer vacant. Furthermore, the reason for the company to deny the applicant a job position was not due to the policy on working clothes but her clothes as such, and the idea that people in general do not like this kind of clothes. The applicant was never informed about the dress code, and hence had no possibility to explain if she was willing to follow it.

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<sup>41</sup> AD 2003:63.

Moreover, a policy on working clothes must be subject to individual conditions, i.e. the use of a headscarf. Accordingly, a violation of the prohibition on ethnic discrimination in paragraph 8 in conjunction with 10, Bullet 1, of the Law (1999:130) on Measures against Ethnic Discrimination in Working Life had taken place.

The company responded that the position had been filled on the 30<sup>th</sup> of May, the day before the meeting. When the other person was appointed, the supervisor had not yet met the applicant, and did not know neither that she was a Muslim nor that she wore a headscarf. The appointment was entirely based on the fact that the person that was appointed had better qualifications, since she unlike the applicant had worked for the company before and had access to a car. It is not disputed that the supervisor told the applicant that Mohammad is a common name. She did that to show that she has nothing against Muslims. It is further not disputed that the supervisor told the applicant that she could not use the clothes she was wearing when demonstrating products. She would then need to use neutral clothes provided by the company. The applicant did at this point not comment on the issue although it, according to the company, would have been natural to mention her point of view before she left.

In its judgement the Labour Court discussed if an employment procedure was still ongoing when the applicant met the supervisor or if the position had been filled before. According to the Law (1999:130), an employment procedure must be ongoing in order for the Law to be applicable on job applicants. The Court noted that the applicant neither before nor during the meeting with the supervisor had been informed that the position was no longer vacant. The supervisor had explained that she tried to call the applicant in the morning but could not reach her, and that she did not want to explain to her in front of staff and customers at the supermarket that the position had been filled. The Court considered it peculiar that the supervisor found it more improper to tell the applicant that the position was no longer vacant in front of others than to comment on her clothes, but still found the explanation reasonable. Hence, the Court found that it had been proved that the position had been filled before the applicant met the supervisor. It was not disputed that the supervisor did not know that the applicant was a Muslim and wore a headscarf before the meeting. The decisions of the company before the meeting can therefore not constitute discrimination. The circumstances that DO claimed constituted discrimination had taken place after employment agreement. Since the procedure of employment by then was terminated, the regulations against discrimination in the Law (1999:130) on Measures against Ethnic Discrimination in Working Life were not applicable. The Court accordingly concluded that no discrimination on the ground of ethnicity in the instant case had taken place.

Hence, the Court merely concluded that an employment procedure was not taking place and did not go into the discussion if the way the company acted should be seen as discrimination according to the Law (1999:130). The sentence consequently gives no guidelines on how to apply the law on issues regarding religious clothing.



*The Court of Appeal for Western Sweden 29<sup>th</sup> January 2008: the Wearing of Religious Clothes at an Indoor Pool*

On 29<sup>th</sup> January 2008 the Court of Appeal for Western Sweden changed a judgement from 7<sup>th</sup> March 2007 by the District Court of Gothenburg<sup>42</sup>. The case concerned two Muslim women who claimed that they had been discriminated against at Kärra indoor pool. The women had separately visited the indoor pool during April 2004, not in order to swim but to accompany their children. According to the written rules of the swimming pool, parents accompanying their children should wear a t-shirt and shorts, a sweat suit or something similar. The women wore, for religious reasons, headscarves, sweat suit pants and long-sleeved t-shirts. They were both told by the swimming pool attendants that their clothes were not appropriate in case they might have to jump into the water to save someone from drowning. The women held that they thereafter were told to leave the indoor pool, whereas the swimming pool attendants held that this was not the case. DO, who brought the action on behalf of the women, held that, at first hand, the women had been directly discriminated against, since they had been treated less favourable than a person with a different ethnic background would have been treated in a similar situation. The less favourable treatment was related to their religion. At second hand, DO held that indirect discrimination had occurred since the dress code of the swimming pool appeared to be neutral but in practice disfavoured persons with a particular religion, namely Muslim women. The dress code was not appropriate and necessary in order to achieve the given purpose. The opposite party, the City of Gothenburg, denied that the applicants had suffered neither direct nor indirect discrimination. It held that the dress code was appropriate to achieve purposes of hygiene and safety and did not disfavour anyone. The dress code did not exclude the wearing of a headscarf and fully covering clothes. The conduct of the swimming pool attendants was not related to the religion or ethnicity of the applicants.<sup>43</sup>

The Gothenburg District Court discussed the burden of proof, and held that DO had not been able to show neither direct nor indirect discrimination. The claim was dismissed.<sup>44</sup>

The Court of Appeal for Western Sweden discussed the burden of proof stating that it is shared: if a person who feels that he or she has been discriminated against can point to circumstances that support such a claim, it is up to the respondent to show that discrimination has not occurred. The question is whether the swimming pool attendants had discriminated against the women by treating them less favourably than someone else being in a comparable situation, and if the treatment was associated with the women's religion. The Court of Appeal held that the applicants had been subjected to treatment that entailed inconvenience which, according to the law, is to be regarded as disfavoured, when being told that their clothes, which they could not change for religious reasons, were inappropriate. Regardless if they were told to leave the indoor pool or

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<sup>42</sup> Göteborgs tingsrätt 2007-03-07, case nr T 6364-05 and T 6365-05; Hovrätten för västra Sverige 2008-01-29, case nr T 2049-07.

<sup>43</sup> Göteborgs tingsrätt 2007-03-07, *ibid.* pp. 2-3.

<sup>44</sup> Göteborgs tingsrätt 2007-03-07, *ibid.* p. 13.

not, it was likely to apprehend that one was not welcome when receiving such a rebuke. It was further not disputed that the swimming pool attendants knew that the women were Muslims. Thus, DO fulfilled its part of the burden of proof by pointing at circumstances supporting the claim that the applicants had been discriminated against. It was then up to the City of Gothenburg to show that discrimination had not occurred. The Court of Appeal found that there was no reason to doubt that the swimming pool attendants did not have any intention to discriminate. The result of their rebukes was however that the applicants were subject to uneasiness. To know if discrimination had occurred, it was therefore decisive if the City of Gothenburg could prove that the rebukes did not have any connection with the religion of the applicants. The Court noted that it was not disputed that accompanying parents were allowed to be at the indoor pool if they wore sweat suit trousers, long-sleeved t-shirts and headscarves. Thus, objectively seen, the clothes worn by the applicants did not diverge from what was allowed considering hygiene and safety. The starting point must be that everyone who visits a public institution, such as municipal indoor pool, has the right not to be discriminated against or harassed. Since the City of Gothenburg had not been able to show any objective reasons which explained why precisely the applicants had been told to change clothes, it must be assumed that a hypothetical person in the same situation would not have been asked to change her or his clothes. It has not been proved that the rebukes, at least to a certain extent, were not connected to the fact that the women wore typical Muslim garments. Thus the City of Gothenburg had not proved that the rebukes solely were due to other facts than the women's religion, and consequently it had not proved that discrimination had not occurred. Since the Court found that direct discrimination had occurred, it did not try if indirect discrimination had taken place. The City of Gothenburg had to pay damages of 20,000 Swedish crowns to each of the applicants.<sup>45</sup> The City of Gothenburg appealed against the judgement to the Supreme Court that decided not to try the case.<sup>46</sup>

### **2.3.2 Conciliations by the Ombudsman against Ethnic Discrimination / Equality Ombudsman**

The Equality Ombudsman has the authority to make settlements with economic compensation for the injured party, and previously the Ombudsman against Ethnic Discrimination had the same authority. Some settlements have been made regarding the wearing of religious symbols at the workplace. A selection of those settlements is presented below. The settlements have been made on a voluntary basis and the outcome might have been different if they had been tried in court.

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<sup>45</sup> Hovrätten för västra Sverige 2008-01-29, case nr T 2049-07, pp. 6-9.

<sup>46</sup> [http://do.episerverhotell.net/t/Page\\_\\_\\_\\_\\_1100.aspx](http://do.episerverhotell.net/t/Page_____1100.aspx) (2009-02-09).

### *Liseberg Amusement Park*

When a young Muslim woman wearing a headscarf applied for a job at Liseberg amusement park in Gothenburg she was told that she could not work there unless she took off her headscarf. After that DO had contacted the employer, the woman was employed by Liseberg and given 15,000 Swedish crowns of damages since she had been subject to discrimination. Moreover, Liseberg now has a matching headscarf to their uniform.<sup>47</sup>

### *Food Store*

A woman applying for a job in a food store reported to DO that she was asked during the job interview if she could take off her headscarf at work since the shop's policy on clothes did not approve headgear. The settlement lead to the woman receiving damages of 80,000 Swedish crowns, and it was furthermore decided that the chain stores should design a headscarf that matches the ordinary working clothes.<sup>48</sup>

### *Elder Care*

A woman applying for a job at an elder care centre in Tensta was told during a job interview that she had to wear trousers and a shirt at work according to the working clothes policy of the centre. It was allowed to wear a headscarf. The woman requested to wear a coat outside the trousers and the shirt for religious reasons. A few days later the woman was told that she would not be employed. Instead, temporary staff at the elder care centre would work supplementary hours. After discussions between DO and the employer, a settlement where the woman received 40,000 Swedish crowns in damages for not having been offered the job because of her religious clothing was agreed upon. Furthermore, the employer agreed to look over the policy on working clothes to make sure that it is not in conflict with anti-discrimination legislation.<sup>49</sup>

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<sup>47</sup> DO, dnr 199-2006.

<sup>48</sup> DO, dnr 1383-2006.

<sup>49</sup> DO, dnr 538-2006.

# 3 The European Convention on Human Rights

## 3.1 The Legal Status of the European Convention on Human Rights in Swedish Law

The European Convention of Human Rights has the status of law in Sweden and the case law of the European Court of Human Rights is binding.

Sweden ratified the European Convention on Human Rights in 1953, but did not incorporate it as a law until 1995.<sup>50</sup> A statute was then included in the Instrument of Government stating that no law or other regulation that contravenes Sweden's commitments under the Convention may be adopted.<sup>51</sup> Accordingly, a law or regulation that has been enacted after the incorporation of the Convention, shall not be applied by a court or other public body if it manifestly conflicts the Convention.<sup>52</sup> The statute does not say anything about the relationship between the Convention and laws enacted before it was incorporated, but the intention is that older laws should be interpreted in the light of the Convention as far as possible.<sup>53</sup> In 1966 Sweden accepted the jurisdiction of the European Court of Human Rights, initially for five years at a time, but since 1996 Sweden recognizes the Court's jurisdiction without time-limit.<sup>54</sup>

## 3.2 Freedom of Religion in the European Convention on Human Rights

Freedom of religion is protected in Article 9 of the European Convention on Human Rights (ECHR). It provides that

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject to only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection

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<sup>50</sup> SFS 1994:1219.

<sup>51</sup> RF 2 :23; Danelius pp. 33-36.

<sup>52</sup> RF 11:14.

<sup>53</sup> Strömberg and Lundell p. 99.

<sup>54</sup> Strömberg and Lundell p. 101.

of public order, health or morals, or for the protection of the rights or freedoms of others.

In the case of *Kokkinakis v. Greece*<sup>55</sup>, the Court underlined the importance of the protected rights:

“[F]reedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and the conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over centuries, depends on it.”<sup>56</sup>

Article 9 is framed as several articles of the Convention<sup>57</sup>: first a paragraph defining the scope of the original right, and second a limitation clause specifying under which circumstances the exercise of the right can be limited. Indeed, the right to freedom of conscience and religion is not absolute. According to the limitation clause of Article 9(2), an interference is justified if certain conditions are met: it must be prescribed by law, it must have a legitimate purpose – which means that it either serves a common good (public safety, public order, public health or morals) or protects the rights of other persons-, and the restriction must also be necessary in a democratic society. The latter is a test of proportionality.<sup>58</sup> We will now take a closer look at Article 9.

#### *The Definition of a “Religion” or a “Belief”*

In order to know what is protected by Article 9 some kind of definition of “religion” and “other belief” is needed. Case law has given the concept a rather broad definition. In the *Kokkinakis* judgement, as mentioned above, the Court stated the importance of freedom of thought, conscience and religion, and noted that this freedom is important not only to believers.<sup>59</sup> Article 9 can consequently be applied to a wide range of convictions and philosophies and not only to religious beliefs. Traditional religions and beliefs such as a variety of Christian denominations<sup>60</sup>, Islam<sup>61</sup>, Hinduism<sup>62</sup>, Buddhism<sup>63</sup> and Judaism<sup>64</sup> have been regarded to fall within the scope of Article 9, as well as atheism<sup>65</sup>. Furthermore, the Church of Scientology has

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<sup>55</sup> *Kokkiniakis v. Greece*, Judgement of 25 May 1993, Series A, No. 260-A; (1994) 17 EHHR 397.

<sup>56</sup> *Kokkiniakis v. Greece*, *ibid.* para. 31.

<sup>57</sup> Articles 8, 9, 10 and 11 have similar limitation clauses in their second paragraphs.

<sup>58</sup> Brems p. 1.

<sup>59</sup> *Kokkiniakis v. Greece*, Judgement of 25 May 1993, Series A, No. 260-A; (1994) 17 EHHR 397, para. 31.

<sup>60</sup> E.g. *Iglesia Bautista “El Salvador” and Ortego Moratilla v. Spain*, App. No. 17522/90, 72 Eur. Comm’n H.R. Dec. & Rep. 256 (1992).

<sup>61</sup> E.g. *X v. UK*, App. No 8160/78, 22 Eur. Comm’n H.R. Dec. & Rep. 27 DR (1981).

<sup>62</sup> E.g. *ISKCON and others v. UK*, App. No. 20490/92, 76-A Eur. Comm’n H.R. Dec. & Rep. (1994).

<sup>63</sup> E.g. *X v. UK*, App. No. 6886/75, 5 Eur. Comm’n H.R. Dec. & Rep. 100 (1976).

<sup>64</sup> E.g. *D v. France*, App. No. 10180/82, 35 Eur. Comm’n H.R. Dec. & Rep. 199 (1983).

<sup>65</sup> *Angeleni v. Sweden*, App. No. 10491/83, 40 Eur. Comm’n H.R. Dec. & Rep. 41 (1986).

been recognised as a religion without further discussion, although it has been a subject of much debate in domestic courts whether Scientology is a religion or not<sup>66</sup>. The Moon Sect<sup>67</sup> has also been acknowledged as a religion<sup>68</sup>. In *Arrowsmith v. UK*, pacifism was regarded as a belief.<sup>69</sup> However, the Court has pronounced that a belief must “attain a certain level of cogency, seriousness, cohesion and importance”<sup>70</sup> to fall under Article 9. In a case considering a man who did not want to be buried in a cemetery which contained graves with Christian symbols but wanted to be cremated and have his ashes spread over his land instead, the Commission acknowledged that his wish had a strong personal motivation but was not protected under Article 9 since it did not express a “coherent view on fundamental problems”<sup>71</sup>. This suggests that some basic level of intellectual or moral coherence is required in order for something to be considered a religion or belief. There also seems to be a requirement for an applicant to prove the existence of an obscure religion or belief.<sup>72</sup> In one case, the Commission noted that the applicant had not mentioned any facts that showed the existence of the Wicca religion that he claimed he belonged to<sup>73</sup>.

#### *Forum Externum-Forum Internum*

When dealing with freedom of religion and belief it is not only important to define what could be considered to be a religion or a belief, but also to decide what substance the conception of a religion or a belief encompasses. Does it encompass only the core ideas of a religion or does it in a much broader sense encompass the way one lives one’s life?<sup>74</sup> Are e.g. food restrictions, refusing to take part in military service and wanting one’s ashes to be spread in the garden instead of a traditional funeral part of religion?

The Commission and the Court have in their case law made a distinction between the *forum internum* of freedom of religion, which is the sphere of personal beliefs and religious creeds, a passive right, and the *forum externum*, the active right to manifest one’s religion or belief. The passive enjoyment of the right to freedom of thought, conscience and religion, e.g. the *forum internum*, is absolute, whereas the *forum externum* can be subject to limitations according to Article 9(2).<sup>75</sup> The two fora are however not easy to distinguish from each other. One source of confusion is that the expression of an “active” right may be that an individual asserts that he or she has the right not to act in a particular way e.g. not to take part in the armed forces.<sup>76</sup>

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<sup>66</sup> *X and the Church of Scientology v. Sweden*, App. No. 7805/77, 16 Eur Comm’n H.R. Dec. & Rep. 68, 70 (1979).

<sup>67</sup> *X v. Austria*, App. No. 8652/79, 26 Eur. Comm’n H.R. Dec. & Rep. 89 (1981).

<sup>68</sup> Evans, C. (1999) p. 390.

<sup>69</sup> *Arrowsmith v. UK*, App. No. 7050/75, 20 Euro. Comm’n H.R. Dec. & Rep. 5 (1978).

<sup>70</sup> *Campell and Cosans v. UK*, Judgement of 25 February 1982, Series A, No. 48 (1982), 4EHRR 293, para. 36.

<sup>71</sup> *X v. Germany* App. No. 8741/79, 24 Eur. Comm’n H.R. Dec. & Rep. 137 (1981).

<sup>72</sup> Evans, C. (1999) p. 390.

<sup>73</sup> *X v. UK*, App. No. 7291/75 11 Eur. Comm’n H.R. Dec. & Rep. 55 (1977).

<sup>74</sup> Fahlbeck (2004) p. 2.

<sup>75</sup> Evans, M. p. 284; Evans, C. (1999) pp. 392-393.

<sup>76</sup> Evans, M. p. 284.

Whereas few are being excluded at the definitional stage of Article 9, the Court and the Commission have not been as generous when dealing with the substance of the protection of freedom of religion or belief.<sup>77</sup> Both the Commission and the Court have in several cases pronounced that

“Article 9 primarily protects the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*”.<sup>78</sup>

Further, the Court has stated that

“While religious freedom is primarily a matter of individual conscience, it also implies freedom to manifest one’s religion”.<sup>79</sup>

The internal dimension of religion seems to be at the core of religious freedom but the implications are unclear. At the most basic level this could be considered only to be the right to hold opinions silently without interference by the state. At this level, it is almost impossible for the state to breach against it unless the state uses brainwashing or systematic indoctrination.<sup>80</sup> If this were the case, there would be little difficulty in the application of Article 9. However, the approach adopted is broader and focuses on the danger of being obliged by the state to act in a way that runs counter to one’s inner beliefs.<sup>81</sup> The extent of the *forum internum* is still not very wide. The Commission has rejected applications from persons who have been required to participate in state-run pension systems<sup>82</sup>, to vote in elections<sup>83</sup> etc. As long as these persons can continue in their beliefs the *forum internum* remains intact and there is no breach of Article 9. In *Valsamis v. Greece* a child belonging to Jehova’s witnesses had refused to participate in a march associated with the national holiday that she perceived as a military parade and was therefore punished by her school. The applicant claimed that participation in such a parade violated her religious commitment to pacifism. The Commission held the opinion that her school was entitled to take disciplinary measures since it did not consider that the procession had a military character and therefore compulsory participation did not amount to indoctrination even though the girl had been required to act in a manner that she thought ran counter to her beliefs.<sup>84</sup>

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<sup>77</sup> Evans, C. (1999) p. 392.

<sup>78</sup> E.g. *C v. UK*, App. No. 10358/83, 37 Eur. Comm’n H.R. Dec. & Rep. 142 (1983).

<sup>79</sup> *Kokkiniakis v. Greece*, Judgement of 25 May 1993, Series A, No. 260-A; (1994) para. 33.

<sup>80</sup> Evans, C. (1999) p. 393.

<sup>81</sup> Evans, M. p. 294.

<sup>82</sup> E.g. *Reformed Church of X v. the Netherlands*, App. No. 1497/62, 5 Yearbook 286 (1962).

<sup>83</sup> E.g. *X v. Austria*, App. No. 4982/71, 15 Yearbook 468 (1972).

<sup>84</sup> *Valsamis v. Greece*, App. No. 21787, Judgement of 18 December 1996; (1997) 24 EHRR 294, para. 40 and para. 50.

### *Manifestation of a Religion or a Belief*

Despite the emphasis given in theory to the *forum internum*, most cases ruled by the Court raise the issue of manifesting a religion or a belief.<sup>85</sup> The second limb of Article 9(1) confers the right to manifest a religion or a belief in “worship, teaching, practice and observance”. In *Arrowsmith v. UK*<sup>86</sup> the Commission developed a test to determine whether an action was to be considered as a “practice”, and thus protected by Article 9. It noted that not all actions motivated by a religion or a belief could be considered a manifestation of that religion or belief. In order to be considered a manifestation the Commission held that the practice had to be closely linked to the requirements of the religion or belief. Later on, this seems to have evolved into a test that requires the applicant to show that the manifestation is necessary to her or his religion or belief (the so called *Arrowsmith* test).<sup>87</sup> In *X v. UK (the School Teacher Case)*, a Muslim school teacher who wanted to take a period of time off on Friday afternoons to attend prayers at the local mosque, the Commission held that it had not been shown that it was a requirement of his religion to do so.<sup>88</sup>

The Court and the Commission seem to be rather narrow in their approach to what constitutes a manifestation of a religion or belief.<sup>89</sup> They tend to make a distinction between conduct that is only motivated by a religion or a belief, and conduct that is a direct manifestation of a religion or belief.<sup>90</sup> Practices such as worship<sup>91</sup> and proselytism<sup>92</sup> have been considered essential to religious life and thus manifestations of Article 9, whereas other practices such as wearing of religious clothing has been considered to be less important. Conscientious actions based on religion or belief in breach of general law, have almost never been considered to be manifestations of a religion or belief.<sup>93</sup> The case *C v. UK* concerned a member of the Religious Society of Friends (the Quakers) who had sought a guarantee that her income tax payments would be used only for peaceful purposes and not for military expenditure. The Commission took a restrictive view of what amounted to the practice of a religion or belief. It underlined that Article 9 primarily protects the private sphere of personal beliefs and religious creeds but that it also

“protects acts which are intimately linked to these attitudes, such as acts of worship and devotion which are aspects of the practice of a religion or a belief in a generally recognised form”.<sup>94</sup>

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<sup>85</sup> Evans C (1999) p. 294.

<sup>86</sup> *Arrowsmith v. UK*, App. No. 7050/75, 20 Euro. Comm’n H.R. Dec. & Rep. 5 (1978).

<sup>87</sup> Evans, C. (1999) p. 394.

<sup>88</sup> *X v. UK*, App. No. 8160/78, 22 Eur: Comm’n H.R. Dec. & Rep. 27 (1981).

<sup>89</sup> Evans, C. (1999) p. 394.

<sup>90</sup> Cumper p. 314.

<sup>91</sup> *Manoussakis and others v. Greece*, Judgement of 26 September 1996; (1997) 23 EHRR 387.

<sup>92</sup> *Kokiniakis v. Greece*, Judgement of 25 May 1993, Series A, No. 260-A; (1994) 17 EHRR 397.

<sup>93</sup> Evans, C. (1999) p. 394.

<sup>94</sup> *C v. UK*, App. No. 10358/83, 37 Eur. Comm’n H.R. Dec. & Rep 142 (1983) p. 147.



The Commission drew a distinction between the private and the public sphere and held that Article 9

“does not always guarantee the right to behave in the public sphere in a way which is dictated by such a belief: for instance by refusing to pay certain taxes because part of the revenue so raised may be applied for military expenditure”.<sup>95</sup>

Eva Brems, professor of human rights law at Gent University, notes that the Commission and the Court repeatedly have stated that Article 9 does not protect every single act motivated or inspired by religious motives. As a result, complaints have often been dismissed on the basis that the situation violating religious freedoms does not even interfere with that freedom. Situations that at first sight seem to concern freedom of religion are kept outside the scope of Article 9. Under the articles with limitation clauses, it is standard practice to first analyse whether a situation falls within the scope of the individual right concerned, e.g. within Article 9(1). The number of cases under Article 9 that are turned down in the first phase, without any examination under the limitation clause, is considerable. This practice is much more infrequent when Article 8 (freedom of privacy) or Article 10 (freedom of expression) is concerned. Moreover, even when a particular practice falls within the scope of Article 9(1), the Commission and the Court often accepts restrictions under the limitation clause.<sup>96</sup>

*Limitations to the Right to Manifest a Religion or a Belief*  
Article 9(2) provides that:

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

The Article tries to balance the competing interests between the individual’s right to manifest a religion or a belief and the state’s legitimate interests in ensuring that such manifestations do not unduly interfere with public health and order, morality, and the rights and freedoms of others.<sup>97</sup> The Court has in several cases held that

“In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom [freedom of religion] in order to reconcile the interests of various groups and ensure that everyone’s beliefs are respected.”<sup>98</sup>

If a limitation upon the right of manifestation of a religion or belief is to be permitted under Article 9(2), two criteria have to be fulfilled. The limitation

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<sup>95</sup> *C v. UK*, *ibid.* p. 147.

<sup>96</sup> Brems p. 4.

<sup>97</sup> Evans, C. (2001) p. 133.

<sup>98</sup> E.g. *Kokkiniakis v. Greece*, Judgement of 25 May 1993, Series A, No. 260-A; (1994) 17 EHHR 397, para. 33; *Dahlab v. Switzerland*, App. No. 42393/98, Admissibility Decision of 15 February 2001, p. 461.

has to be, firstly, “prescribed by law” and secondly, “necessary in a democratic society”. The notion “prescribed by law” means that any restriction placed upon the enjoyment of this right has to be sanctioned by the domestic legal system. Furthermore, the law in question has to be adequately accessible and formulated with sufficient precision so that its application can be foreseen by the citizen. Even if a restriction has been “prescribed by law” it must still be “necessary in a democratic society” for one of the reasons outlined in Article 9(2): public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others. The Court then examines whether the restriction is justified by a “pressing social need” and “proportionate” in the particular case. In connection with this assessment of necessity, the Court has developed the so-called doctrine of the margin of appreciation.<sup>99</sup>

The margin of appreciation is an entirely judge-made doctrine with no textual basis in the convention itself which the Court uses to strike a balance between the individual’s right and the greater social good when dealing with those articles in the Convention that, like Article 9, have a two-paragraph structure.<sup>100</sup> The purpose of the doctrine is to allow a degree of latitude to states as to how they protect the individual rights set in the Convention. The margin of appreciation has been held especially important in areas where there is said to be a lack of consensus or common practice across Europe, for example in the fields of moral and religion.<sup>101</sup> In these areas states have been accorded a wide margin of appreciation.<sup>102</sup> In *Şahin v Turkey* the Court stated that

“Where questions concerning the relationship between the State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision making body must be given special importance [---]. It is not possible to discern throughout Europe a uniform conception of the importance of the significance of religion in society [...] and the meaning or impact of the public expression of are religious belief will differ according to time and context [...] Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the needs to protect the rights and freedoms of others and to maintain public order [...]. Accordingly the choice of the extent and form such regulations should take must inevitably be left to a point to the State concerned, as it will depend on the domestic context concerned [...].”<sup>103</sup>

The width of the margin of appreciation depends very much on the right in question. The margin granted to states when restricting freedom of expression under Article 10 or consensual homosexual conduct in private under Article 8 has been much narrower than in cases involving religious manifestation under Article 9.<sup>104</sup>

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<sup>99</sup> Evans, M. pp. 318-320.

<sup>100</sup> Articles 8 (right to respect for private and family life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression) and 11 (freedom of association and assembly).

<sup>101</sup> Lewis p. 397.

<sup>102</sup> Evans, M. p. 322.

<sup>103</sup> *Şahin v. Turkey*, App. No. 44774/98, Judgement of 10 November 2005, para. 109.

<sup>104</sup> Lewis, p. 398.

Because of the limited scope of Article 9(1), relatively few cases have been decided under Article 9(2). Some cases have been decided directly under Article 9(2) without addressing Article 9(1) since the actions taken by the state were in any event clearly justified under Article 9(2).<sup>105</sup> In a case concerning a Sikh man, who refused wearing a motorcycle helmet since this required him to remove his turban, the Commission held that the British law that required the wearing of motorcycle helmets was necessary for the protection of health in accordance with Article 9(2). It never discussed whether a law such as this was a restriction of the Sikhs' right to manifest their religion.<sup>106</sup> In *Chappell v. UK*, a representative of the British Druids challenged the right of the government to ban Druids from Stonehenge during the summer solstice. The Commission held that they did not have to determine whether Druidism was a religion or not, since the Government had sound justifications under Article 9(2) for banning people from Stonehenge during the summer solstice to prevent the disorder and lawlessness that had occurred in previous years. Therefore the Commission moved straight to a consideration of Article 9(2) without determining whether there was a breach of Article 9(1).<sup>107</sup>

### 3.3 Anti-Discrimination Regulations in the ECHR

#### 3.3.1 Article 14

Article 14 of the Convention contains a general prohibition of discrimination in relation to the rights guaranteed by the Convention and the Protocols:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

Article 14 has no independent existence but has to be invoked in conjunction with a substantive article. However, in the *Belgian Linguistic Case*, the Commission stated that the breach of Article 14 does not presuppose the violation of another right guaranteed by the Convention.<sup>108</sup> There may be a violation of Article 14 considered together with another article of the Convention in cases where there is no violation of that other article taken alone.

Article 14 is frequently invoked by applicants, but in many cases the Court has only determined if there has been a violation of Article

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<sup>105</sup> Evans, C. (2001) p. 134.

<sup>106</sup> *X v. UK*, App. No. 7992/77, 14 Eur. Comm'n H.R. Dec. & Rep. 234 (1978).

<sup>107</sup> *Chappel v. UK*, App. No. 12587/86, 53 Eur. Comm'n H.R. Dec. & Rep. 241 (1987).

<sup>108</sup> *Belgian Linguistic Case*, Judgement of 23 July 1968, Series A, No. 6; (1979-80) 1 EHRR 252.

14 and the substantive article if it first has decided that there has been no violation of the substantive article.<sup>109</sup> In *Dudgeon v. UK*, the Court said:

“Where a substantive Article of the Convention has been invoked both on its own and in conjunction with Article 14 and a separate breach has been found of the substantive Article, it is not generally necessary for the Court also to examine the case under Article 14, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case”.<sup>110</sup>

Discrimination in relation to religion, Article 14 in conjunction with Article 9, has been invoked in quite a number of cases. In *Grandrath v. Germany* the applicant was a Jehova’s Witness and exercised the function of a Bible study leader. Like other Jehova’s Witnesses he objected, for reasons of conscience and religion, to perform military service as well as any kind of substitute service. The German authorities required him to perform civilian service. He refused and was convicted to six months imprisonment. The applicant complained under Article 9 but no violation was found. Furthermore the Commission considered of its own motion the question if the applicant under Article 14 in conjunction with Article 9 had been subject to discrimination as compared to Roman Catholic or Protestant ministers. According to German legislation, an ordained Roman Catholic or Evangelical minister was exempt from military service, also from the substitute service, whereas a minister of another religion was exempt if the ministry was his principal occupation and his functions were equivalent to those of an ordained Roman Catholic or Evangelical minister. The Commission did not find that this difference in treatment amounted to discrimination in violation of Article 14 in conjunction with Article 9 since the legislation had been drafted in such a way to prevent many people, maybe even entire religious communities, from being exempt from military service.<sup>111</sup>

It may also be considered discrimination when there is failure to treat different individuals or groups differently. *Thlimmenos v. Greece* concerned a Jehova’s witness who had been convicted for refusal to serve in the army. As a result of this conviction, he had been excluded from the profession of chartered accountant since the law prescribed that all those who had been convicted would be excluded. The applicant complained to the Court that no distinction was made between those convicted as a result of their religious beliefs and those convicted on other grounds. The Court found, under Article 14 in conjunction with Article 9, that a violation had taken place and extended its case law to situations where a state fails to treat

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<sup>109</sup> Ovey and White pp. 420-421.

<sup>110</sup> *Dudgeon v. UK*, Judgement of 22 October 1981, Series A, No. 45; (1982) 4 EHRR 149, para. 67.

<sup>111</sup> *Grandrath v. Germany*, App. No. 2299/64, Report of Commission, 12 December 1966; Decision of Committee of Ministers, 29 June 1967, (1967), 10 Yearbook, p. 672.

differently persons whose situations are significantly different without any objective and reasonable justification.<sup>112</sup>

### **3.3.2 Protocol 12**

Protocol 12 adds a general prohibition of discrimination to the prohibition of discrimination in relation to rights guaranteed in the Convention found in Article 14. The first Article of the protocol reads:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

The emphasis under Protocol 12 moves from a prohibition of discrimination to a recognition of a right to equality. Whereas Article 14 requires the applicant to show that there is differential treatment in an area within the scope of the Convention, Article 1 of Protocol 12 requires the applicant to show that there is differential treatment in the enjoyment of any right set forth in national law.<sup>113</sup>

Additional Protocol 12 came into force on 1<sup>st</sup> April 2005 when it had been ratified by 10 member states. Sweden has not ratified the protocol.<sup>114</sup>

## **3.4 Cases Settled by the European Court of Human Rights and the European Commission of Human Rights**

### **3.4.1 Cases regarding the Wearing of Religious Symbols**

*X v. UK (The Crash Helmet Case)*

The case concerned a Sikh man living in the United Kingdom, who refused wearing a motorcycle helmet since he then had to remove his turban, which he was required to wear by his religion. He was prosecuted, convicted and fined twenty times in 1973-1976, and complained that the requirement to wear a crash helmet interfered with his freedom of religion. The

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<sup>112</sup> *Thlimmenos v. Greece*, App. No. 34369/97, Judgement of 6 April 2000; (2001) 31 EHR 411.

<sup>113</sup> Ovey and White pp. 430, note 91.

<sup>114</sup> <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&DF=&CL=ENG> (2009-06-01).

Commission held that the British law that required the wearing of motorcycle helmets was necessary for the protection of health in accordance with Article 9(2). It never discussed whether a law such as this was a restriction on the Sikhs' right to manifest their religion (by wearing turbans). At the end of 1976, an amendment to British legislation exempted Sikhs from wearing crash helmets.<sup>115</sup>

*Karaduman v. Turkey*

In *Karaduman v. Turkey*, a Turkish student who had been denied to wear a headscarf on the photo of her degree certificate complained before the Commission that her right to freedom of thought, conscience and religion had been violated. The applicant held that her degree certificate had been withheld from her for a period of two years since she had not supplied an identity photograph showing her bare-headed, which would be incompatible with her religious beliefs.

The Commission denied her case stating that a student at a secular university is implicitly subject to certain rules of conduct laid down in order to ensure the rights and freedoms of others. Furthermore, the Commission held that "The purpose of the photograph affixed to a degree certificate is to identify the person concerned. It cannot be used by that person to manifest his religious beliefs". The Commission also considered that regulating students' dress and refusing them administrative services, such as degree certificates, as long as they failed to comply with regulations, did not, as such, constitute a breach of Article 9.<sup>116</sup>

*Dahlab v. Switzerland*

In *Dahlab v. Switzerland*, the applicant, Lucia Dahlab, was appointed as a teacher in a Swiss state school for 4-to-8-year-olds in September 1990. She converted to Islam and started to wear a headscarf in school in March 1991. In May 1995 the school inspector of the Vernier district informed the Canton of Geneva Directorate General for Primary Education that the applicant regularly wore a headscarf at school. The inspector added that she had never received any comments on the subject. On 26<sup>th</sup> August 1996, the Directory General for Primary Education prohibited the applicant from wearing a headscarf while carrying out her professional duties, as such conduct was incompatible with Section 6 of the Swiss Public Education Act. She appealed against the decision to the Geneva Cantonal Government, which dismissed her appeal on the ground that the denominational neutrality of the school system had to be upheld. The Federal Court upheld the Geneva Cantonal Government's decision in a judgement of 12 November 1997. A considerable part of the Swiss Federal Court's judgement is published in the ECtHR's judgement. The Federal Court held a lengthy discussion if there had been a violation of Article 9 of the ECHR, as the applicant claimed. It held that civil servants are bound by a special relationship of subordination to the public authorities; a relationship that they have freely accepted and from which they benefit. In

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<sup>115</sup> *X v. UK*, App. No. 7992/77, 14 Eur. Comm'n H.R. Dec. & Rep. 234 (1978).

<sup>116</sup> *Karaduman v. Turkey*, App. No. 16278/90, 74 Eur. Comm'n H.R. Dec & Rep 93 (1993), p. 109.

displaying a powerful religious symbol such as the headscarf in the classroom, the applicant may have interfered with the religious beliefs of her pupils, other pupils at the school or the parents of the pupils. The Federal Court held that the school's decision was fully in accordance with the principle of denominational neutrality in schools, which seeks to protect the religious beliefs of pupils and parents and to ensure religious harmony. After having made this conclusion, the Federal Court noted that it had to be determined whether the impugned decision observed the principle of proportionality. The applicant's freedom of religion had to be weighed against the public interest in ensuring the denominational neutrality of the school system; namely the applicant's interest in obeying a precept laid down by her faith against the interest of pupils and parents in not being influenced in their own beliefs, and the concern to maintain religious harmony in schools. Regard must also be taken to the need of tolerance between members of different faiths. The Federal Court stressed the importance of the teacher as a role model saying that her conduct may have a considerable influence on her pupils due to the tender age of the pupils, the daily contact and the hierarchical nature of the relationship. Teachers are representatives of the state, and the state is consequently responsible for their conduct. It is therefore especially important that teachers remain denominationally neutral. In the current case, prohibiting the applicant from wearing a headscarf forced her to make a difficult decision between a precept laid down by her religion and running the risk of no longer being able to teach in state schools. However, the headscarf is a manifest religious symbol and the applicant taught young children who were particularly impressionable. She was not accused of proselytising or even talking to the pupils about her beliefs, but she could scarcely have avoided questions from the children about her way of dressing. The Federal Court further said that it must be acknowledged that it is difficult to reconcile the wearing of a the headscarf with the principle of gender equality which is a fundamental value laid down in the Swiss Constitution that must be taken into account by schools. Moreover, religious harmony has to be kept, and the applicant's attitude was likely to provoke reactions, or even conflict, which had to be avoided. Due to all these aspects, the Swiss Federal Court held that there had been no violation on the applicant's right to freedom of religion and conscience.<sup>117</sup>

The applicant complained to the ECtHR that the measure to prohibit her from wearing a headscarf while teaching infringed her freedom to manifest her religion, as guaranteed by Article 9. She further held that the Swiss courts had erred in accepting that the measure had a sufficient basis in law and in considering that there was a threat to public safety and to the protection of public order. She noted that it had gone unnoticed for four years that she wore an Islamic headscarf and it did not appear to have caused any obvious disturbance in the school.

The Swiss Government recalled that the Federal Court had held that the prohibition on wearing an Islamic headscarf applied solely to the applicant in her capacity as a teacher at a state school and could not be

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<sup>117</sup> *Dahlab v. Switzerland*, App. No. 42393/98, Admissibility Decision of 15 February 2001, pp. 451-456.

extended to the alleged effects on freedom of conscience and religion of pupils wearing headscarves. The Government stated that the measure to prohibit a state school teacher from wearing a headscarf at school did not amount to interference with her right to freedom of religion. They drew attention to the fact that Swiss state schools are non-denominational, a principle laid down in the Federal Constitution. The applicant had chosen to pursue her profession at a state school and was consequently required to observe the principle of secularism. The Government held that the applicant had the option of teaching infant classes at private schools, of which there were many in the Canton of Geneva, that were not bound by the principle of secularism. The measure prohibiting the applicant from wearing an Islamic headscarf was based on the principle of denominational neutrality in schools and on the principle of religious harmony. According to the Government, the authorities enjoyed a wider margin of appreciation in restricting the applicant's freedom of religion since she was bound to the state by a special status. As a teacher at a state school, she had freely accepted the requirements deriving from the principle of denominational neutrality. She represented the state and her conduct should not suggest that the state identified itself with one religion rather than the other. That was especially valid where loyalty to a specific religion was manifested by a powerful religious symbol such as the Islamic headscarf. The Government held that state neutrality regarding religious beliefs is all the more valuable in a pluralistic society in order to make it possible to preserve individual freedom of conscience. There were pupils from different cultural background in the applicant's class, which made it even more important to preserve such pluralism. The Government also pointed out that teachers are important role models for their pupils, especially when the children are young children attending primary school. Such children tend to identify with their teacher due to the daily contact and the hierarchical nature of the relationship.

The applicant held that the secular nature of state schools meant that teaching should be independent from all religious faiths, but did not prevent teachers from holding beliefs or wearing religious symbols. She emphasised that her teaching, which was of secular nature, had never provoked the slightest problem or given rise to any complaints from pupils or parents. The authorities had been aware that she was wearing a headscarf from March 1991, but did not intervene until June 1996. The applicant further held that she had no choice but to teach within the state school system since there were few private schools in the Canton of Geneva, none of them non-denominational but all governed by religious authorities others than her own. Furthermore, the applicant held that it had never been established that her clothing had had any impact on the children, and the mere fact that she was wearing a headscarf was not likely to influence the children's beliefs. Indeed, some of the children and their parents wore similar garments at home and at school. Lastly, the applicant held that the fact that no complaints had been made by pupils and parents during more than five years constituted sufficient proof that the religious beliefs of the others had been respected. Religious harmony had never been disturbed within the school because the applicant had always shown tolerance towards



her pupils, all the more so since they encompassed a wide range of nationalities and were consequently accustomed to diversity and tolerance.<sup>118</sup>

The ECtHR held that the Swiss authorities were justified in forbidding the applicant from wearing a headscarf at work, consistent with their policy of maintaining religious neutrality in schools, although there was no evidence that the teacher had spoken about religion with her pupils or that there had been any comments from the parents on the subject. The Court agreed with the Swiss Federal Court which had pronounced that the measure by which the applicant was prohibited, purely in her activities as a teacher, from wearing a headscarf was justified by the potential interference with the religious beliefs of her pupils, other pupils at school and the parents of the pupils, and by the breach of the principle of denominational neutrality in schools. Thereby, the Federal Court took into account the very nature of the profession of state school teachers and weighed the legitimate aim of ensuring the neutrality of the state school system against the freedom to manifest one's religion. The Federal Court further noticed that the impugned measure had led to a difficult choice for the applicant, but considered that state schoolteachers had to tolerate proportionate restrictions on their freedom of religion. Hence, the interference with the applicant's freedom to manifest her religion was justified by the need to protect the right of state school pupils to be taught in a context of denominational neutrality. Religious beliefs were fully taken into account in relation to the requirements of protecting the rights and freedoms of others and preserving public order and safety, and it was clear that the decision was based on those requirements and not on any objections to the applicant's religious beliefs.

The ECtHR further noted that it is very difficult to assess the impact that a powerful external symbol such as the headscarf might have on the freedom of conscience of young children. However, the Court held that it cannot be denied that seeing their teacher wearing a headscarf might have a proselytizing effect on children at a young and impressionable age.

Furthermore, the Court held that the wearing of a headscarf, which appears to be imposed on women by a precept in the Koran, is hard to square with the principle of gender equality, and it therefore seems difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils. The Court stated that when weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony, the Swiss authorities had not exceeded their margin of appreciation and the measures taken had not been unreasonable to pursue the legitimate aim of ensuring the neutrality of the state primary-education system, especially regarding the tender age of the children for whom the applicant was responsible as a representative of the state.

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<sup>118</sup> *Dahlab v. Switzerland* *ibid.* pp. 457-460.

*Şahin v. Turkey*

*Leyla Şahin v. Turkey*<sup>119</sup> is one of the most recent and most significant cases regarding religious manifestation through dress. The case concerned Leyla Şahin, who enrolled at Istanbul University as a medical student in August 1997. As she considered it her religious duty to wear a headscarf, she was wearing one when attending classes. In February 1998 the Vice Chancellor of the University, due to a series of judicial decisions of the Turkish Administrative and Constitutional Courts, decided to prohibit the wearing on campus of the Islamic headscarf and the wearing of beards. Subsequently, Şahin was refused access to lectures and examinations. She took part in an unauthorized demonstration against the ban and was then suspended from the university for a semester, although an amnesty later on revoked this penalty. Her attempts to have the prohibition set aside by Turkish courts failed. In September 1999 she transferred to Vienna University to be able to continue her studies while wearing a headscarf.<sup>120</sup>

Leyla Şahin applied to the ECtHR, claiming that Article 9 had been violated when she was prohibited to wear a headscarf at university. The Turkish Government argued that the headscarf ban in universities was necessary to protect the constitutional values of secularism and gender equality. In a judgement of 29 June 2004, the Chamber held unanimously that there had been no violation of Article 9. Although the measures taken by the university had interfered with the applicant's right to manifest her religion, this interference was justified since it could be regarded as "necessary in a democratic society". The applicant thereafter requested the case to be referred to the Grand Chamber, a request that was accepted.<sup>121</sup>

The judgement of the Grand Chamber was delivered on 10<sup>th</sup> November 2005. The Grand Chamber agreed with the Chamber that there had been no violation of Article 9. It accepted the reasons put forward by the Turkish Government that it was necessary to ban the headscarf to uphold the fundamental principles of secularism and gender equality, and furthermore for the protection of the rights of others and to maintain public order. The Grand Chamber held that the wearing of the headscarf had taken political dimensions in recent years and that a threat of extremist political movements seeking to impose on society as a whole religious symbols and the conception of society founded on religious precepts existed. It was therefore legitimate for the state to take measures against such movements and understandable that the university authorities would like to preserve the pluralist and secularist nature of the institution by banning the Islamic headscarf. In matters of religion, the state is entitled to a margin of appreciation, and the Grand Chamber therefore stated that the university authorities, by reason of their direct and continuous contact with the education community, were in principle better placed than the ECtHR to evaluate local needs and conditions or the requirements for a regulation. By a majority of 16 votes to one, the Grand Chamber concluded that the

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<sup>119</sup> *Şahin v. Turkey*, App. No. 44774/98, Judgement of 10 November 2005.

<sup>120</sup> *Şahin v. Turkey*, *ibid.* para. 14-28.

<sup>121</sup> *Şahin v. Turkey*, *ibid.* para. 1-10.

measures were a proportionate interference with Leyla Şahin's Article 9 rights.<sup>122</sup>

*Dissenting opinion of Judge Tulkens*

In her dissenting opinion, Judge Tulkens criticised the majority's application of the margin of appreciation when it stated that the national authorities were better placed than the ECtHR to evaluate needs for regulations on the headscarf. In order to justify the broad margin of appreciation, the majority argued that there is diversity in practice between the states on the issue of regulations concerning religious symbols in education. Judge Tulkens held that there is no lack of consensus on this matter and that, in fact, none of the member states except Turkey has a ban on wearing religious symbols extended to university education. Furthermore, Judge Tulkens said that European supervision must accompany the margin of appreciation, but in this case, European supervision quite simply seemed to be absent. The issue raised by the applicant was not merely a local issue, but one of importance to all member states. European supervision could therefore not be escaped simply by invoking the margin of appreciation.<sup>123</sup>

The majority put forward mainly two arguments to justify the ban of the headscarf: secularism and equality. Judge Tulkens held that there had been no investigation if wearing the headscarf generally contravenes the principle of secularism; it was merely an assumption accepted by the Court. Neither did the judgement address the applicant's argument that she had no intention to call the principle of secularism into doubt. Furthermore, the judgement made no distinction between teachers and students. Judge Tulkens pointed out that whereas the principle of secularism requires education to be provided without any manifestation of religion or belief and has to be compulsory for teachers and public servants, as they have voluntarily taken up posts in neutral environment, the position of pupils and students seemed to her to be different.<sup>124</sup> She further held that there was no evidence that the headscarf that Ms Şahin was wearing had been ostentatious, was used to exert pressure or that it undermined the convictions of others. Neither had it been suggested or demonstrated that there was any disruption in teaching or in everyday life at the university as a result of the applicant wearing the headscarf.<sup>125</sup> The majority still however maintained that "when examining the headscarf in the Turkish context, there must be borne in mind that the impact which wearing such symbol, which is presented or perceived as compulsory religious duty, may have on those who choose not to wear it".<sup>126</sup> Judge Tulkens held that the possible effect that the headscarf might have on those who did not wear it, did not seem to fulfil the requirement of a pressing social need in the light of the Court's case law. In the sphere of freedom of expression (Article 10) the Court had not accepted that interference with the exercise of the right to freedom of

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<sup>122</sup> *Şahin v. Turkey*, *ibid.* para. 112-123.

<sup>123</sup> Dissenting opinion of Judge Tulkens, *Şahin v. Turkey*, *ibid.* para. 3.

<sup>124</sup> Dissenting opinion of Judge Tulkens, *Şahin v. Turkey*, *ibid.* para. 4-7.

<sup>125</sup> Dissenting opinion of Judge Tulkens, *Şahin v. Turkey*, *ibid.* para. 8-9.

<sup>126</sup> *Şahin v. Turkey*, *ibid.* para. 115.

expression could be justified by the fact that the ideas were not shared by everyone and might offend some people. In *Gündüz v. Turkey* of 4 December 2003, the Court held that there had been a violation of freedom of expression when a Muslim leader had been convicted for violently criticising the secular Turkish regime, demanding the introduction of sharia and referring to children born of marriages celebrated only before the secular authorities as “bastards”. Judge Tulkens found it remarkable that peacefully manifesting one’s religion by wearing a headscarf may be prohibited whereas remarks that could be construed as incitement to religious hatred are covered by freedom of expression.<sup>127</sup> She then criticised the Court’s statement that in countries like Turkey, where the majority of the people belong to a particular religion, measures that are taken in universities to prevent fundamentalist religious movements from exerting pressure on students who do not practise that religion or belong to another religion might be justified under Article 9(2), saying that merely wearing the headscarf could not be associated with fundamentalism. Not all women who wear the headscarf are fundamentalists, and there is no evidence that Ms Şahin held fundamentalist views. Her personal interest in exercising her right to manifest her religion by an external symbol should not be wholly absorbed by the public interest in fighting extremism.<sup>128</sup> Lastly, Judge Tulkens opposed the Court’s assumption that a ban on wearing the headscarf promotes gender equality. She stated that the wearing of a headscarf does not necessarily symbolise the submission of women, and she would have liked to hear the opinions of women who do wear respectively do not wear the headscarf. Furthermore, she criticized the Court’s statement in *Dahlab v. Switzerland* that it is hard to reconcile the wearing of the headscarf with the principle of gender equality. It is not the Court’s role to make an appraisal of this type of a religious practice. Judge Tulkens concluded that the banning of the headscarf on the university premises was not “necessary in a democratic society”, and that there subsequently had been a violation of the applicant’s right to freedom of religion.<sup>129</sup>

#### *Kurtulmuş v. Turkey*

The *Kurtulmuş v. Turkey* case concerns Sevgi Kurtulmuş, a professor at the faculty of economy at the University of Istanbul. The applicant started to work at the university in 1982, and became an associate professor in 1996. All this time she was wearing a headscarf. In 1998 disciplinary proceedings were brought against the applicant as a result of her failure to comply with the dress code for civil servants that stated that civil servants had to be bare-headed. On 12<sup>th</sup> February 1998 she had her promotion frozen for two years. On 18<sup>th</sup> May 1998 the applicant, who persisted in wearing a headscarf while carrying out her professional duties, was issued a warning that she might be dismissed. On 27<sup>th</sup> May 1998 she was dismissed for failure to comply with the dress code. The decision was upheld in Turkish courts.<sup>130</sup>

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<sup>127</sup> Dissenting opinion of Judge Tulkens, *Şahin v. Turkey*, *ibid.* para. 8-9.

<sup>128</sup> Dissenting opinion of Judge Tulkens, *Şahin v. Turkey*, *ibid.* para. 10.

<sup>129</sup> Dissenting opinion of Judge Tulkens, *Şahin v. Turkey*, *ibid.* para. 11-13.

<sup>130</sup> *Kurtulmuş v. Turkey*, App. No. 65500/01, Decision of 24 January 2006, pp. 1-2.

The applicant complained to the ECtHR that prohibiting her to wear a headscarf while carrying out her professional duties violated her right to manifest her religion. Furthermore, the dress code contained several other prohibitions that were not upheld, e.g. that it was prohibited to wear skirts that did not cover the knee, sandals etc. The fact that only the prohibition to wear headgear was upheld constituted discrimination according to Article 14 in conjunction with Articles 9 and 10. Moreover, she held that it constituted discrimination that only female Muslims were concerned by the prohibition against a headgear, whereas male Muslims could exercise their profession without being subject to any form of discrimination.<sup>131</sup>

The Court referred to *Şahin v. Turkey*, stating that if the applicant said that she was obeying a religious precept by wearing a headscarf, accordingly her decision to wear one may be regarded as motivated by a religion or a belief. Thus, the Court would assume that the regulations which restricted the applicant to wear a headscarf constituted an interference with her right to manifest her religion.<sup>132</sup> The Court thereafter examined the case according to Article 9(2), holding that the measure was prescribed by law and had a legitimate aim in protecting the rights of others and public order. It remained to examine whether the limitation was necessary in a democratic society. The Court noted that secularism is one of the fundamental principles of the Turkish State, and that a democratic state is entitled to require civil servants to be loyal to the constitutional principles on which it is founded.<sup>133</sup> In *Dahlab v. Switzerland*, the Court held that the Swiss authorities had not exceeded the margin of appreciation when prohibiting the applicant to wear a headscarf while teaching, taken into account the tender age of the children and the neutrality of the Swiss State school system. In the current case, the regulation that Ms Kurtulmuş argued infringed her right to manifest freedom of religion was based on the principle of neutrality in the public sector, especially within public educational institutions, and secularism. As stated in *Şahin v. Turkey*, the Court found that when it came to regulating the wearing of religious symbols in educational institutions, the choice of the extent and form such regulations should take must be left up to a point to the state concerned, as it will depend on the domestic context concerned. Due to the diversity of approaches taken by national authorities on the issue, the regulations in Turkey were within the state's margin of appreciation.<sup>134</sup>

Considering the alleged violations of Article 14, the Court held that the regulations at issue had the legitimate aim to protect public order and the rights of others, and to safeguard the principle of neutrality and secularity within public education. The regulations were not directed at the applicant as a member of a specific religion or of the female sex. Similar

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<sup>131</sup> *Kurtulmuş v. Turkey*, *ibid.* pp. 2-3.

<sup>132</sup> *Kurtulmuş v. Turkey*, *ibid.*, p. 4; *Şahin v. Turkey*, App. No. 44774/98, Judgement of 10 November 2005, para. 78.

<sup>133</sup> *Kurtulmuş v. Turkey*, *ibid.* p. 5.

<sup>134</sup> *Kurtulmuş v. Turkey*, *ibid.* p. 5; *Şahin v. Turkey*, App. No. 44774/98, Judgement of 10 November 2005, para. 109.

rules did exist also for men to assure the discretion of their manifestation of religion.<sup>135</sup> The Court consequently found no violation of Article 14<sup>136</sup>

### **3.4.2 Cases on Manifestation of Religion at the Workplace not regarding Religious Symbols**

#### *X v. Denmark*

The applicant in the case *X v. Denmark* was a clergyman in the State church of Denmark. He made it a condition for christening children that the parents attended five religious lessons. The Church Ministry, being of the opinion that the clergyman had no right to make such conditions, advised him to abandon this practice or to resign. The applicant complained that his right to freedom of conscience had been violated.

The Commission held that in a state church system, its servants are employed for the purpose of applying and teaching a specific religion. Ministers enjoy their individual right of freedom of religion at the moment they accept or refuse employment as a clergyman and by their right to leave the church. The Commission concluded that freedom of religion within the meaning of Article 9(1) did not include the right of a clergyman, in his capacity of a civil servant in a State church system, to set up conditions for baptising which are contrary to the directives of the highest administrative authority of that church. The Court consequently found no violation of Article 9.<sup>137</sup>

#### *X v. UK (the School Teacher Case)*

In the case of *X v. UK*, a Muslim school teacher, who had worked a full five-day week without attending a mosque for worship on Friday afternoons, started to attend a nearby mosque when he was relocated to another school. His request to his employer, the Inner London Education Authority, for formal permission to take an extra seventy-five minutes break every Friday to attend the mosque was refused. He was however offered a four-and-a-half-day weekly contract, which he refused, and left claiming unfair dismissal. The Commission held that the applicant had not convincingly shown that he was required by Islam to disregard his continuing contractual obligation and to attend the mosque during school time, and it assumed a conflict between the applicant's religious and contractual obligations. It emphasised the binding nature of his contractual obligations and that the employer had tried to find a solution to make it possible for the teacher to have some time off for Friday prayers in the mosque, but that such an arrangement would cause serious problems. The Commission held that there had been no violation of Article 9.<sup>138</sup>

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<sup>135</sup> According to Turkish regulations, male civil servants also have to be bareheaded. They are not allowed to wear a beard, and some further rules regarding the way they shall dress exist as well. See *Kurtulmuş v. Turkey*, *ibid.* p. 2.

<sup>136</sup> *Kurtulmuş v. Turkey*, *ibid.* p. 7.

<sup>137</sup> *X v. Denmark*, App. No. 7374/76, 5 Eur. Comm'n H.R. Dec. & Rep. 157 (1976), pp. 157-158.

<sup>138</sup> *X v. UK*, App. No. 8160/78, 22 Eur. Comm'n H.R. Dec. & Rep. 27 (1981).

*Stedman v. UK*

In *Stedman v. UK*<sup>139</sup>, Louise Stedman, an assistant manager at a travel agency, refused to sign an amended contract of employment on the ground that Sunday would have been included as a normal working day. She was dismissed, and argued that her refusal to work on a holy day constituted a violation of her freedom to manifest her Christian faith in worship, practice and observance. The Commission regarded her complaint as being less a matter of religious freedom and more an issue of contractual liability, holding that she had been dismissed as a result of her failure to work certain hours rather than for her religious belief as such, and that she was free to resign from her employment. It considered that, had the applicant been employed by the state and dismissed in similar circumstances, such a dismissal would not have amounted to an interference with her rights under Article 9. The United Kingdom cannot be expected to have legislation that would protect employees against such dismissals by private employers. Hence, no violation against Article 9 had taken place.

*Konttinen v. Finland*

The *Konttinen v. Finland*<sup>140</sup> case concerned a man working for the Finnish State Railways. He joined the company in 1986, and in 1991 he joined the Seventh-day Adventist Church. An Adventist must refrain from working on the Sabbath (Saturday), which starts at sunset on Friday. The applicant performed shift work and sometimes had evening shifts on Fridays. After having joined the Seventh-day Adventist Church, the applicant at six occasions left work Friday at sunset before his shift was finished after having informed his employer. He was repeatedly warned by his superiors that further absence from work would lead to his dismissal but he withheld that he would continue to keep the Sabbath in accordance with his religious convictions. On 23<sup>rd</sup> March 1993 he was dismissed.<sup>141</sup>

The applicant complained to the ECtHR that his right to freedom of religion had been violated on account of his dismissal by the State Railways. He claimed that this right allegedly included the right of having his holy day respected as long as this was not unreasonable from the employer's point of view and did not violate the rights of others. The conflict between his duty to respect his working hours and his religious convictions only arose about five times a year due to early sunset in the winter-time. His request to exchange his Friday evening shifts for morning shifts during winter-time and Friday morning shifts for evening shifts during summer-time was not unreasonable and would not have afforded him any advantage in comparison to his colleagues. The applicant furthermore invoked Article 14 of the ECHR and complained that his dismissal was discriminatory since, under the legislation on working hours, the weekly holiday fell on Sunday, the holy day for the main religious communities in Finland. Thus the State Railways respected the right of his colleagues to

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<sup>139</sup> *Stedman v. UK* (1997) App. No. 29107/95, 89-A Eur. Comm'n H.R. Dec & Rep. 104 (1997).

<sup>140</sup> *Konttinen v. Finland*, App. No. 24949/94, Eur. Comm'n decision of 3 December 1996.

<sup>141</sup> *Konttinen v. Finland*, *ibid.* pp. 69-70.

keep the Sabbath on Sunday but failed to respect his right to keep it on Saturday.<sup>142</sup>

The Finnish Government replied that the State Railways were entitled to rely on the employment contract, which the applicant had signed without reservations in 1986. Having joined the Seventh-day Adventist Church, he was free to relinquish his work if he considered that his professional duties were not reconcilable with his religious convictions. He could also have taken the Fridays concerned off. Furthermore, the State Railways had made efforts to transfer the applicant to another post, which was not possible due to lack of vacant posts, and changing the shift schedule in accordance with the applicant's proposal would have led to inconveniences for his employer and his colleagues.<sup>143</sup>

The Commission found that the applicant as a civil servant had a duty to accept certain obligations towards his employer, including the obligation to observe his working hours. In these particular circumstances the Commission found that the applicant was not dismissed because of his religious convictions but for having refused to respect his working hours. The refusal to work on Friday afternoons could not as such, even if motivated by religious convictions, be considered protected by Article 9(1). Moreover, the applicant had not showed that he was pressured to change his religious views or prevented from manifesting his religion.<sup>144</sup> The Commission added that "having found his working hours to conflict with his religious convictions, the applicant was free to relinquish his post. The Commission regarded this as the ultimate guarantee of his right to freedom of religion."<sup>145</sup> There was no indication that the applicant's dismissal interfered with the exercise of his rights under Article 9(1).

Regarding Article 14, the Commission recalled that Finnish legislation provided that the day of rest usually is Sunday. This legislation, however, did not contain provisions, which guaranteed members of a certain religious community any absolute right to have a particular day regarded as their holy day. The applicant could be considered to be in a situation comparable to that of members of other religious communities and the Commission therefore found that he had not been treated differently in comparison to members of other communities. Consequently, there had been no violation of Article 14 in conjunction with Article 9.<sup>146</sup>

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<sup>142</sup> *Konttinen v. Finland*, *ibid.* pp. 72-73.

<sup>143</sup> *Konttinen v. Finland*, *ibid.* pp. 73-74.

<sup>144</sup> *Konttinen v. Finland*, *ibid.* p. 75.

<sup>145</sup> *Konttinen v. Finland*, *ibid.* p. 75.

<sup>146</sup> *Konttinen v. Finland*, *ibid.* pp. 75-77.



## 4. Conflicting Values

Regarding the wearing of religious symbols at the workplace, many conflicting interests are at stake. These conflicts of interest are dealt with by the ECtHR and discussed in the literature. In this chapter some important conflicting rights at stake will be presented.

### 4.1 Positive Freedom of Religion versus Negative Freedom of Religion

The Swedish regulations on freedom of religion as well as those of the ECHR cover both positive freedom of religion, the right to have and express religious opinions, and negative freedom of religion, the right to be free from unwanted religious influence.<sup>147</sup> In *Buscarini v. San Marino*, the ECtHR stated that

“freedom (freedom of religion) entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion”.<sup>148</sup>

In *Kokkinakis*, the ECtHR held that Article 9

“recognizes that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected”.<sup>149</sup>

Historically, the positive freedom of religion, the right **to** religion, has been prevailing, and in many countries, including Sweden, the citizens were obliged to belong to a certain state prescribed religion. The right not to belong to a religion and to be able to state that publicly has enjoyed much less protection. However, in today’s society, conflicts of interest between those who want to manifest their religion and those who do not want to be exposed to religious manifestations are not uncommon.<sup>150</sup>

The discussion about positive freedom of religion versus negative freedom of religion is found in some ECtHR cases regarding religious clothing. In *Karaduman v. Turkey*, the Turkish Government held that wearing the Muslim headscarf could lead to claims that women who do not wear it are atheists, and thus create social conflict. The Commission, deciding in favour of the Turkish state, took into consideration that the Turkish Constitutional Court had found that the act of wearing a headscarf in Turkish universities may constitute a challenge towards those who have

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<sup>147</sup> Fahlbeck (2004) p. 3.

<sup>148</sup> *Buscarini and others v. San Marino*, App. No. 24645/94, Judgement of 18 February 1999; (2000) 30 EHRR 208, para. 34.

<sup>149</sup> *Kokkinakis v. Greece*, Judgement of 25 May 1993, Series A No. 260-A; (1994) 17 EHRR 397, p. 18, para. 33.

<sup>150</sup> Fahlbeck (2004, nr 1) pp. 7-8.

chosen not to wear one. It held that by choosing to study at a secular university a student submits to those university rules, which may make the freedom of students to manifest their religion subject to restriction to ensure harmonious coexistence between students of different beliefs. Especially in countries where the great majority of the population adhere to one particular religion, manifestation of the observances and symbols of that religion may constitute pressure on students who do not practise that religion or who belong to another religion. Where secular universities have laid down dress regulations for students, they may ensure that fundamentalist religious movements do not disturb public order in higher education or impinge on the beliefs of others.<sup>151</sup> Reinhold Fahlbeck comments on the judgement, saying that the Commission starts the discussion on negative freedom of religion on its own initiative. There is nothing in the investigation to support that other students actually felt that their negative freedom of religion had been violated.<sup>152</sup> The university had not invoked negative freedom of religion as an underlying value in its regulations. Thus, the reference made by the Commission is hypothetical.<sup>153</sup> In 2005 Human Rights Watch wrote a memorandum to the Turkish Government, expressing their concern about the prohibition for women who wear the headscarf to enter higher education. In the memorandum, Human Rights Watch writes that a commonly advanced justification for the headscarf ban is that it protects the rights and freedoms of others who choose not to cover their heads. The organisation is however not aware of any evidence from the early 1990's, when the headscarf was worn more freely in Turkish universities, to suggest that this is a genuine problem, and finds that excluding headscarfed women entirely from further education cannot be a reasonable and proportionate measure. Human Rights Watch further comments on the case *Karaduman v. Turkey*, observing that one of the main rationale for the Commission to decide in favour of the Turkish State was that in a country with a majority Muslim population, such a visible symbol of religion as the headscarf could result in non-Muslim students being put under pressure. Human Rights Watch does not agree with the Commission's zero sum calculation of the interests of devout Muslims and their non-Muslims colleagues; i.e. the assumption that the broadening of Muslim's rights and freedoms necessarily narrows the rights and freedoms of non-Muslims and secularists.<sup>154</sup>

As previously mentioned, the ECtHR cited the extensive judgement by the Swiss Federal Court in *Dahlab v. Switzerland*. The Federal Court held that

“ (...) the appellant's interest in obeying a precept laid down by her faith should be set against the interest of pupils and parents in not being influenced or offended in their own beliefs, and the concern to maintain religious harmony in schools. (...)”<sup>155</sup>

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<sup>151</sup> *Karaduman v. Turkey*, App. No. 16278/90, 74 Eur. Comm'n H.R. Dec & Rep 93 (1993), pp. 107-108.

<sup>152</sup> Fahlbeck (2002) p. 516.

<sup>153</sup> Fahlbeck (2002) p. 503.

<sup>154</sup> Human Rights Watch pp. 36-37.

<sup>155</sup> *Dahlab v. Switzerland*, App. No. 42393/98, Admissibility Decision of 15 February 2001, p. 455.

The Federal Court accordingly said that the interest of Ms Dahlab to manifest her religion had to be weighed against the interest of pupils and parents not to be exposed to her beliefs. The Federal Court continued by stating that teachers must tolerate proportionate restrictions on their freedom of religion due to the civic duties attached to a post in the secular Swiss school system. The pupils' and parents' interest in negative freedom of religion prevail. Moreover, the Federal Court noted that although there had been no complaints from pupils or parents during the years that the applicant had worn a headscarf at school, this did not mean that none of them was affected. Some may have disliked the situation, but did not take action as to not aggravate the situation and hoped that the education authorities would react.<sup>156</sup>

The ECtHR agreed with the Swiss authorities. It noted that the applicant had been wearing the headscarf at school for more than three years without any action being taken by the district school inspector or any comments being made by parents. That implied that there were no objections to the content or the quality of the teaching by the applicant, who does not appear to have tried to influence the children with her religious beliefs. The Court, however, found it difficult to assess the impact that such a powerful external symbol as the headscarf might have had on the freedom of conscience and religion on very young children. It noted that the applicant's pupils were aged between four and eight, an age at which "children wonder about many things and are also more easily influenced than older pupils".<sup>157</sup> The Court concluded by emphasising the need to protect the young pupils from manifestation of religion by their teacher.<sup>158</sup>

In *Şahin v. Turkey* the ECtHR stressed the impact "which wearing such a symbol, which is presented or perceived as a compulsory duty, may have on those who choose not to wear it."<sup>159</sup> The Court referred to prior judgements, e.g. *Karaduman*, stating that the issue at stake included the protection of "rights and freedoms of others" and the "maintenance of public order" in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, are Muslims.<sup>160</sup>

As stated before, in her dissenting opinion, Judge Tulkens discussed the limitation in Article 9(2): freedom to manifest one's religion may not infringe the rights or freedoms of others or prejudice public order. Regarding infringement on the rights or freedoms of others, this condition would have been satisfied if the headscarf the applicant wore as a religious symbol had been ostentatious or aggressive or was used to exert pressure, to provoke a reaction, to proselytise or to spread propaganda and undermined, or was liable to undermine, the convictions of others. The Turkish Government did not, however, argue that this was the case and there was no evidence before the Court to prove that Ms Şahin had such intention. As to

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<sup>156</sup> *Dahlab v. Switzerland*, *ibid.* pp. 454-455.

<sup>157</sup> *Dahlab v. Switzerland*, *ibid.* p. 463.

<sup>158</sup> *Dahlab v. Switzerland*, *ibid.* p. 463.

<sup>159</sup> *Şahin v. Turkey*, App. No. 44774/98, Judgement of 10 November 2005, para. 115.

<sup>160</sup> *Şahin v. Turkey*, *ibid.* para. 115.

the other condition, that public order may not be infringed, it had not been demonstrated or even suggested that there had been any disruption in everyday life at the university because the applicant was wearing a headscarf. Still the majority of the Grand Chamber maintained that one must bear in mind the impact that the headscarf might have on those who choose not to wear it. In Judge Tulkens opinion, this possible impact on others did not seem to fulfil the requirement of a pressing social need. *Mutatis mutandis*, in the sphere of freedom of expression, the Court had never accepted that interference with the right of freedom to expression could be justified by the fact that the ideas were not shared by everyone and might offend some people.

The argument about protecting the negative freedom of religion of others is also put forward by the defendant in the case regarding Christel Dahlberg-Kamara ruled by the Swedish Labour Court. The company argued that in case the Court would consider that the company had not hired the applicant because of the way she was dressed, and furthermore did not accept the company's dress code (neutral clothes with the emblem of the company and a cap), then the company nevertheless would have had the right not to hire the applicant since her wearing a headscarf would violate the right of others not to be opposed to religious manifestation, i.e. the negative freedom of religion. As stated before, the Court never came to a decision on this matter since it concluded that no employment procedure was going on and therefore never went into substance on ethnic discrimination.<sup>161</sup>

To conclude, looking at the case law of the ECtHR, the Court seems to give importance to the negative freedom of religion to a rather big extent. Reinhold Fahlbeck makes the reflection that the negative freedom of religion over time most likely will be reduced. He observes that harmonious coexistence, conflict avoidance, religious harmony and tolerance are values referred to by the Court and by member states. He asks if this leads to Article 9 requiring people to accept religious manifestations of a nature not familiar to them. The notions used by the Court seem to speak in that direction. As a consequence, over time the Convention should leave less room for invoking negative freedom of religion e.g. not to have to be exposed to religious manifestations by others since frequent exposure to a religious manifestation reduces the religious impact of that exposure.<sup>162</sup>

## 4.2 Secularism. Religion as a Private or a Public Matter?

In many of the cases ruled by the ECtHR on religious clothing, focus has been put on secularism. In *Dahlab v. Switzerland* the Swiss State emphasised the secular nature of the Swiss school system. In all cases regarding religious clothing in Turkey, the Turkish State has stressed the

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<sup>161</sup> AD 2003:63.

<sup>162</sup> Fahlbeck (2004, nr 1) p. 10.

importance of Turkish State secularism. We will now look further into this aspect of the cases.

In *Dahlab v. Switzerland* the Swiss State recalled the principle in the Swiss Constitution that state schools are non-denominational and that the applicant was required to observe the principle of secularism since she was working in a state school.<sup>163</sup> The ECtHR noted that in its judgement, the Swiss Federal Court had weighed the protection of the legitimate aim of ensuring the neutrality of the state education system against the freedom to manifest one's religion. Upon doing so, the Federal Court came to the conclusion that the interference with the applicant's freedom to manifest her religion was justified by the need, in a democratic society, to protect the right of state school pupils to be taught in a context of denominational neutrality. The ECtHR accepted, as noted before, the reasoning of the Federal Court and the Swiss Government.<sup>164</sup>

In *Karaduman v. Turkey* as well as in *Şahin v. Turkey* the Turkish Government claimed that the headscarf ban at universities was necessary to protect the constitutional value of secularism.<sup>165</sup> Article 2 of the Turkish Constitution provides that

“The Republic of Turkey is a democratic, secular (laik) and social State based on the rule of law that is respectful of human rights in a spirit of social peace, national solidarity and justice, adheres to the nationalism of Atatürk and is underpinned by the fundamental principles set out in the Preamble.”<sup>166</sup>

In a judgement of 7 March 1989 the Turkish Constitutional Court held that a provision providing that a veil or a headscarf covering the neck and hair may be worn out of religious conviction was contrary to Article 2 of the Turkish Constitution. In the judgement the Constitutional Court explained that secularism had acquired constitutional status by reason of the historical experience of the country and the particularities of Islam compared to other religions. Secularism was an essential condition for democracy and the guarantor of freedom of religion and equality before the law, preventing the state from manifesting a preference for a particular religion or belief, and protecting the individual from arbitrary interference by the state as well as from pressure from extremist movements.<sup>167</sup>

In *Karaduman v. Turkey* the Turkish Government took the view that the prohibition for women to wear headscarves on the degree certificate must be held in order to uphold the decision of the Turkish Constitutional Court that the wearing of headscarves in the higher education is contrary to the principle of secularism as provided in the Constitution. The applicant held that the university's refusal to issue her degree certificate constituted an interference with her freedom of religion and belief which

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<sup>163</sup> *Dahlab v. Switzerland*, App. No. 42393/98, Admissibility Decision of 15 February 2001, p. 458.

<sup>164</sup> *Dahlab v. Switzerland*, *ibid.* pp. 462-463.

<sup>165</sup> *Karaduman v. Turkey*, App. No. 16278/90, 74 Eur. Comm'n H.R. Dec & Rep 93 (1993) p. 107; *Şahin v. Turkey*, App. No. 44774/98, Judgement of 10 November 2005, para. 39.

<sup>166</sup> *Şahin v. Turkey*, *ibid.* para. 29.

<sup>167</sup> *Şahin v. Turkey*, *ibid.* para. 39 and para. 113.

could not be justified by respect for the principle of secularism. The applicant maintained that secularism was one of the political principles in Turkey, but held that by wearing a headscarf an individual merely takes part in religious practice which did not impinge on the secularity of the state. The Commission agreed with the Government, and noted that the rules applicable to the identity photographs did form part of the university rules laid down with the aim of preserving the “republican” and hence “secular” nature of the university. That being the case, the Commission considered, having regard to the requirements of a secular university system, that there had been no interference with the applicant’s right to freedom of religion and conscience.<sup>168</sup>

In *Şahin v. Turkey* the Grand Chamber found that upholding the principle of secularism may be considered necessary to protect the democratic system in Turkey. Therefore, an attitude that failed to respect the principle of secularism would not necessarily be accepted as being covered by the freedom to manifest one’s religion.<sup>169</sup> The Court concluded that it is the principle of secularism, as drafted by the Turkish Constitutional Court, that is the paramount consideration underlying the ban on wearing religious symbols in universities and it was considered understandable that the Turkish authorities liked to preserve the secular nature of the universities and did not allow the headscarf to be worn.<sup>170</sup>

Judge Tulkens did not agree with the majority that the headscarf contravened the principle of secularism. She noted that the signification of wearing a headscarf and its relationship with secularism had been a subject of much debate. According to her, the Court made a generalised assessment that gave rise to difficulties. Firstly, the judgement did not address the applicant’s argument, an argument that the Government did not dispute, that she had no intention to call the principle of secularism, a principle with which she agreed, into question. Secondly, there had been no evidence to show that the applicant had contravened the principle through her conduct, attitude or acts. This is a test that the Court otherwise always has applied in its case law. Lastly, the judgement made no distinction between teachers and students, whereas the Court in *Dahlab v. Switzerland* particularly noted the role-model aspect of the teacher.<sup>171</sup>

Reinhold Fahlbeck discusses the implications of religious manifestations depending on the structure of the society in question. There is a considerable difference between states that have made secularism a basis for society (such as France and Turkey) and states that have not (such as the Nordic countries). Even rather innocent religious manifestations can assume grave proportions in the societies based on secularism. He takes the headscarf as an example. In Turkey the headscarf is not allowed to be worn in universities, in France not in schools. In these countries secularism is the central dogma of society. In countries where the state is religiously neutral, but not based on secularism, few people will have religious reasons to

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<sup>168</sup> *Karaduman v. Turkey*, App. No. 16278/90, 74 Eur. Comm’n H.R. Dec & Rep 93 (1993) pp. 107-109.

<sup>169</sup> *Şahin v. Turkey*, App. No. 44774/98, Judgement of 10 November 2005, para. 114.

<sup>170</sup> *Şahin v. Turkey*, *ibid.* para. 116.

<sup>171</sup> Dissenting opinion of Judge Tulkens, *Şahin v. Turkey*, *ibid.* para. 7.

oppose Muslim girls to wear the headscarf (but they may oppose it on other grounds e.g. gender equality). In its judgements, the ECtHR takes into consideration if the responding state is based on secularism or not. At least to some extent the Convention allows countries to decide on religious manifestations according to their fundamental view on the place of religion in society. Therefore it is quite likely that the outcome of a case like *Karaduman v. Turkey* would have been different in a country not based on secularism, as Sweden. Here people are allowed to wear religious garments on official documents like passports and driving licences. Thus, it might be considered a violation of freedom of religion not being allowed to wear a headscarf on a graduate certificate issued by a university.<sup>172</sup>

Human Rights Watch considers the principle of secularism as an unconvincing argument to uphold the ban in Turkey since the U.N. special rapporteur on the elimination of all forms of religious intolerance has questioned whether the Turkish arrangements can be described as secular at all, and a number of secular states permit women students to wear headscarves at university. Besides referring to an abstract principle, the Turkish Government has not shown how wearing a headscarf in a state university can undermine a public policy that is effectively protecting the rights of citizens. In this case, the interest of public order is not overriding, and the benefit of limiting a right has to be weighed against the interests of those who wish to exercise that right. The costs for the women denied higher education are heavy, whereas the benefit for other citizens is far from clear, since headscarves were frequently worn in universities without incident during the 1980's and much of the 1990's.<sup>173</sup>

Linked to the question of secularism and the one of positive versus negative freedom of religion is the matter whether religion should be manifested in public or kept private. The ECtHR discusses this in the terms of *forum externum* and *forum internum*.

Carolyn Evans holds that in the case law of ECtHR, the internal dimension of religion or belief, *the forum internum*, is considered to be at the core of religious freedom, and she criticises the primacy the Court has given to the internal role and the notion that freedom of religion or belief is mainly about being able to hold a particular set of beliefs. The notion that the internal religious life of a person is easily separable from her or his actions in accordance with her or his religion or belief is controversial and not accepted by all believers. The emphasis given to the *forum internum* is not necessarily in accordance with the way many religions would define themselves. It has been argued that the notion that particular internal beliefs can be separated from a religious way of life is alien outside Europe. It is therefore, according to Carolyn Evans, certainly not the case that forcing a person to act in a way that is against the teachings of her or his religion, or penalising her or him for acting in compliance with a teaching of her or his religion, is irrelevant to the core of many people's religion or belief. The limited scope given to the notion of manifesting a religion or belief underlines the Court's assumption that the core of freedom of religion is a set of theological propositions rather than a moral framework or a particular

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<sup>172</sup> Fahlbeck (2004, nr 1) pp. 5-6.

<sup>173</sup> Human Rights Watch p. 35.

way of living. Evans concludes that religious actions and symbols are an important part of religion. Some religions emphasise theology or dogma, whereas others emphasise acting. Distinctive clothing, dietary requirements and other patterns of behaviour are essential parts of the religions and beliefs of many. To tell these people that they can maintain the core of their religion although the state does not allow them to follow their dietary requirements, manner of dressing or moral commitments is to ignore the significance of these external manifestations of religion in the lives of many believers. Evans holds that the ECtHR as an international court with the task to uphold human rights and fundamental freedoms ought to show a greater awareness of the diverse and complex nature of religion and belief. It should not simply assume that there is a shared conception of a division of religion into an internal and external sphere, and that there is primacy of the internal realm of conscience, whereas living out one's religion or belief is of less importance.<sup>174</sup>

Tom Lewis<sup>175</sup> is also sceptical towards the Court's division of religion in *forum externum* and *forum internum*. He states that it has been argued that the split between the *forum internum* and the *forum externum* has the effect of favouring post-reformation Christianity which emphasises the internal holding of faith rather than outward display of it; Martin Luther's position was that justification was obtained *sola fide*, by faith alone, and that good works were not necessary.<sup>176</sup>

### 4.3 Majority versus Minority - Protection of Pluralism

Generally, working life in Western Europe is arranged according to Christian standards with Sunday as the day of rest and public holidays based on the Christian calendar.<sup>177</sup> European countries have traditionally been rather religiously unified with one prevailing religion, Christianity, and multiplicity as an exemption.<sup>178</sup> Today's society is however much more pluralistic. Are then believers of minority faiths as well protected as those who belong to the prevailing faith? The ECtHR has received some criticism not to support adherers to minority religions sufficiently.

Carolyn Evans notes that the Commission and the Court sometimes have been accused of being unsympathetic to applicants belonging to non-Christian traditions or religions without a long history in Europe. They tend not to hold in favour of applicants in cases dealing with the wearing of religious garment or having a particular appearance, which can be important to people from some religious traditions, whereas it has little relevance in Christianity. The Commission has on the other hand held that there is a right to proselytise (or bear Christian witness), although this is

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<sup>174</sup> Evans, C. (1999) pp. 394-396.

<sup>175</sup> Nottingham Law School, Nottingham Trent University.

<sup>176</sup> Lewis p. 400, note 34.

<sup>177</sup> Cumper p. 316.

<sup>178</sup> Fahlbeck (2004) p. 10.



an issue that is generally controversial. There is a potential that the Court, when determining what is and is not necessary to the religion or belief of an applicant, will single out for protection the religious practices with which its members are most familiar. This may lead to favouring traditional types of religious practice over the practices within newer, at least in the European context, religions and beliefs.<sup>179</sup>

Eva Brems holds a similar opinion to the one of Evans, and states that the Court does not protect religious practices to a sufficient degree. She points out that the internal aspect, the *forum internum*, is the main element for the Court and the Commission. The external aspect, i.e. the right to manifest one's religion is also protected, but considered less important. The Court does not explain this further although it is not self-evident. She finds that the question must be asked if this attitude of the Court manifests a bias towards Christianity. Christian religions are more confined to the inner realm than many others. They do not really impose rules with regard to food, dress codes etc. Moreover, as far as such rules exist within Christian denominations, they have already been accommodated within the legal system and the practices of European societies, e.g. most jobs do not entail work on Sundays or on the main Christian holidays. Thus, the Court's attitude towards religious manifestations mainly affects adherents of other, primarily minority, religions.<sup>180</sup>

Tom Lewis notes that there is nothing on the face of the ECHR to suggest that freedom of religion should be accorded less weight than freedom of political speech or sexual privacy, but this is the implication of the case law: those rights that are valued by the liberal, pluralist, autonomy valuing culture, i.e. the Enlightenment culture from which human rights originally grew, are valued more highly than those rights based on pre-Enlightenment religious values stressing divinely ordained obligation. Lewis holds that it would be easy to understand a Muslim woman or girl, claiming the right to wear a garment that she sincerely believes is required by her religion, for thinking that the opinions in the judgements by the ECtHR look like "one rule for them and another one for me".<sup>181</sup>

Reinhold Falhbeck holds another opinion. He asks whether the Court expresses Christian ethnocentricity in *Karaduman v. Turkey* and *Dahlab v. Switzerland*<sup>182</sup>. In both cases it was decided that Muslim women did not have the right to wear a headscarf at university respectively in school. Had the outcome been different if the cases would have dealt with Christian manifestations of religion? Falhbeck answers no, stating that there is not even a hint in the Court's case law that it would treat non-Muslim dresses differently. The line of reasoning is strictly religion neutral and would be the same if other garments were at issue. In *Dahlab* the Court referred to the decision of the Swiss Federal Court which argued that one reason for not allowing the headscarf was that then other "garments that are

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<sup>179</sup> Evans C. (1997) p. 125.

<sup>180</sup> Brems pp. 3-5.

<sup>181</sup> Lewis p. 412.

<sup>182</sup> *Şahin v. Turkey* was not yet decided when this article was written.

powerful symbols of other faiths, such as soutanes or kippas”<sup>183</sup> would have to be accepted as well. Further, the Swiss Federal Court stated that the principle of proportionality had led the Swiss Cantonal Government to allow teachers to wear discreet religious symbols, such as small pieces of jewellery. This might seem like a certain amount of Christian ethnocentricity since crosses are often worn by Christians and such crosses tend to be small and in the form of jewellery. There is no equivalent symbol for Muslim women. However, Fahlbeck holds that there is nothing in the position of the Swiss authorities that demonstrates Christian ethnocentricity since the Federal Court equates the headscarf with other religious garments.<sup>184</sup> He compares with a case ruled by the Bavarian Constitutional Court on crosses in classrooms, a case that clearly expresses Christian ethnocentricity. In Bavaria, which is predominately Catholic, there had to be a cross or crucifix in every classroom. According to the German Federal Constitutional Court this was an unconstitutional violation of the separation between state and religion. The majority principle could not prevail and minorities should be protected.<sup>185</sup> Following this decision Bavaria amended its rules. The crosses should remain in the classrooms, but in case someone opposed them for serious and understandable reasons of belief or philosophy of life, attempts shall be made to find an amicable solution. If this fails, the school must find a solution that respects both the freedom of belief of the complainant and that of the other students. The wish of the majority shall then, to a certain extent, be taken into account. This practice that clearly favours the Catholic majority has been accepted by the Bavarian Constitutional Court. This is however not a Convention case.<sup>186</sup>

Fahlbeck also points out another aspect. Democracy is based on majority principles and thus there is a constant risk that religious majorities suppress religious minorities.<sup>187</sup> Human rights law is accordingly of great importance to minorities and most cases concerning religion at the workplace have concerned religious rights of minorities. The cases have generally not been decided with reference to that aspect. However, in *Karaduman v. Turkey* the majority-minority dichotomy was considered as one out of several reasons for giving Turkey the right to uphold the ban on wearing a headscarf at a photo of a degree certificate. The Court noted that

“Especially in countries, where a great majority of the population owe allegiance to one particular religion, without restriction as to place or manner, may constitute pressure on students who do not practise this religion or those who adhere to another religion”.<sup>188</sup>

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<sup>183</sup> *Dahlab v. Switzerland*, App. No. 42393/98, Admissibility Decision of 15 February 2001, p. 456.

<sup>184</sup> Fahlbeck (2004, nr 1) p. 10.

<sup>185</sup> Federal Constitutional Court (Bundesverfassungsgericht), BVerfGE 93, 1, BvR 1087/91 (May 16, 1995).

<sup>186</sup> Fahlbeck (2004, nr 1) p. 6.

<sup>187</sup> Fahlbeck (2004, nr 1) p. 6.

<sup>188</sup> *Karaduman v. Turkey*, App. No. 16278/90, 74 Eur. Comm’n H.R. Dec & Rep 93 (1993) p. 108.

The applicant belonged to the Muslim majority in Turkey and the Court upheld a restraint on her freedom of religion in order to protect the rights of minorities. Fahlbeck finds the Court's position remarkable since the Turkish state had not expressed any concern for minorities but based its case almost exclusively on secularism.<sup>189</sup>

Fahlbeck once again compares with German case law, in which the conflict between majority and minority has been much discussed. In the *Bavarian Schoolroom Cross Case*, the German Federal Constitutional Court (Bundesverfassungsgericht) declared unconstitutional the Bavarian rule that there should be a cross in every public school room.<sup>190</sup> The Bavarian Government defended the rule by referring to the strength of Catholicism in Bavaria and the fact that a majority of the inhabitants had voted in favour of a school system with a Christian character.<sup>191</sup> The German Federal Constitutional Court held however that the conflict could not be solved through a majority decision since the fundamental right to freedom of religion particularly comprises the protection of minorities. No matter if there is a strong majority, the state always has to assure a treatment based on equality of different religious groups.<sup>192</sup> This, however, does not mean that there is no possibility at all to take the majority's wish into consideration.<sup>193</sup> In another German case, the *Ludin* case, which concerned a woman who was denied to teach in German primary schools (Grundschule) and non-selective secondary schools (Hauptschule) in the Federal State Baden-Württemberg while wearing a headscarf, the German Federal Constitutional Court delegated to the various federal states (Bundesländer) to regulate religious manifestations. Tolerance and compromise must be promoted, but due to different traditions in the school systems, different religious composition of the population in different federal states and whether religion is more or less strongly rooted, the Court handed over to the federal states to decide. The German Federal Court stated that the federal states have the duty to find a middle course in striking a balance between "the positive freedom of faith of a teacher on the one hand and the state's duty of religious and ideological neutrality, the parents' right of education and the negative freedom of faith of the pupils on the other hand; taking into account the requirement of tolerance" and the "legislature must seek a compromise that is reasonably acceptable to everyone."<sup>194</sup> Fahlbeck believes that the ECtHR will arrive at a similar result. He notes that the position of the German Federal Constitutional Court is in perfect accordance with the situational character of case law of the Convention so far and that religious multiplicity with due – but not overdue- regard for the majority seems to be the position to be expected, i.e. a principle of proportionality.<sup>195</sup>

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<sup>189</sup> Fahlbeck (2004, nr 1) p. 6.

<sup>190</sup> Federal Constitutional Court (Bundesverfassungsgericht), BVerfGE 93, 1, BvR 1087/91 (May 16, 1995) para. 58.

<sup>191</sup> Federal Constitutional Court (Bundesverfassungsgericht), *ibid.* para. 19.

<sup>192</sup> Federal Constitutional Court (Bundesverfassungsgericht), *ibid.* para. 35.

<sup>193</sup> Fahlbeck (2004) p. 11.

<sup>194</sup> Federal Constitutional Court (Bundesverfassungsgericht), BVerfGE, 2 BvR 1437/02 (24 September 2003) para. 47.

<sup>195</sup> Fahlbeck (2004) pp. 10-11.

## 4.4 Gender Equality versus Freedom of Religion

A much discussed issue in the cases of the ECtHR and in literature is the one of gender equality versus freedom of religion regarding Muslim women covering their heads.

In *Dahlab v. Switzerland* the Court stated that it finds it hard to reconcile the wearing of a headscarf with gender equality:

“In those circumstances, it cannot be denied outright that the wearing of headscarf might have some 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 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.”<sup>196</sup>

In *Şahin v. Turkey* the Court refers to the *Dahlab* decision, repeating that the headscarf is hard to reconcile with gender equality.<sup>197</sup> Further, the Court held that

In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.<sup>198</sup>

There has been some criticism towards the ECtHR’s reasoning on gender equality. In *Şahin v. Turkey*, the dissenting Judge Tulkens criticised the majority’s view on gender equality. In the judgement, wearing the headscarf was considered synonymous with the alienation of women, and the banning of it is therefore seen as promoting equality between men and women. The judgement, however, did not explain the connection between the ban and gender equality, and there is no discussion about the signification of wearing a headscarf. Judge Tulkens referred to the German Constitutional Court which noted in its judgement of 24 September 2003 that wearing the headscarf has no single meaning but a variety of reasons. It does not necessarily symbolise the submission of women to men, and there are those who maintain that it can sometimes be a means of emancipating women. Judge Tulkens is lacking the opinion of women in the debate, both women who wear the headscarf and those who have chosen not to. According to Judge Tulkens, the most questionable part of the Grand Chamber’s reasoning is when it refers to the *Dahlab* decision citing that wearing a headscarf represents a “powerful external symbol”, which “appeared to be imposed on women by a religious precept that was hard to reconcile with

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<sup>196</sup> *Dahlab v. Switzerland* App. No. 42393/98, Admissibility Decision of 15 February 2001, p. 463.

<sup>197</sup> *Şahin v. Turkey*, App. No. 44774/98, Judgement of 10 November 2005, para. 111.

<sup>198</sup> *Şahin v. Turkey*, *ibid.* para. 116.

the principle of gender equality” and that the practice 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”<sup>199</sup>. Judge Tulkens held that it is neither the ECtHR’s role to make such an appraisal of a religion or religious practice, nor to determine, in a general or abstract way, the signification of wearing a headscarf, and impose its viewpoint on Ms Şahin. The applicant was an adult university student and there was nothing to suggest that the applicant was not telling the truth when she said that she was wearing the headscarf of her own free will. Judge Tulkens cannot see how the principle of gender equality can justify prohibiting a woman from following a practice, which she, in the absence of proof of the contrary, must be taken to have freely adopted. Equality and non-discrimination are subjective rights that must remain under control of those who are entitled to benefit from them. Furthermore, if wearing the headscarf really was contrary to the principle of equality between men and women, the state would have a positive obligation to ban the headscarf in all places, public as well as private.<sup>200</sup>

In an article on the headscarf debate, Dawn Lyndon<sup>201</sup> and Deborah Spini<sup>202</sup> criticise the Court’s discussion on gender equality in *Dahlab* saying that the analysis is superficial, and that there is no attempt from the Court to engage in the debate on what it means to wear the headscarf. There is an assumption that the headscarf is not consistent with gender equality although the case clearly concerns an adult woman who herself has chosen to wear a headscarf.<sup>203</sup>

In a comment on the *Şahin* case and gender equality, Jill Marshall<sup>204</sup> also criticises the fact that in *Şahin* as well as in *Dahlab* there is an assumed conflict between Islam and women rights that goes on uninvestigated. In the ECtHR’s judgments the view of veiling as a patriarchal practice that limits women is implicitly to be found, but without any adequate analysis. Marshall stresses the fact that both cases involved *adult* women, feeling so strongly about their conviction to wear the headscarf that they exhausted national remedies and took their cases to Strasbourg. There was no evidence in any of the cases that the wearing of the headscarf was anything but the choice of these women.<sup>205</sup>

The writers are all asking for a profound discussion on the issue of Islam and women rights by the ECtHR. Lyon and Spini hold that many interpret the wearing of the headscarf as a symbol of oppression of women, in which their dignity as subjects is denied by a patriarchal world, and therefore banning it can be seen as liberating Muslim women. Muslim women, however, put a range of meanings in wearing the headscarf, and we must learn to dialogue with positions we do not immediately understand. This is the real meaning of tolerance; not only to accept difference but also

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<sup>199</sup> *Şahin v. Turkey*, *ibid.* para. 111.

<sup>200</sup> Dissenting opinion of Judge Tulkens, *Şahin v. Turkey*, *ibid.* para. 11-12.

<sup>201</sup> Department of Law, Queen Mary, University of London.

<sup>202</sup> Department of Sociology, University of Essex.

<sup>203</sup> Lyon and Spini p. 338.

<sup>204</sup> Department of Social Sciences, Syracuse University, Florence.

<sup>205</sup> Marshall p. 454.

to recognise the dignity in difference. The writers emphasise that one constraint (the religious obligation to wear a headscarf) can never be replaced by another (the obligation not to wear a headscarf), i.e. an effective process of liberation cannot be based on a prohibition. The problem is not the headscarf itself, but the headscarf as an object of free choice. If it is seen as an object of free choice, the headscarf can take on a non-regressive symbolic meaning that bears witness to a particular tradition in a condition of freedom. Banning the headscarf means denying Muslim women the chance to combine elements of modernity and tradition and to be seen as autonomous subjects while conserving differences they might wish to retain. The writers say that it is more complicated when children are involved. In France, the ban on the headscarf (and on other religious symbols) is supposed to defend young women from an oppressive and family-enforced tradition, but at the same time it submits these women to another form of tutelage. If the French State really would like to support Muslim women, it should focus on the social, economic, legal and political conditions in which they live in order to be able to create conditions in which choice can be real.<sup>206</sup>

Marshall discusses the same topic in her article. She notes that in the ECtHR's judgements, the view that headscarf bans are supposed to help women to compete in public spaces and institutions on equal terms with men, free from patriarchal restrictions, is found. Not much of an analysis is made by the Court to support this view, and Marshall says that an adequate analysis needs to be done since these issues have an impact on the lives of many. If it were the case that a choice, even if made by an adult woman, was the result of oppression and restrictive conditions, and not in her own interest, it might be argued that this choice is not a real one and should therefore not be available. Marshall asks if this is what the ECtHR is alluding to, and if this is the case, is it then correct to uphold a ban in the interest of gender equality? In the increasingly pluralist societies in Europe, a more complex understanding of equality needs to be acknowledged and continually investigated. It could be seen as more meaningful upholding a form of equality that acknowledges differences amongst people, including cultural identity and religious beliefs, rather than insisting on everyone to be the same. Furthermore, if there are women not able to make a real free choice about the headscarf as a consequence of lack of self-esteem and self-confidence caused by oppression, then what they need is to be reinforced in their own identity. This is not likely done through prohibitions of choices they make for themselves, e.g. about what to wear. The starting point must be that people should exercise their own choice to discover for themselves what they want to be and do, including what they want to wear. Moreover the consequences and impact of a ban on women's life in practice must be fully evaluated. Will a ban prevent women from going to university or being teachers? Will it lead to increased isolation of women within the Muslim community who choose to wear headscarves, and to a narrower isolated, marginalized and potentially indignant Muslim community? If analyses involved consideration of these points, the conclusion may be reached that

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<sup>206</sup> Lyon and Spini pp. 341-342.

banning means imposing a set of standards in the name of gender equality that actually denies these women freedom as autonomous persons. As it is now, the message from the Court seems to be that these women do not know what is best for them, and therefore they should be forced not to wear a headscarf. Marshall concludes that if the ECtHR continues to restrict the freedom and choice of adult women also in the future, she hopes that a more coherent analysis as regards gender equality and women's freedom will take place. There should not be a largely uninvestigated assumption that the culture and/or religion of women who wear a headscarf is based on gender inequality and that all these women are victims. A starting point must be to respect choices of individual women who freely wear the headscarf and feel strongly enough about it to take their cases to the ECtHR hoping that their right to freedom of religion will be upheld.<sup>207</sup>

Eva Brems holds that the ECtHR seems somewhat hostile to Islam. She is critical towards the Court's statement in *Dahlab v. Switzerland* that the headscarf is hard to square with equality of the sexes, and that it is difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and above all equality and non-discrimination. Brems notes that the Court usually does not give an opinion on the content of the teachings of a religion. It may be justified to do so in certain situations, but then the Court should be well informed and careful in the way it expresses its opinion. What the Court puts forward in this case does not go beyond the level of prejudices about Islam. Islam is one of the main world religions, and millions of Muslim women wear a headscarf to show their religious devotion. The Court is telling them that they are wearing a harmful symbol. Brems holds that in Islam, as in other religions, there are some rules that can be called discriminatory. The wearing of a headscarf is however not clearly such a discriminatory regulation. Some Muslim women experience Islamic dress codes as liberating, or as an expression of their (minority) identity, and for others it is just a tradition that they are attached to. Whenever women are forced to wear a headscarf this must be considered wrong. The *Dahlab* case, however, deals with a woman who claims the right to wear a headscarf and obviously considers it to have a positive meaning. What authority then does the Court have to oppose her and proclaim that the headscarf has a negative signification? The Court has to take the "insider perspective" into account, i.e. the perspective of the believer herself, of what she considers is required by her religion. If outsiders perceive the headscarf as a symbol of discrimination, this is often related to ideas associated with other rules of Islam. People tend to see Islam as a monolithic block and equate the headscarf in Switzerland with the burqa in Afghanistan. Such generalisations reveal prejudice and lack of information about the complexity and heterogeneity of Islam. The ECtHR should definitely avoid giving any such impression.<sup>208</sup>

German Courts, including the Federal Court, has ruled on some cases concerning the wearing of religious symbols, particularly headscarves, at the workplace. In an article, Dagmar Schiek<sup>209</sup> comments on

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<sup>207</sup> Marshall pp. 459-461.

<sup>208</sup> Brems pp. 15-17.

<sup>209</sup> Centre for Law and Legal Studies, Leeds.

the German case law, observing that it is clear that equality concerns lie behind the reasoning of the German courts on these issues. It is being alleged that teachers wearing headscarves display behaviour that shows a conservative role model for women. Accordingly, restrictions of religious freedom are justified in the name of furthering substantive equality, especially for female school children. It might be argued that girls may feel that a teacher wearing a headscarf backs up their parents' claims for them to wear a headscarf. However, these issues are not this simple. Firstly, a Muslim woman achieving a career as a teacher and earning her own living could just as well serve as a role model to Muslim girls attending her classes, especially if these pupils are confronted with parental demands not to attend further education. In addition, a headscarf ban would in fact hinder steps towards emancipation by Muslim women, who are not prepared to adapt to Western ideals of equality, and thus not allow them to integrate into public life. Lastly, Schiek quotes a comment on a ruling by the Federal Court: "The more inferior the position of the employee, the more difficult it is to assume that [the headscarf] violates employers' entrepreneurial freedom". According to Schiek, this reflects employment practices in German schools, as they do not object their Muslim part-time cleaners wearing headscarves, but discourage academically educated Muslim women to work for them.<sup>210</sup>

Reinhold Fahlbeck is much more positive to the ECtHR's case law on gender equality than the scholars presented so far. He observes that the situation in *Dahlab v. Switzerland* is complex since two important human rights, freedom of religion and gender equality, clash. The headscarf can be seen as a means to oppress women and a woman claiming this would be given full protection under anti-discrimination law. But how about the opposite case, women who want to wear the headscarf to manifest their freedom of religion but are denied? Another question, posed by the Court in *Dahlab*, is whether a female Muslim wearing a headscarf can teach children equality and non-discrimination. Fahlbeck notes that some difficult balancing acts will be required. If people of one gender freely want to wear some clothes or other symbols to manifest their religion they cannot, based on the Convention, be forbidden to do so because the other gender does not wear this garment. The problem is to know if the person wearing the garment or symbol does so out of free will. Social pressure can be hard, and often it is not pertinent to speak about free will or even informed consent. Fahlbeck asks if we can substitute our perception of appropriate manners for those of other people? On one hand there is a risk of patronizing and arbitrary guardianship, on the other hand there is a risk of sanctioning gender discrimination. Discrimination law requires an element of unfairness in order to acknowledge discrimination. Different treatment is not enough. Discrimination law is concerned with enforcing social values that often face opposition and most legal systems therefore apply objective standards to find out if there is unfairness. If too much emphasis is put on the person claiming discrimination some of the statutory aim might be lost. However, discrimination law has not yet dealt much with the possibility that those

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<sup>210</sup> Schiek p. 72.



covered by it maintain that they want to be treated in a way that the law considers to be discriminatory. In such a social environment, objective standards have to be applied if a particular circumstance is to be considered discriminatory since the legal standards applied will have their spiritual home somewhere else than in the spiritual environment of the person concerned.

Reinhold Fahlbeck further notes that Christianity traditionally has not favoured gender equality. However, although the way was long, gender equality in the Western world today is mainstream and actively promoted. He asks if the Convention and gender equality law in Europe will become a tool for Muslim women in Europe to achieve the same thing. The risk is that such attempts would be counterproductive since those Muslim women who see the headscarf as compulsory will most likely not go to work without one. Strict bans on headscarves in order to enforce gender equality might lead to exclusion from many jobs and thus result in these women becoming isolated from society.<sup>211</sup>

Carolyn Evans criticises the Court and the Commission for not paying enough attention to religion and for limiting the scope of Article 9(1) too much. She states that they seem to “prefer not to become involved in the competing claims of, for example, women’s equality and religious freedom. Instead, the reasons given for limiting manifestations of religion or belief have tended to focus more on administrative convenience and broad concepts of public order”.<sup>212</sup> In *Karaduman* the Commission “brushed over the complicated issues of whether women being allowed to wear headscarves in public universities would put pressure on other women to do the same (thus limiting their freedom of religion) and promote gender inequality, and by that it “failed to acknowledge the importance of religious apparel to many Muslims”.<sup>213</sup> Reinhold Fahlbeck does not share Carolyn Evans criticism, but agrees with her on the point that the Court needs to be prepared to deal directly with these conflicts and develop principles to adjudicate between the competing claims.<sup>214</sup> He observes that the Court took a first step in that direction in *Dahlab v. Switzerland* which was decided after the publication of Carolyn Evans’ book. The Court then seems to give gender equality priority over freedom of religion. It refers to one of the standard principles of interpretation of the Convention: the interpretation and application of it in accordance with common European ground, in this case the fact that the advancement of the equality of the sexes is a major goal in the member states. The Court takes the same approach in *Şahin*. Fahlbeck finds that the Court to some extent misses the point since freedom of religion is a common European ground as well.<sup>215</sup>

Another issue discussed is the one on gender-based discrimination. In e.g. *Dahlab v. Switzerland* the applicant argued that the prohibition for her to wear a headscarf when teaching amounted to

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<sup>211</sup> Fahlbeck (2004) pp. 11-14.

<sup>212</sup> Evans, C. (2001) p. 206.

<sup>213</sup> Evans, C. (2001) p. 206.

<sup>214</sup> Evans, C. (2001) p. 206; Fahlbeck (2004, nr 1) p. 15.

<sup>215</sup> Fahlbeck (2004, nr 1) p. 15; *Şahin v. Turkey*, App. No. 44774/98, Judgement of 10 November 2005 para. 111, 114 and 116.

discrimination on the ground of sex with the meaning of Article 14 of the ECHR in conjunction with Article 9 since a man belonging to the Muslim faith could teach at a state school without being subject to any prohibitions, whereas a woman holding similar beliefs has to refrain from practising her religion in order to be able to teach. According to the ECtHR's decision, the applicant was not prohibited to wear a headscarf because of her female sex but because of the legitimate aim of ensuring the neutrality of the state primary-education system. Such a measure could also be applied to a man wearing clothing that clearly identified him as a member of a different faith. The Court concluded that there was no discrimination on the ground of sex in the case.<sup>216</sup>

In the case tried by the Swedish Court of Labour concerning Christel Dahlberg Kamara, DO argued that the dress code policy of the Company constituted indirect gender discrimination according to the Equal Opportunities Act (1991:433)<sup>217</sup>, Section 16 in comparison with Section 17.1. The gender discrimination consisted in the fact that the headscarf was not allowed at the workplace and that a woman wearing one was not able to fulfil the dress code policy of the company. The dress code policy seemed gender neutral but was particularly disadvantageous to women. It cannot be motivated by a legitimate aim. The Company held that the applicant had not been denied employment because of her clothes. Should the Court come to the conclusion that this was the case, no sex discrimination had taken place since both women and men of different religious adherence wear headgears, and subsequently the criterion is neutral. The Court never discussed the matter since it concluded that no employment procedure was on-going.<sup>218</sup>

Human Rights Watch discusses indirect discrimination in its report on Turkey, observing that the impact of a ban on visible religious symbols, even if phrased in neutral terms, will fall disproportionately on Muslim women who wear the headscarf as a sign of devotion. Consequently, Muslim girls and women are indirectly discriminated by such bans, and Human Rights Watch finds that these kinds of bans violate anti-discrimination provisions of international law.<sup>219</sup>

Reinhold Fahlbeck, on the other hand, agrees with the reasoning of the ECtHR on genderbased discrimination. He asks if *Dahlab v. Switzerland* shows an element of inherent gender discrimination, and if we are worried about the headscarf because it is worn exclusively by women? Are we worried that women are a weaker sex and need to be protected even against their own wishes? Are we, in fact, denying women a right that we would afford men? He finds that *Dahlab* is not gender discriminatory since the Court explicitly states that the state neutrality policy also could be applied to a man who, in similar circumstances, wore clothing that clearly identified him as a member of a different faith. There

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<sup>216</sup> *Dahlab v. Switzerland*, App. No. 42393/98, admissibility decision of 15 February 2001, pp. 463-464.

<sup>217</sup> Jämställdhetslagen (1991:433). Now replaced by the Discrimination Act (2008:567).

<sup>218</sup> AD 2003:63.

<sup>219</sup> Human Rights Watch p. 24.

are religions that mandate particular garments for men as the turban for Sikhs and various headgear for orthodox Jews.<sup>220</sup>

In an article on the *Şahin* case Kerem Altiparmak<sup>221</sup> and Onur Karahanoğullari<sup>222</sup> hold that it is not realistic to claim that such measures that were taken against Ms Dahlab and Ms Şahin would be applied to a man. Indeed, the Turkish State can prohibit men from wearing beards at university, but growing one's beard is not perceived as a compulsory rule for practising Muslim males. Therefore the Court's assumption that this kind of measures could also be applied to a man wearing religious symbols, is not correct.<sup>223</sup>

## 4.5 Contractual Obligations versus Freedom of Religion

The ECmHR and the ECtHR have in some cases discussed if freedom of religion can be limited by means of contract. Perhaps the clearest case of this is the position of clergy and office holders in a Church or other religious organisations. In the case of *X v. Denmark*<sup>224</sup>, the Commission, as stated previously, held that the Church of Denmark had acted lawfully when preventing one of its priests from imposing conditions on the christening of children that were not in accordance with the official church policy. The Commission noted that servants of religious organisations "are employed for the purpose of applying and teaching a specific religion"<sup>225</sup> and "their individual freedom of thought, conscience and religion is exercised at the moment they accept or refuse employment as clergymen"<sup>226</sup>. The priest was consequently free to leave the church in order to protest against its teachings.<sup>227</sup> The unusual nature of religious vocation and the formalized structure of service life tend to distinguish this kind of employment from other positions of employment. An interesting question is, if the freedom to manifest one's religion can be regulated by contract also in other areas. The ECtHR has discussed contractual obligations regarding different kinds of employment.

In *Stedman v. UK*<sup>228</sup>, the Commission recognised that it had jurisdiction although Stedman had been employed by a private company and the state had not been directly responsible for her dismissal. It underlined that the complaint was rather a matter of contractual liability than an issue of religious freedom, and held that she had been dismissed as a result of her failure to "agree to work certain hours rather than for her religious belief as

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<sup>220</sup> Fahlbeck (2004, nr 1) p. 15.

<sup>221</sup> Faculty of Political Science, Human Rights Centre, Ankara University.

<sup>222</sup> Faculty of Political Science, Ankara University.

<sup>223</sup> Altiparmak and Karahanoğullari p. 289.

<sup>224</sup> *X v. Denmark*, App. No. 7374/76, 5 Eur. Comm'n H.R. Dec. & Rep, 157 (1976).

<sup>225</sup> *X v. Denmark*, *ibid.* p. 157.

<sup>226</sup> *X v. Denmark*, *ibid.* pp. 157-158.

<sup>227</sup> Cumper p. 314.

<sup>228</sup> *Stedman v. UK*, App. No. 29107/95, 89-A Eur. Comm'n H.R. Dec. & Rep. 104 (1997).

such”<sup>229</sup>. The Commission noted that Stedman “was free to resign and did in effect resign from her employment.”<sup>230</sup> Peter Cumper<sup>231</sup> discusses the case and holds that this interpretation of Article 9 is dangerously narrow since it presupposes that an applicant can find another work of comparable worth without too much hardship. This is often not the case, and many who feel that they are being forced to compromise or even act contrary to their faith will suffer in silence since they cannot afford to resign from their current employment in order to be able to manifest their religious freedom. An interesting aspect of this case is that the applicant, a practising Christian, encountered problems in the UK, a country where public holidays are based on the Christian calendar.

One would then imagine even greater difficulties for persons belonging to minority faiths.<sup>232</sup> In *X v. UK*<sup>233</sup>, the British Court of Appeal ruled by a majority of two to one that the dismissal of the school teacher was fair.<sup>234</sup> The dissenting Judge Scarman held that the breadth of Article 9(1) of the ECHR did not end with the law of contract, and that the educational system must accommodate the beliefs of both teachers and children. He was concerned that rejection of the applicant’s appeal would mean that a Muslim, who took his religious duties seriously, could never work as a full-time teacher. The majority, however, emphasised the limitations under Article 9(2) and held that the applicant’s right to manifest his religion must be subject to the rights of the employer under the contract. The latter approach was adopted by the Commission which rejected the applicant’s complaint. The Commission noted that the applicant had failed to mention, both during the interview for the teaching position and during the first six years of his employment, that he would require time off during normal school hours for attending prayers.<sup>235</sup> The Commission stressed the binding nature of the applicant’s contractual obligations and did not even find a violation of Article 9(1) since “the applicant remained free to resign if and when he found that his teaching obligations conflicted with his religious duties”.<sup>236</sup> The right of the applicant to resign has been described as “the ultimate guarantee of his right to freedom of religion” by the Commission in *Konttinen v. Finland*.<sup>237</sup> Peter Cumper criticises the Commission’s approach, stating that it is irrational to presuppose that everyone has a real choice of finding alternative employment. Economic factors, housing costs and family concern all render it difficult to exercise this “freedom”. Furthermore, it is inequitable that members of minority faiths are discriminated. In a “Christian” country, with the working week fixed according to the Christian calendar, a Christian employee who has to seek alternative employment is far more likely to find a suitable one than a

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<sup>229</sup> *Stedman v. UK*, *ibid.* p. 107.

<sup>230</sup> *Stedman v. UK*, *ibid.* p. 108.

<sup>231</sup> Faculty of Law, University of Leicester.

<sup>232</sup> Cumper p. 316.

<sup>233</sup> *X v. UK*, App. No. 8160/78, 22 Eur. Comm’n H.R. Dec. & Rep. 27 (1981).

<sup>234</sup> *X v. UK*, *ibid.* p. 32, para. 26.

<sup>235</sup> *X v. UK*, *ibid.* p. 36, para. 14.

<sup>236</sup> *X v. UK*, *ibid.* p. 36, para. 15.

<sup>237</sup> *Konttinen v. Finland*, App. No. 24949/94, Eur. Comm’n Decision of 3 December 1996, p. 75.

person from a different religious tradition. Moreover, the Commission's decision in *X v. UK* is illogical since it is based on the Western premises that religion is only a matter of choice and that certain beliefs and restrictions can be set aside when at work. Cumper holds that the Commission has taken this narrow approach in order not to put unreasonable financial burdens on states. There is no absolute duty for the state to recognise the manifestation of a religion or a belief at the workplace, the opposite would pose a risk for administrative chaos and an erosion of the rights of the "secular" majority. It seems however quite unsatisfactory that an employee in a multi-faith society is only accorded the "right" to resign in case of a contractual conflict with her or his religious belief.<sup>238</sup>

As previously mentioned, in *Dahlab v. Switzerland* the Swiss State argued that it has to be taken into account that teachers are bound to the state by a special status. As a teacher at a state school the applicant had freely accepted the requirements deriving from the principal of denominational neutrality in schools. The Swiss Government pointed out that when the applicant was appointed on a permanent basis, i.e. signed the contract, she satisfied the requirement of denominational neutrality since she at the time did not manifest her religious beliefs by wearing any conspicuous religious symbols. It was after the appointment that she had decided to wear a headscarf in class. The Government held that the applicant had the option to teach infant classes in private schools which were not bound by the requirement of secularism.<sup>239</sup> The applicant replied that she had no choice but to teach within the state school system since state schools in practice had a monopoly on infant classes. In the Canton of Geneva there were few private schools and none of them was non-denominational but governed by religious authorities other than those of the applicant and accordingly not accessible to her.<sup>240</sup> The Court did not explicitly discuss the contract situation, but stated, in line with the reasoning of the Swiss Government, that the applicant as a civil servant had to accept the denominational neutrality of the state and therefore had to tolerate proportionate restrictions to her freedom of religion. Since she had accepted the position as a civil servant she was bound by certain conditions.<sup>241</sup>

In *Karaduman v. Turkey* and *Şahin v. Turkey*, the Commission and the Court also took up the idea of a contract. As the applicants voluntarily had entered a secular state university, they had implicitly accepted restrictions on the manifestation of their religion.<sup>242</sup> The Commission stated that:

"By choosing to pursue her higher education in a secular university a student submits to those university rules, which may make the freedom of students to manifest their religion subject to restrictions as to place and

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<sup>238</sup> Cumper pp. 317-319.

<sup>239</sup> *Dahlab v. Switzerland*, App. No. 42393/98, Admissibility Decision of 15 February 2001, p. 458.

<sup>240</sup> *Dahlab v. Switzerland*, *ibid.* p. 460.

<sup>241</sup> *Dahlab v. Switzerland*, *ibid.* p. 462.

<sup>242</sup> Brems p. 7.

manner intended to ensure harmonious coexistence between students of different beliefs”.<sup>243</sup>

Eva Brems is critical to the approach of the Court and Commission regarding contractual obligations. She holds that within a broader concept of freedom of religion, individuals would be protected to make such difficult choices as between their profession or their professional qualifications on the one hand and their religious practice on the other. True respect for religion requires an “insider approach” for delimiting the scope of religious freedom. Such an approach is based on the perspective of the believers themselves of what is required by their religion. The question whether a particular practice is to be accommodated or not should not depend on the scope of Article 9(1), but on the application of the limitation clause, where the individual’s right to manifest her or his religion would be balanced against public interests and the individual rights of others.<sup>244</sup>

Reinhold Fahlbeck discusses freedom of religion versus freedom of contract thoroughly. He asks to what extent the rights under Article 9 can be limited by means of contract? The whole idea that the fundamental rights and freedoms established by the Convention could be negotiable at individual employee level seems quite surprising. People looking for work often do not have a choice and real freedom of contract. It may seem offending to let the outcome interfere with a fundamental right. There are limitations to freedom of contract in all legal systems. Contracts or clauses *contra bonos mores* can be modified or declared invalid by Courts. The Convention does not use this term but some cases nevertheless deal with what are *de facto* allegations that employment conditions or other regulations, such as the university regulations in *Karaduman v. Turkey*, are in violation of *bonos mores*. In some cases, however, a decisive factor for the Court to find that there has not been a violation of Article 9, has been that the employee has accepted the conditions of the contract. Fahlbeck asks if it is possible for an employee to invoke observance to religious mandates, such as use of religious symbols or attendance at religious ceremonies, in order not to fulfil the employment contract to the letter? He examines the *School Teacher Case* to find an answer. The teacher argued that a “mere contractual obligation cannot excuse absence – a man cannot willingly put himself into a position where he cannot attend [Friday prayers]”.<sup>245</sup> He accordingly holds that there are limits of an overriding character to the freedom of contract. The teacher’s argument does not perfectly fit into the structure of Article 9(1) regarding the *forum externum* (manifestation of religion) and the *forum internum* (holding personal beliefs and religious creeds). This distinction is important for the scope of Article 9(2) since the *forum internum* is absolute, whereas limitations can be made to the *forum externum*. Subsequently, contractual obligations could not be invoked to limit the *forum internum*, but possibly to limit the *forum externum*. Is attending Friday prayers at a mosque then falling within the *forum internum*

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<sup>243</sup> *Karaduman v. Turkey*, App. No. 16278/90, 74 Eur. Comm’n H.R. Dec & Rep 93 (1993), para. 108.

<sup>244</sup> Brems pp. 8-9.

<sup>245</sup> *X v. UK*, App. No. 8160/78, 22 Eur. Comm’n H.R. Dec & Rep 27 (1981), p. 34, para. 8.

or the *forum externum*? The teacher's position is that the obligation to attend Friday prayers is an integral part of religion itself and therefore inviolable under the first limb of Article 9(1). If this were the case, a contract preventing him to attend Friday prayers would be against *bonos mores* and a violation of the Convention. The Commission did not explicitly evaluate the teacher's argument. Instead of examining if the contract despite its voluntary character was in violation of Article 9 the Commission stated that the teacher had accepted the contract without mentioning Friday prayers. Fahlbeck holds that the Commission then misses the point, since there according to the teacher's argument is no room for a free will in this kind of situation. Further, the Commission held that "even if such religious obligations were assumed, it could not, for reasons stated below, justify the applicant's claim under the provision."<sup>246</sup> This is an indirect way of rejecting the teacher's argument. Without explicitly saying so, the Commission bases its reasoning on the distinction between *forum externum* and *forum internum*. It takes the view that attendance to Friday prayers is a manifestation of religion and accordingly can be subject to limitations. Fahlbeck would have preferred a more transparent reasoning. Since attendance to Friday prayers is being considered a manifestation of religion, it is not decisive if attendance is mandated. The same conclusion was reached by the Commission in *Karaduman* regarding headscarves, and the *Crash Helmet Case* regarding Sikh turbans. Thus the second limb of Article 9(1) is open to contractual limitations. This freedom of contract is according to case law however not unlimited. The principal limitation is the obligation of the state to positive action to ensure the enjoyment of the freedom protected by Article 9. It is clear from case law that a lot of attention is paid to the extent to which the state has fulfilled its obligation. In the *School Teacher Case* the authorities had made quite many efforts to accommodate the teacher. When their efforts were unsuccessful and serious problems would arise if they were to accommodate the teacher's requests, they invoked the contract as a last resource to be able to act in a way interfering with the teacher's requests. In the *Karaduman* case the university had allowed the student to wear a headscarf on campus and in class, and in the *Dahlab* case the teacher had been offered to wear a headscarf in school outside the classroom.<sup>247</sup>

Another limitation is that the factual circumstances must speak in favour of applying the contract. In *Karaduman* many circumstances were of importance for the Commission to find that there was no violation of Article 9(1). Most important was probably the negative freedom of religion, i.e. the respect for the other students and teachers at the university not to be exposed to religion. In *Dahlab* the decisive factors were that the schoolchildren were very young and therefore impressionable, and the principle of gender equality. It is most possible that the Court would have come to a different conclusion if the circumstances had been different, such as regarding a teaching position at university.<sup>248</sup>

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<sup>246</sup> *X v. UK*, *ibid.* p. 35, para. 10.

<sup>247</sup> Fahlbeck (2004, nr 1) pp. 17-18.

<sup>248</sup> Fahlbeck (2004, nr 1) p. 18.

A third factor in case law regards the situation at the time of the conclusion of the employment contract. It is important that the applicant has access to sufficient information about the conditions at the workplace or at the state university. Lastly, the applicant must have entered into the contract freely and without compulsion, and must be free to terminate it, e.g. resign from a job or leave university. We do not know how the cases would have been decided if circumstances had not met these limitations. However, since the Court and the Commission have emphasised these limitations it is likely to believe that it is possible that a violation of Article 9 would have been found if no limitations had existed.<sup>249</sup>

The cases discussed concern the public sector. Article 9 is however not limited only to public life, but is also applicable concerning private employment since member states are obliged to ensure that the standards of the Convention are met everywhere in society.<sup>250</sup> This obligation is not only restricted to situations when the state itself is a party.<sup>251</sup> Extensive anti-discrimination legislation is one way of fulfilling this obligation.<sup>252</sup> In Recommendation 1396 (1999) on “religion and democracy” the Council of Europe requests members to “safeguard religious pluralism by allowing all religions to develop in identical conditions”<sup>253</sup> and to “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 (with scope for adjusting leave) and military service”.<sup>254</sup> The workplace situation is covered by that statement.<sup>255</sup>

Case law by the Court provides guidance on the position of freedom of religion in private employment under the Convention. State neutrality and separation between the state and religion, crucial factors when deciding public employment limitations, are absent when the private sector is concerned. Private employers are not constrained by religious neutrality and can, to a certain extent, give their business any profile they like. Accordingly, they can give their business a certain religious character. Subsequently the courts have wider frames to decide cases involving religious manifestations in the private sector. Fahlbeck discusses a detailed and analytical case decided by the German Federal Labour Court (Bundesarbeitsgericht, BAG) which explicitly refers to the Convention. He holds that it is highly likely that the reasoning by the German Federal Labour Court will influence the ECtHR. The case considered a long-time salesclerk in a department store in a small town. She was terminated when she announced her intention to start wearing a headscarf. The Federal Labour Court came to the conclusion that the termination was not justified since the constitutionally protected freedom of religion outweighed the business interests of the employer, although business interests are protected

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<sup>249</sup> Fahlbeck (2004, nr 1) pp. 18-19.

<sup>250</sup> Fahlbeck (2004, nr 1) p. 20.

<sup>251</sup> Fahlbeck (2004) p. 11.

<sup>252</sup> Fahlbeck (2004, nr 1) p. 20.

<sup>253</sup> Recommendation 1396 (1999) Religion and Democracy, para 13 i a.

<sup>254</sup> Recommendation 1396 (1999) Religion and Democracy, para. 13 i b.

<sup>255</sup> Fahlbeck (2004, nr 1) p. 20.



by the German Constitution as well. The employer had claimed that he feared considerable business problems, but since the applicant had never begun to wear a headscarf he could not show that any such problems had been encountered. The Federal Labour Court thus stated that the dismissal was not socially justified and that mere presumptions and misgivings were not enough to set aside a constitutional right, especially since the problems that the employer feared had not been clearly demonstrated in experience from elsewhere. Thus the Federal Labour Court did not find any reason to consider in detail how to balance the two opposing constitutionally protected rights in the present case.<sup>256</sup>

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<sup>256</sup> Federal Labour Court (Bundesarbeitsgericht), 2 AZR 472/01 (October 10, 2002).

## 5. The Swedish Context

What conclusions can be drawn regarding the wearing of religious symbols at the workplace in Sweden looking at legislation and case law, and bearing in mind the underlying principles to strike a balance between competing interests?

We can note that there is an extensive protection against religious and ethnic discrimination in Swedish legislation, and that freedom of religion is protected as well, although limitations can be made. Looking at the legislation and the Government bills, a prohibition against religious symbols at a workplace ought to amount to discrimination in many cases. Moreover, the wearing of religious symbols is already a common sight at the labour market. Many workplaces where a uniform is required, such as Ikea and ICA, have elaborated matching headscarves.<sup>257</sup> The transport company Veolia has employed women with headscarves as bus drivers and have done recruitment campaigns to get more female bus drivers, both with and without headscarves.<sup>258</sup> Since 1<sup>st</sup> March 2006 the police accept turbans, headscarves and kippas to be worn by policemen on duty as long as they do not endanger security. If it e.g. is not possible to combine the religious headgear with a helmet, the person should not participate in actions where a helmet is needed, such as manifestations, but be given other work tasks. However, the police do not consider this a major problem. In Jordan and Great Britain, solutions have been elaborated for using headscarves underneath helmets. In Sweden, no uniform turban, headscarf or kippa has been designed but it is up to the policeman and the employer to agree upon the colour and look of the headgear.<sup>259</sup> It is also allowed to wear religious headgear within the Swedish military, and there have already been Sikhs wearing turbans during military service.<sup>260</sup>

Looking at Swedish case law, few conclusions can be drawn. The new legislation from 1<sup>st</sup> January 2009 has not yet been tried in Court on cases regarding religious symbols in working life, neither have there been any significant cases according to the previous legislation from 1999 which is similar to the current one. The two cases regarding Sikhs wearing turbans in the public transport sector were tried according to even older legislation. Reinhold Fahlbeck notes that it would be impossible for the Swedish Labour Court today to totally disregard the religious aspect as it did in 1986 taking into account the Swedish anti-discrimination legislation and Sweden's commitments according to the ECHR. It is much more likely that a similar case would be decided by balancing competing interests against each other, as did the Stockholm District Court in the case of the Sikh ticket collector.<sup>261</sup> The case of Christel Kamara Dahlberg, ruled under the

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<sup>257</sup> Thorsson in *Aftonbladet* 2007-05-03; Hansson 2005-08-26.

<sup>258</sup> Emmelin in *Metro* 2008-11-19.

<sup>259</sup> Wising in *Tidningen Svensk Polis* 2009-03-10.

<sup>260</sup> Krantz in *SVD* 2005-04-12.

<sup>261</sup> Fahlbeck (2002) p. 519; AD 1986:11; Stockholms tingsrätt 1987-06-11, case nr T 3-107-86.

legislation from 1999, does not give much of a hint since the Labour Court never arrived to the actual question of the wearing of a headscarf at work. Maybe we can still sense some inability by the Labour Court to see the religious aspect and a preference to hold on to traditional labour law. The case on Kärna indoor pool<sup>262</sup> did not regard the workplace, but is still interesting, since we can see the reasoning of the Court of appeal regarding the Prohibition of Discrimination Act of 2003 which is similar to the present legislation. Considering the different factors, the Court came to the conclusion that discrimination had taken place. Conciliations in favour of persons wearing religious symbols at the workplace have been made by the Equality Ombudsman (the former Ombudsman against Ethnic Discrimination). Damages have been paid to women who have been denied work because they wear a headscarf, and in some cases companies have decided to make matching headscarves for Muslim employees who feel required to wear one. The settlements are however not binding case law. One can wonder why there are rather few cases on religious clothing tried in court. Does this implicate that it is not much of a problem in Swedish society to wear religious clothes at the workplace, or does it mean that it is difficult to prove that one has been discriminated against? Maybe few employers would directly say to a job seeker that the reason for not getting employed is his turban or her headscarf, but use other arguments instead?

DO has expressed its opinion on the wearing of religious symbols in some areas according to their interpretation of the legal situation. *Shops*: Shop assistants should not be forbidden to wear a headscarf.

*The food industry*: There have been demands that employees must wear hairnets, and must not wear a headscarf for hygienic reasons, or must not wear a headscarf for safety reasons since it can get stuck in e.g. cutting machines. DO is sceptical to this kind of reasons. Generally, it is considered to be hygienic to cover one's hair when working with food.

*Health care*: According to the guidelines of the National Board of Health and Welfare<sup>263</sup>, it is compulsory to wear short sleeves when working within the health care system. DO holds that the security of the patients must be put in first place, but would like the health care to consider other solutions, such as wearing long gloves, to make it possible for Muslim women to work within the health care system. In case the matter will be tried in court, DO will have to prove that there are other ways of dressing that are hygienic enough, otherwise DO will have to accept the obligation to wear short sleeves.

*Police and defence*: Both the police and the defence allow religious headgear to be worn.<sup>264</sup>

The case law of the European Court on Human Rights is also binding in Sweden, and the Court has tried several cases on religious clothing. The ECtHR has in general not been very generous towards applicants wearing religious symbols. However, none of the ECtHR cases has regarded Sweden. Would the reasoning of the Court be any different if Sweden was concerned? In its case law, the Court usually refers to the

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<sup>262</sup> Hovrätten för västra Sverige 2008-01-29, case nr T 2049-07.

<sup>263</sup> Socialstyrelsen.

<sup>264</sup> Sandén in *Sydsvenskan* 2007-03-08.

specific circumstances of the case stressing e.g. state secularism, the tender age of the children the applicant was teaching etc. In the two most comprehensive cases from the Court regarding the wearing of the headscarf, *Dahlab v. Switzerland*<sup>265</sup> and *Şahin v. Turkey*<sup>266</sup>, in which the Court decided in favour of the state's right to prohibit women to wear a headscarf at work respectively in university, factors that are not decisive in the Swedish society, such as secularism and Islam's position as a majority faith, were emphasized. It is therefore possible that the cases would have had a different outcome if Sweden had been the respondent state instead of Switzerland or Turkey. Some factors discussed by the Court however, are applicable on the Swedish society as well, such as gender equality and the possibility that young children are influenced by their teacher's religious views.

Looking further at the conflicting values at stake, which ones would prevail at the workplace in the Swedish context?

Regarding negative freedom of religion versus positive freedom of religion, Reinhold Fahlbeck notes that harmonious coexistence, conflict avoidance, religious harmony and tolerance are values referred to by the Court and by member states. He argues that these notions used by the Court speak in the direction that people have to accept religious manifestations of a nature not familiar to them. Over time the Convention should leave less and less room for invoking negative freedom of religion, e.g. not to have to be exposed to religious manifestations by others, since frequent exposure to a religious manifestation reduces the religious impact of that exposure.<sup>267</sup> Looking at Sweden, it has been quite common for many years to see people with religious headgear in the street, at school, in university or at a workplace. There are salespersons, police, military etc. wearing religious symbols. In most cases it ought to be difficult to invoke negative freedom of religion as a reason for not hiring someone wearing religious clothing. Furthermore, it is worth considering what Human Rights Watch brought up in their report on the Turkish situation: do we have to see the wearing of religious clothing in public as a zero-sum game? Does the broadening of the right to wear religious symbols for some religious people necessarily narrow the right of non-religious people or people belonging to other religions?<sup>268</sup> Fahlbeck holds that since Sweden is a secularised country, manifestations such as wearing a headscarf, opposite to e.g. in Turkey, are seen as rather neutral and do not have very much impact on other people, nor is it something that other people take much notice about. If a religious manifestation is of much importance to a person and of little importance to those around her or him, the consequence would quite likely be that the manifestation can be accepted to a high extent.<sup>269</sup>

The principle of secularism has been underlined by the Court in the Turkish cases and in the Swiss *Dahlab* case since both Turkey and Switzerland have secularism as a basis for society. In Sweden, however, the state, although religiously neutral, does not have secularism as its central

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<sup>265</sup> *Dahlab v. Switzerland*, App. No. 42393/98, Admissibility Decision of 15 February 2001.

<sup>266</sup> *Şahin v. Turkey*, App. No. 44774/98, Judgement of 10 November 2005.

<sup>267</sup> Fahlbeck (2004, nr 1) p. 10.

<sup>268</sup> Human Rights Watch p. 37.

<sup>269</sup> Fahlbeck (2002) p. 537.

dogma. It can therefore be assumed that secularism would not be a decisive factor when deciding a case against Sweden.

People wearing religious symbols at the workplace in Sweden are primarily members of minority religions. Within Christianity there are no specific symbols that are prescribed as compulsory to wear, and it seems that it sometimes is difficult for the employer to realise the importance of the religious symbols for e.g. Sikh men and Muslim women. In Sweden, religion is not very visible in public life, but rather something private. The ECtHR uses the notions *forum internum* and *forum externum*, where the *forum internum* is the right to keep religious beliefs, a private aspect of religion, and the *forum externum* is the right to manifest one's religion, a public aspect. Quite a few scholars have criticised this distinction made by the Court saying that it is based on Christian ideas. In many other religions this clear distinction cannot be made. Manifestation is much more intimately linked to the faith. As Fahlbeck writes, human rights are of special importance to minorities. Discrimination legislation is in place to protect minorities, and to promote what is not the standard. This is necessary in a pluralistic society.<sup>270</sup> Since an important aspect of anti-discrimination legislation is to protect minorities, and to make sure that those who are not exactly like the majority get their rights assured, anti-discrimination legislation would probably support the demands of people from minority religions to be able to wear religious symbols at work, as long as no other important interests are held against.

Gender equality versus freedom of religion is a much discussed question in the literature, by the ECtHR and in the daily press regarding the wearing of headscarves by some Muslim women. The ECtHR has pronounced that it finds it hard to square the principle of gender equality with the wearing of a headscarf. This opinion has been criticised. Judge Tulkens and several scholars hold that the Court has not gone into depth of the question about the signification of wearing a headscarf, and note that there was nothing in the cases of Lucia Dahlab and Leyla Şahin that suggested that these women did not wear the headscarf out of free will. What about gender equality and freedom of religion in the Swedish working life context? Gender equality is a fundamental principle in Sweden, as well as freedom of religion. It has to be stressed that within the context of working life, we are talking about adult women. Basically, it must be assumed that most of the adult women who wear a headscarf have chosen to do so themselves and wear it out of free will in order to respect their religious convictions. No woman should be constrained to wear a headscarf, but no woman should be constrained not to wear one either. If there are women who are being forced to wear headscarves, or do not have knowledge enough to make a free, well-informed choice on whether to wear a headscarf or not, this is a problem and should be dealt with, but doing that by forbidding women with headscarves to work does not seem like an efficient solution. This would rather send women who wear headscarves, out of free will or not, back to their homes instead of making it possible for them to take part in society and by doing so, obtain gender equality. The

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<sup>270</sup> Fahlbeck (2004, nr 1) p. 6.

headscarf is not *per se* a repressive symbol. It is important that every woman has a free choice on wearing a headscarf or not at work, and that we trust women of being capable to make their own decisions on this matter.

As a basic rule, fundamental rights, like freedom of religion, should not be possible to limit through an employment contract, and contracts *contra bonos more* can be declared invalid by Courts. Regarding contractual obligations versus freedom of religion, the ECtHR has to a certain extent however accepted that applicants are bound by contractual obligations which force them to set their religious convictions aside. The Court has in several cases stated that the applicant remains free to resign if the obligations at work conflict with her or his religious duties. This statement has been criticized since many do not have a real choice to find another employment due to economic factors, family factors etc., and might then have to compromise or act against their faith. Furthermore, it is more difficult for people belonging to minority religions to find a workplace where they can act according to their religious beliefs. However, in the cases tried by the ECtHR, the Court has generally emphasized the importance of the employer making efforts to accommodate the employee's wishes regarding freedom of religion, e.g. by allowing headscarves outside the classrooms for a school teacher or by offering a 4.5 day-contract in order for the employee to attend Friday prayers, and only invokes the contract as a last resource. It consequently seems that the Court accepts the employer's right to invoke contractual obligations only as a last resource when he or she has made serious efforts to accommodate the employee's wishes but cannot do more without severe problems arising. Reinhold Fahlbeck notes that the Stockholm District Court's judgement from 1987 concerning the Sikh ticket collector is completely in line with the case law of the ECtHR, particularly the *Muslim School Teacher Case*. The District Court deals with freedom of religion as the main question, and the balancing of interests is perfectly made. The District Court comes to the conclusion that no serious problems will arise if the applicant wears a turban at work and therefore rules in his favour.<sup>271</sup>

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<sup>271</sup> Fahlbeck (2002) p. 508.

## 6 Conclusion

Considering the extensive anti-discrimination legislation and the Government bills, a prohibition of the wearing of religious symbols ought to amount to discrimination in many cases. Case law from domestic courts gives very little guidance. Few cases have been tried in court. There has been one convicting verdict when two Muslim women were told that they could not wear headscarves and clothes that covered legs and arms at a swimming pool. This case did not concern working life however, and was ruled according to the previous legislation, which nevertheless is very similar to the current one. DO has made some settlements in cases where women have been told that they may not wear head scarves at work. Religious symbols are already worn at many workplaces such as shops, the police, elder care etc., and are generally accepted.

The ECtHR has granted the states quite an extensive margin of appreciation regarding the wearing of religious symbols which has led to the approval of prohibiting religious symbols at the workplace and in university in some cases in Turkey and Switzerland. Swedish society is however different from the Turkish and Swiss ones, and the outcome would probably have been different if Sweden was concerned. It is mainly interesting to see which principles the Court has discussed and which values that have been balanced against each other. The principle of secularism has been essential when deciding in favour of the state since especially the Turkish State, but also the Swiss one, is based on that principle. Swedish society, however, is not. In the Turkish cases, it has also been underlined that Islam is a majority religion, and therefore women who do not wear headscarves might feel pressured and feel that their negative freedom of religion is limited if other students or teachers wear head scarves. This is not applicable on Swedish society either. Furthermore, the Court has discussed gender equality and the wearing of headscarves, implicating that Muslim women wearing headscarves are generally oppressed. This has however been criticized. When adult women at a workplace or in university are concerned, it would be more accurate to presuppose that they have chosen to wear the headscarf as long as nothing else is shown. No one should be forced to wear a headscarf, but the state should find other ways to assure that than by prohibiting religious clothing at work. Otherwise, those who voluntarily wear the headscarf do not have access to the labour market, a situation which certainly does not improve women's rights.

In cases regarding the wearing of religious symbols at the workplace, a balance has to be struck between freedom of religion and the competing interests. Considering all the different aspects, in most cases the wearing of religious symbols at the workplace ought to be allowed. In each case the different factors have to be weighed against each other. Arguments like "Our customers do not like women in headscarves", or, "At our workplace we have a special dress code that does not contain a headgear" are not enough. Limitations can be made only if the counter part's basic

rights and freedoms in a certain case are more worthy of protection than the employee's right to freedom of religion and non-discrimination, or if there is a sincere risk for the employee's or other employees' health and safety due to the wearing of religious symbols. It will be interesting to see some case law on the wearing of religious clothing at the workplace based on the new discrimination act.



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