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# HUMAN RIGHTS, IDENTITY AND THE LEGAL REGULATION OF DRESS

JILL MARSHALL\*

## INTRODUCTION

Law, particularly anti-discrimination or equalities and human rights law, is supposed to protect our fundamental freedoms in a liberal democratic system. Such freedoms include rights to religious and other forms of expression protected in various human rights laws. In European human rights law, such rights include those set out in Articles 8 to 11 of the European Convention on Human Rights (ECHR) which allow elements of who we are, our identities, - including our religious beliefs – to be visible to others. However, these rights are restricted and qualified by the rights and freedoms of these others. In liberal democracies, the contradiction between the rights holder as an individual, bounded ‘atomistic’ person, yet somehow to be balanced with others’ rights is most obviously seen in these qualified rights of respect for one’s private life, free speech, religious expression and associating with others. In this paper, these issues are critically explored, particularly by reference to the European Court of Human Rights’ (ECtHR) jurisprudence but sometimes from other international and national human rights courts, to see if, and if so, how, such interpretations lead to exclusion, lack of recognition and silencing of those whose dress is restricted. Will such interpretations lead to the shutting down of debate and unduly restrict who we are allowed to be?

Some aspects of the expression of our identities have had success under human rights law, but many have not. The difficulty appears to be caused by the requirement to balance individual rights with the rights of others, and who holds the power in these situations. Society has become more accepting of some types of appearance as a reflection of who we ‘really’ or ‘truly’ are. These cover the grounds for discrimination commonly found in anti-discrimination law including race, sex, religion and disability. However, these focus on seemingly fixed and immutable characteristics as grounds of action. A preferable central requirement of discrimination would be, as Sandra Fredman argues, that “a person or group has been discriminated against when a legislative distinction makes them feel that they are less worthy of recognition or value as human beings, as members of society”.<sup>1</sup> Yet even for the accepted grounds, legal success can be elusive. Legally justifiable different treatment can be explained through ‘grooming policies’ in the workplace, or the supposed ‘unreasonable’ and ‘ostentatious’ style of appearance. This can be seen in case law concerning hairstyles. For example, ‘the dismissal was caused by braids, or dreadlocks or finger waves’, not race;<sup>2</sup> or the problem is a full length

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<sup>1</sup> Sandra Fredman, *Discrimination Law* (Clarendon Press 2011) 43.

<sup>2</sup> See the US case of *Hollins v Atlantic Company Inc.* 188 F.3d 652 (6<sup>th</sup> Cir. 1999). The court found there was a question of fact as to whether the employer’s grooming policy, which allegedly was not applied to white women, was a pretext for discrimination. See also *Burchette v Abercrombie & Fitch Stores Inc.* 2010 WL 1948322 where a multiracial woman with blonde highlights in her hair was reprimanded and informed not to return to work until she dyed her hair black again. Abercrombie obtained summary judgment in their favour because the policy was seen as racially neutral. However, in *EEOC v Abercrombie & Fitch Stores Inc.* 575 US (2015) 1–10, the US Supreme Court held that the same company could not make an applicant’s religious practice a factor in employment decisions: this applies whether or not the applicant has informed the employer of a need for accommodation. Here, the company refused to hire a woman because the headscarf she wore for religious reasons conflicted with their dress policy.

covering like a *jilbab* or a face veil seen as, amongst other things, too ‘ostentatious’ or ‘unreasonable’, and not religious (or racial or sex) discrimination.<sup>3</sup>

In totalitarian North Korea, there are reportedly 28 state permissible, approved hairstyles.<sup>4</sup> One would not expect such oppression on personal appearance in liberal democracies in Europe. Somewhat disappointingly then, in certain European countries, a woman is not allowed to wear a headscarf on her hair in public sector work; or a full face veil walking down the street in France and Belgium.<sup>5</sup> People are told, through legal penalty, that they cannot look a particular way. Many argue that, if they do dress this way, their human rights are protected because they are ‘free’ to leave their employment or stay indoors. In cases that purport to be based on a ‘choice’ over one’s appearance, such as a hairstyle or an item of clothing, human rights law is often of little assistance. This shows the potential for disconnect between how we perceive ourselves and how others perceive us. Other people’s experience of us through this manifestation leads to their, often inaccurate, judgements about us. I argue that if the law is interpreted this way, this can constitute a misrecognition and disrespect of the person affected. Making legal decisions as to permissible choices and lifestyle behaviour, including in the form of dress, even in a liberal democracy, causes problems, most evident in factual situations involving dress deemed offensive and found unacceptable by the majority for a variety of reasons, followed up through restrictions and bans in the name of the majority’s specific traditions, cultures, moral sensibilities and national principles. Human rights law exists to assist those in need, minorities, and to ensure our personal freedom. If one fits with society’s norms and values and beliefs, one is less likely to need human rights law’s protection.

### EXPRESSIONS OF IDENTITY

Freedom of expression, association and peaceful assembly are enshrined in the Universal Declaration of Human Rights and the ICCPR.<sup>6</sup> Under article 19 of the Universal Declaration, “everyone has the right to freedom of thought and expression; this right includes freedom to hold opinions without interference and to seek receive and impart information and ideas”. Under article 20 (1), “everyone has the right to freedom of peaceful assembly and association.” The ICCPR permits restriction of these rights, but only when provided by law and necessary to protect the rights, or, in the case of expression, reputation, of others or national security, public safety, public order or public health or morals.

As Macklem convincingly argues, freedom of expression is about more than a representation to the world. Expressing oneself is as much about *creation* as it is about representation. Freedom of expression is not merely the freedom to communicate one’s *existing* voice to others. It is more importantly the freedom to develop a *distinctive voice of one’s own*.<sup>7</sup> Laurence Tribe has expressed criticism of the tendency by most US courts to reject constitutional challenges to state-imposed regulations of appearance, such as hair length and clothing. As he expresses it:

<sup>3</sup> See analysis in *R (on the application of SA Watkins-Singh) v The Governing Body of Aberdare Girls’ High School* [2008] EWHC 1865 (Admin).

<sup>4</sup> See Sara C Nelson ‘North Korean hairstyles: Pyongyang salons display menus of state sanctioned trims (pictures)’ (*The Huffington Post UK*, 20 February 2015) <[www.huffingtonpost.co.uk/2013/02/21/north-korean-hairstyles-pyongyang-salons-menus-state-sanctioned-crops-pictures\\_n\\_2733715.html](http://www.huffingtonpost.co.uk/2013/02/21/north-korean-hairstyles-pyongyang-salons-menus-state-sanctioned-crops-pictures_n_2733715.html)> accessed 26 April 2016.

<sup>5</sup> See further below.

<sup>6</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Articles 19–20; 999 UnTrS 171 (ICCPR).

<sup>7</sup> T Macklem, *Independence of Mind* (Oxford University Press 2006) ix, emphasis mine.

one need not regard a person's hair length as fully equivalent to speech in order to perceive that governmental compulsion in this realm invades an important aspect of personality.<sup>8</sup>

Tribe expresses special concern for regulations that affect young people for whom "the freedom to shape one's personality through appearance" is "fundamental."<sup>9</sup> Kahn comments that this is an elaboration of constitutional doctrines that are ultimately grounded in a legal recognition not only of the general value of human dignity, but of its more particularized manifestation as it bears on maintaining the conditions necessary for individuation—the realization of one's distinctive identity as a unique human being.<sup>10</sup> Bloustein proposes an explicit link between individual privacy and the right of association. "The right to be let alone" he asserts:

protects the integrity and dignity of the individual. The right to associate with others in confidence—the right of privacy in one's associations—assures the success and integrity of the group purpose.<sup>11</sup>

Kahn expresses the view that one of the cases most clearly embodying Bloustein's concerns is *NAACP v. Alabama*. The case concerned the requirement of the organization NAACP – the National Association for the Advancement of Colored People – to reveal to the State's Attorney General the names and addresses of all its members and agents in the state.<sup>12</sup>

we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State . . . individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.<sup>13</sup>

According to the ECtHR's well-established case law, all of the qualified rights to respect for private life, freedom of expression, religious or otherwise, and freedom of association constitute essential foundations of a democratic society and basic conditions for its progress and the self-fulfilment of each individual.<sup>14</sup> The state, the ECtHR explains, should use its powers 'sparingly' to protect its institutions and citizens from associations that might jeopardise them. Exceptions to the right to free association "are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom."<sup>15</sup> States only have a limited margin of appreciation in restricting Article 11 rights.<sup>16</sup> In *Moscow Branch of the Salvation Army v Russia*, the ECtHR examining Article 9 in the light of Article 11, explains that the rights safeguard "associative life against unjustified State interference".<sup>17</sup> It continues:

<sup>8</sup> L Tribe, *American Constitutional Law* (Foundation Press 1988) cited by J Kahn, 'Privacy as a Legal Principle of Identity Maintenance' (2003) 33 Seton Hall Law Review 371, 403ff.

<sup>9</sup> L Tribe at 218 cited in J Kahn *Ibid*. See *Kelly v. Johnson* 425 U.S. 238 (1978). In this case before the US Supreme Court, a police department's regulation of officers' hairstyles was upheld as permissible.

<sup>10</sup> J Kahn, 'Privacy as a Legal Principle of Identity Maintenance' (2003) 33 Seton Hall Law Review 371.

<sup>11</sup> E Bloustein, 'Group Privacy: The Right to Huddle' (1977) 8 RUTGERS-CAM. L.J. 219, 278.

<sup>12</sup> 357 U.S. 449 (1958) from J Kahn, 'Privacy as a Legal Principle of Identity Maintenance' (2003) 33 Seton Hall Law Review 371, 401.

<sup>13</sup> 205 *Roberts v United States Jaycees* 468 U.S. 609 (1984) at 618–19 (citations omitted).

<sup>14</sup> See, for example, *Tammer v Estonia* (2001) 37 EHRR 857 [59].

<sup>15</sup> At para 62.

<sup>16</sup> At para 76.

<sup>17</sup> At para 58.

the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention . . . the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is . . . at the very heart of the protection which Article 9 affords. The State's duty of neutrality and impartiality . . . is incompatible with any power on the State's part to assess the legitimacy of religious beliefs.<sup>18</sup>

In legally regulating dress in liberal democracies, it is usually assumed that we start from a position of initial personal freedom, including freedom to wear what we want. Law then steps in to restrict this freedom in certain circumstances. An individual's right to freedom of religion and conscience is an absolute human right. However, manifestations, of a religious or any other kind, are not. This connects to our right to identity now existing through jurisprudential development at the ECtHR on Article 8:

the concept of "private life" . . . can sometimes embrace aspects of an individual's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life . . . Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world . . . the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.<sup>19</sup>

Legally regulating what people wear is nothing new.<sup>20</sup> There are legal regulations in many parts of the world on wearing certain clothing, including 'extreme' political dress, such as the wearing of Nazi regalia and other politically offensive outfits.<sup>21</sup> In some Muslim states, the wearing of certain clothing is compulsory, usually for women.<sup>22</sup> Often, there are restrictions that apply in certain limited contexts or spaces, most notably in the workplace, especially in public sector employment, and in schools. However, more recently restrictions in all public places have also come into existence. In the next section, I explore some aspects of these areas by reference to case law examples involving adults.

## IDENTITY AND THE LEGAL REGULATION OF DRESS

### *In the Workplace*

The workplace is an important sphere for the manifestation of our identity. It is for many an intrinsic part of who we are. A working 'persona' may be shown and presented which is likely to be different to who we are, our identity, for example, at home, with our parents, our friends, our spare time activities, or clubbing or whatever else we choose to do on a Saturday night. Often, businesses want to increasingly present a corporate brand or personality into which we as individual persons have to fit.

We spend a significant portion of our lifetimes in working relationships. Aspects of our working life, the material well-being it brings, our private lives, our religious beliefs or non beliefs, all of which are necessary for our identity to be sustained, illustrate the

<sup>18</sup> Citing *Metropolitan Church of Bessarabia and Others and Hasan and Chaush v Bulgaria* [GC] at para 62) (all para 58 of Moscow Salvation Army).

<sup>19</sup> *Pretty v the UK* (2002) 35 EHRR 1 [61].

<sup>20</sup> In 1746, the Dress Act banned the wearing of tartan. See <[www.tartansauthority.com/resources/archives/the/archives/scobie/tartan-and-the-dress-act-of-1746](http://www.tartansauthority.com/resources/archives/the/archives/scobie/tartan-and-the-dress-act-of-1746)> accessed 26 April 2016, and <[www.scotclans.com/scottish\\_history/jacobean\\_scotland/1746\\_proscription.html](http://www.scotclans.com/scottish_history/jacobean_scotland/1746_proscription.html)> accessed 26 April 2016.

<sup>21</sup> See, for example, *Strafgesetzbuch* § section 86a

<sup>22</sup> For example, in Iran and Saudi Arabia.

'redrawing of the public/private divide.'<sup>23</sup> However, when it comes to employment law situations, many applicants are unsuccessful in their legal claims on the basis of free expression, religious or otherwise. This section is not meant to provide a comprehensive employment law exposition of all these issues. It is used to illustrate some examples of the lack of existence of self-determining identity rights in practice through examples involving dress.

The 2013 ECtHR *Eweida* case examined some of these matters in some depth.<sup>24</sup> The Court noted that analysis of the law and practice relating to the wearing of religious symbols at work across various Council of Europe states demonstrates that in the majority, the wearing of religious clothing and or religious symbols in the workplace is unregulated. In three, the wearing of religious clothing and or religious symbols for civil servants and other public sector employees is prohibited but in principle it is allowed for employees of private companies. In five countries – Belgium, Denmark, France, Germany and the Netherlands, the domestic courts have expressly admitted an employers' right to impose certain limitations on the wearing of religious symbols by employees. But there are no laws or regulations expressly allowing an employer to do this. The Court noted that at the time of Judgment, in France and in Germany, there was a strict ban on the wearing of religious symbols by civil servants and state employees.

The Court referred to its previous case law and that of the Commission which indicates that if a person is able to take steps to circumvent a limitation placed on his or her religion or belief, there is no interference with the rights under Article 9 (1) and the limitation does not therefore need to be justified by Article 9(2). Reference was made to decisions that mention the possibility of resigning from the job and changing employment. This meant that there was no interference with the employee's religious freedom.<sup>25</sup> The Court expressed some reservations regarding this approach, making clear that this approach had not been applied in relation to other rights protected by the Convention. For example, this has not happened in the right to respect for private life under Article 8, the right to freedom of expression under Article 10 or the negative right not to join a trade union under Article 11. This is an important step for the Court, and has been described as '*an important turning point*.'<sup>26</sup>

The Court noted that Ms Eweida's wish to wear a small Christian cross at work could be considered as her fundamental right because a healthy democratic society needs to tolerate and sustain pluralism and diversity, with it being seen as important for many religious people to be able to communicate their beliefs to others. At the same time, the Court recognised that an employer may wish to project a certain corporate image. While this is legitimate, the Court decided that the domestic court accorded too much weight to it and a fair balance had *not* been struck in the case. In deciding in her favour, the ECtHR referred to the 'discreet' nature of this particular cross, noting it cannot have detracted from her professional appearance. It is unclear if the Court means that an overtly visible sign of religion would therefore detract from one's professional appearance, and if so, what exactly is the problem with being professional and, at the same time, showing one's religion, or other identity through overt expression. The later amendment of BA's code to allow employees to wear a cross demonstrated

<sup>23</sup> European Social Charter ILO, see para 47. H Collins, 'The Protection of Civil Liberties in the Workplace' (2006) 69(4) MLR 619, 628.

<sup>24</sup> *Eweida and others v UK* Application Numbers 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 27 May 2013).

<sup>25</sup> See *Konttinen v Finland* Commission's decision of 3 December 1996, Decisions and Reports 87-A, 68; *Stedman v the UK*, Commission's decision of 9 April 1997; compare *Kosteski v 'the former Yugoslav Republic of Macedonia'* no 55170/00 para 39 13 April 2006.

<sup>26</sup> J Maher 'Proportionality Analysis after *Eweida and Others v UK*: Examining the Connections between Articles 9 and 10 of the ECHR' (21 June 2013) <http://ohrh.law.ox.ac.uk> accessed 10 September 2014.

to the Court that the earlier prohibition was not of crucial importance.<sup>27</sup> However, in the case of the second applicant in the same decision, Chaplin, there was held to be a justifiable interference in her wearing a cross around her neck. Chaplin was a nurse on a geriatric ward. This was a public authority employer. The reason for the policy was to protect the health and safety of nurses and patients. There was a risk a disturbed patient might seize and pull the chain or that it might swing forward and come into contact with an open wound. Other employees had been similarly restricted. She could have worn the jewellery under a high-necked top.<sup>28</sup> Such restriction was therefore not disproportionate.<sup>29</sup> Such a restriction makes sense if health and safety considerations like these apply.

For some commentators, the jurisprudence of the ECtHR focuses on choice. It is the employee's choice to work at a particular workplace. They can choose to leave.<sup>30</sup> On this viewpoint, in the previous ECtHR case law, employees could choose to resign and find alternative employment.<sup>31</sup> However, in the *Eweida* case, the ECtHR is more sympathetic to religious views and this is not the position reflected in its judgment. Rather than holding that the possibility of changing job would negate any interference with the right, the Court explains that a better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.<sup>32</sup>

As Stephanie Palmer has observed, appearance in workplace cases "have not met with great success in the UK".<sup>33</sup> Such cases are normally brought under discrimination legislation. In the 1970s case of *Schmidt v Austicks Bookshops Ltd*,<sup>34</sup> where female employees were not allowed to wear trousers, the Court held this was not sex discrimination. In somewhat circular reasoning, it states there were rules for both men and women as to clothing:

although obviously, women and men being different, the rules in the two cases were not the same' and an employer is granted 'a large measure of discretion in controlling the image of his establishment, including the appearance of staff, and especially so when . . . they come into contact with the public.<sup>35</sup>

In *Dansie v Metropolitan Police*,<sup>36</sup> the Dress Code of the Metropolitan Police was held to be equally balanced between the sexes, and there was no discrimination against Mr Dansie, a trainee, who was required to cut his hair (or leave). Mr Dansie had his hair slicked back and in a bun. This style would have complied with the Code if he had been a woman. However, the Employment Appeals Tribunal stated that the correct legal test to apply in England is whether, applying contemporary standards and conventions, as well as the specific needs of the profession in question, the employer's dress code as a whole was asking its employees to display an equivalent level of smartness as between the sexes. In stating this to be the law, they applied the earlier cases of *Smith v Safeway*

<sup>27</sup> All at para 94.

<sup>28</sup> All at 98.

<sup>29</sup> At para 100.

<sup>30</sup> N Gibson, 'Faith in the Courts: Religious Dress and Human Rights' 66 (2007) Cambridge Law Journal 657.

<sup>31</sup> See, for example, *Kontinnen v Finland* (n25) and *Stedman v the UK* (n25). See also *X v Denmark* Application no 7374/76 5 D&R at 157–158.

<sup>32</sup> *Eweida* (n24) [83].

<sup>33</sup> S Palmer 'Human Rights: Implications for Labour Law' (2000) 59 CLJ 168, 187. See also for analysis of American law on appearance: D Rhode *The Beauty Bias: The Injustice of Appearance in Life and Law* (OUP 2010).

<sup>34</sup> EAT 1978 ICR 85.

<sup>35</sup> At 88.

<sup>36</sup> [2009] UKEAT 0234\_09\_2010.

*Plc*<sup>37</sup> and *DWP v Thompson*.<sup>38</sup> In *Smith v Safeway* a man was dismissed for refusing to cut his hair. This was held not to be discriminatory on the grounds of his sex even where a woman with identical hair length would not have been dismissed. The court said requiring a conventional standard of appearance was not of itself directly discriminatory. In *DWP v Thompson*, the Employment Appeals Tribunal said it was not necessarily discriminatory for an employer to impose a certain dress code on men – in this case to wear a collar and tie – but not on women.

It is only in the last decade that religion and belief have become grounds for a discrimination action in the UK, following EU directives.<sup>39</sup> Prior to this, some people of certain religions received protection because they were perceived as ‘an ethnic minority’ under race equality legislation.<sup>40</sup> The United Kingdom has traditionally had little issue with the expression of religious views through the wearing of the Islamic headscarf. However, the issue has in recent years come to the fore in a number of cases and through media attention. For example, when he was Leader of the House of Commons, Jack Straw MP, once a Labour Party Home Secretary, voiced his concerns about being able to properly communicate when talking to constituents with veiled faces.

A young teaching assistant, Aisha Azmi, was dismissed from work for wearing a face covering and took her claim to an employment tribunal with wide, largely negative, press coverage.<sup>41</sup> In *Azmi*, the EAT held that as a bi-lingual support worker, her suspension was not direct discrimination and, even though indirectly discriminatory, it was proportionate.<sup>42</sup> She worked with pupils from ethnic minority backgrounds including those at risk of under-achieving. She was suspended for refusing to remove her veil, or niqab, from her face in class. She had asked that she work only with female teachers. This would have enabled her to remove her face covering but this request could, apparently, not be accommodated.

In some countries, such as Turkey and France, a strict separation exists constitutionally between public and the private spheres. With state secularism’s importance, the idea is prevalent that individuals’ private religious beliefs ought not to be overtly displayed in the public sphere, most notably in state schools or while working in public sector employment.<sup>43</sup> Thus civil servants, including teachers, have been legally prohibited from displaying religious symbols in the workplace.

<sup>37</sup> [1996] ICR 868.

<sup>38</sup> [2004] IRLR 348. The Tribunal gave guidance as to the correct test to be applied and remitted the case to the ET. The case was subsequently settled and the dress code withdrawn.

<sup>39</sup> As first set out in the Employment Equality (Religion or Belief) Regulations 2003.

<sup>40</sup> *Mandla v Dowell Lee* [1983] 2 AC 548; *Seide v Gillette Industries Ltd* [1980] IRLR 427; *Commission for Racial Equality v Dutton* [1989] QB 783.

<sup>41</sup> *Azmi v Kirklees Metropolitan Borough Council* UKEAT/0009/07/MAA Judgment EAT 30 March 2007. This case was widely reported in the British media. See, for example, <<http://education.guardian.co.uk/schools/story/0,,2038239,00.html>> See discussion in Hill and Sandberg, ‘Is Nothing Sacred? Clashing Symbols in a Secular World’ (2007) Public Law 488.

<sup>42</sup> Her claim for victimization was successful but the lowest sum of compensation possible was ordered.

<sup>43</sup> See S Poulter, ‘Muslim Headscarves in School: Contrasting Legal Approaches in England and France’ (1997) 17 Oxford Journal of Legal Studies 43. It is the recent adoption of a new law outlawing any religious sign or garment that overtly manifests the religious affiliation of the wearer in state primary and secondary schools which has provoked most recent comment. (see Law No 2004–228 of March 15, 2004, JO March 17 2004 p 5190 JCP 2004, III page 640. Available at <[www.legifrance.gouv.fr](http://www.legifrance.gouv.fr)> See analysis in D Lyon and D Spini, ‘Unveiling the Headscarf debate’ (2004) 12 Feminist Legal Studies 333; B Gokariksel and K Mitchell, ‘Veiling, secularism, and the neoliberal subject: national narratives and supranational desires in Turkey and France’ (2005) 5 Global Networks 147; J Vaisse, ‘Veiled Meaning: The French Law Banning Religious Symbols in Public Schools’ at <http://www.brookings.edu/research/articles/2004/03/france-vaiss> last accessed 4 May 2016; E.T. Beller, ‘The Headscarf Affair: The Conseil d’Etat on the Role of Religion and Culture in French Society’ (2004) 39 Texas International Law Journal 581. C Laborde, ‘Secular Philosophy and Muslim Headscarves in Schools’ (2005) 13 The Journal of Political Philosophy 305; M Idriss, ‘Laicite and the banning of the “hijab” in France’ (2005) 25 Legal Studies 260; S Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004); S Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press 2002) 94–102.



Many German *lander* or states have passed laws prohibiting teachers in public schools from wearing visible religious clothing and symbols. It is reported that debates surrounding the passing of such laws illustrate that the Islamic headscarf is the principal target.<sup>44</sup> In March 2015, the German Federal Constitutional Court delivered its judgment on two cases dealing with a general prohibition against teachers wearing the headscarf and declared this unconstitutional under the German Basic Law. Article 4 protects freedom of faith and conscience, Article 2 protects personality, Article 3 protects gender equality and Article 12, free choice of profession. The Court said that limiting these rights was possible but “has to be based on concrete facts rather than on generalised abstract opinions or prejudice,”<sup>45</sup> The Erlangen Centre for Islam and Law in Europe highlights the Court reasoning on the need to avoid abstract evaluation that the headscarf represents values opposed to those of the Constitution, such as gender equality and human dignity, “Wearing a headscarf can be an individual choice on the basis of tradition or identity . . . ”<sup>46</sup>

Countries imposing bans on the wearing of the Islamic headscarf and the full face veil profess to justify them on a variety of grounds. As reflected in the German decision, the bans are evaluated on the basis of abstract values like *secularism* and *gender equality* as well as the *human dignity of women*. References to the dignity of women in the state’s interpretation often involve some sort of idea of freeing women from oppression and trying to ensure gender equality, through criminalising their behaviour. For example, it has been stated that full face veils are ‘*discriminatory, harmful, and contrary to the dignity of women and real and effective equality between men and women.*’<sup>47</sup> Integration, national identity and citizenry arguments are made with the aim of showing that bans are a solution to threats to national identity or secular citizenship.

Cases concerning the wearing of the Islamic headscarf by adult women have been decided at the ECtHR where in my view a restricted view of personal identity is evident. In these cases, the issue has been Islamic headscarf bans in public education institutions and most recently in public sector employment.<sup>48</sup> The cases have concerned France, Switzerland and Turkey where bans on adult women wearing the headscarf are (or were) in force in certain circumstances.<sup>49</sup> Any interpretation by the European Court is on the basis of Article 9. Sometimes, it is decided that the right is not engaged, sometimes it is engaged but the applicants are ultimately unsuccessful because of the

<sup>44</sup> Two of these states impose the same restriction more widely on some or all other civil servants. See in general <[www.hrw.org/en/reports/2009/02/25/discrimination-name-neutrality-0](http://www.hrw.org/en/reports/2009/02/25/discrimination-name-neutrality-0)> accessed 20 April 2016 and [www.hrw.org/en/news/2010/12/20/questions-and-answers-restrictions-religious-dress-and-symbols-europe](http://www.hrw.org/en/news/2010/12/20/questions-and-answers-restrictions-religious-dress-and-symbols-europe)> accessed 20 April 2016.

<sup>45</sup> ‘The Decision of the German Constitutional Court regarding Muslim teachers wearing a headscarf in public schools – A landmark decision for preserving true state neutrality and fact-orientation against widespread prejudice.’ Erlangen Centre for Islam and Law in Europe 13 March 2015, available at <[www.ezire.uni-erlangen.org](http://www.ezire.uni-erlangen.org)> accessed 20 April 2016.

<sup>46</sup> As above. See also commentary by C Haupt ‘The ‘New’ German Teacher Headscarf Decision’ available at <<http://www.icconnectblog.com>>; C Stark ‘Opinion: German Court ruling to allow headscarves for teachers means freedom for all’ available at <[www.dw.com](http://www.dw.com)?>, both accessed 4 November 2015.

<sup>47</sup> As cited in <[www.hrw.org/en/news/2010/12/20/questions-and-answers-restrictions-religious-dress-and-symbols-europe](http://www.hrw.org/en/news/2010/12/20/questions-and-answers-restrictions-religious-dress-and-symbols-europe)>

<sup>48</sup> J Marshall ‘Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate (2008) 30 Human Rights Quarterly 631–654; J Marshall ‘Women’s Right to Autonomy and Identity in European Human Rights Law: Manifesting One’s Religion’ (2008) 14 Res Publica 177; J Marshall, *Personal Freedom through Human Rights Law?* (Brill 2008).

<sup>49</sup> *Karaduman v Turkey* application no. 16278/90 (3 May 1993); *Dahlab v Switzerland* application no. 42393/98 (15 February 2001); *Dal and Ozen v Turkey* application no. 45378/99 (decision 3 October 2002); *Baspinar v Turkey* application no. 45631/99 (decision 3 October 2002); *Sen and Others v Turkey* application no. 45824/99 (admissibility decision 8 July 2003). *Sahin v Turkey* application no 44774/98 (Chamber judgment 29 June 2004), available at <[www.echr.coe.int/echr](http://www.echr.coe.int/echr)>. Sahin most fully explores the issues involved. There is one dissenting judge, Judge Tulkens who found a violation of Article 9 and Article 2 of Protocol 1. The most recent case is *Ebrahimian v France* (26 November 2015) where a woman who wore a headscarf faced non-renewal of her employment contract at a public hospital for refusing to remove her headscarf.

qualification in paragraph 2 of the provision. At times, the right to education set out in Article 2 of Protocol 1 is also relied on and the same reasoning is employed by the court in its decisions. Accordingly, the restrictions on religious headscarves are allowed on the basis that they are prescribed by law, follow a legitimate aim and are necessary in a democratic society. In deciding the last element of these, amongst other things, the rights and freedoms of others, and gender equality have been said to be important. I have previously argued that this case law is inconsistent with the same court's case law on a right to autonomy and identity to be found in its interpretations of Article 8 where, as Judge Tulkens says, the court has developed 'a real right to personal autonomy'.<sup>50</sup>

### *In all Public Places*

Since April 2011, the French government has prohibited, in any public space, the wearing of clothing 'designed to conceal the face'.<sup>51</sup> It is also illegal to force another to wear such a garment.<sup>52</sup> The wording of the bans or proposed bans does not explicitly refer to the Islamic *burqa* or the full face veil. Concealing the face is described in neutral terms with reference in the French legislation to punishing those who force another to wear clothing designed to conceal the face 'by reason of the sex of said person'.<sup>53</sup> However, the explanatory notes attached to the legislation, and the nature of the political and media debates make clear that the Islamic full face veil is the target.<sup>54</sup> The French legislation's notes state that "to compel a woman, regardless of her age, to conceal her face is an affront to her dignity. It also contravenes the principle of gender equality". Estimates of the number of girls and women in Europe who wear the full face veil vary and are unlikely to be accurate given the difficulty in quantifying dress practice. The non-governmental organisation, Human Rights Watch, has reported that they constitute a very small minority. The estimated figures they quote are 700 to 2000 women in France, but this was before the ban.<sup>55</sup>

A similar ban was enacted in Belgium in June 2011.<sup>56</sup> A Belgian Liberal party MP is reported to have claimed that Belgium would "break through the chain that has kept countless women enslaved" by enacting this legislation.<sup>57</sup> Estimates of the number of women who wear the face veil are again hard to quantify in Belgium: Human Rights Watch mention 300 to 400 women. In 2012, the Belgian Constitutional Court upheld this ban as constitutional, but interestingly in 2014, Council of State Judgment rejected abstract principles and speculations as a basis of headscarf bans and limited them to occasions where

<sup>50</sup> See Judge Tulkens in her dissenting opinion in the *Sahin* case.

<sup>51</sup> Act No 2010-1192 of 11 October 2010 prohibiting the concealing of the face in public, Article 1. Public space comprises the public highway and premises open to the public or used to provide a public service. Exceptions can be made as may be provided for on, for example, health or sporting grounds: Article 2.

<sup>52</sup> Forcing another person, by reason of their sex to conceal their face is punishable by a year in prison and a 30,000 Euro fine. This punishment increases to 2 years and a 60,000 Euro fine if the person so forced is a minor. Anyone who conceals their face will be subject to a fine of up to 150 Euros and/or compelled to attend a 'citizenship' course.

<sup>53</sup> Article 4.

<sup>54</sup> See, for example, <[www.strasbourgobservers.com/1010/05/04/burq-and-niqab-ban/](http://www.strasbourgobservers.com/1010/05/04/burq-and-niqab-ban/)>

<sup>55</sup> See in general <[www.hrw.org/en/reports/2009/02/25/discrimination-name-neutrality-0](http://www.hrw.org/en/reports/2009/02/25/discrimination-name-neutrality-0)> and <[www.hrw.org/en/news/2010/12/20/questions-and-answers-restrictions-religious-dress-and-symbols-europe](http://www.hrw.org/en/news/2010/12/20/questions-and-answers-restrictions-religious-dress-and-symbols-europe)>. These numbers may be too high – a recent report in The Guardian Newspaper put it at around 300 for women in France. However this is after the ban and the numbers may have reduced since its coming into force. See <[www.guardian.co.uk/world/2011/sep/19/battle-for-the-burqa](http://www.guardian.co.uk/world/2011/sep/19/battle-for-the-burqa)>. See also the interventions in the S.A.S. case which specify the empirical work carried out by the Human Rights Center at Ghent University, and the Open Society Initiative.

<sup>56</sup> The text introduces a new provision into the criminal code creating a new offence punishable by a maximum of 137.50 Euros and or detention of 1 to 7 days for: "those who, except for contrary legal provisions, are present in places that are accessible to the public with their faces completely or partially covered or hidden, such as not to be recognizable."

There are exceptions for the workplace, police regulations and festivities. Belgian criminal code, Article 563bis. See discussion by Eva Brems on [www.strasbourgobservers.com/2011/04/28/belgium-votes-burqa-ban/](http://www.strasbourgobservers.com/2011/04/28/belgium-votes-burqa-ban/)

<sup>57</sup> See V Mock and J Lichfield 'Belgium passes Europe's first ban on wearing the burka in public' (*The Independent*, 1 May 2010).

there were concrete risks for the neutrality and rights of others.<sup>58</sup> One of the reasons for the face veil ban was a ‘living together’ caveat to freedom of expression, religious or otherwise, and our right to private life. Making much of the ‘essential element of individuality’ expressed through the face, it was said that covering this would make living together impossible.

This concept of ‘living together’ has now been recognised at the ECtHR in *S.A.S. v France* 2014 when the Grand Chamber ruled, by a majority of 15 judges to 2, that the French ban was not contrary to the ECHR, as will be explored more fully below. Comparable nationwide measures have been proposed in a variety of countries, including Spain, Italy, the United Kingdom and Denmark.<sup>59</sup>

As we have seen, in previously decided cases concerning bans on wearing of the Islamic headscarf in educational and public sector workplaces, the Court has accepted the right of a state to justify its laws.<sup>60</sup> Even though, in this author’s view, those cases have been wrongly decided, distinctions can be drawn between the proportionality of the prohibition on the full face veil, as the Islamic headscarf bans are not applicable in all public places, being confined to public education and or employment. Such a distinction can be seen in *Arslan v Turkey*.<sup>61</sup> The ECtHR found a violation of Article 9 in the criminal conviction of members of a religious group for wearing the distinctive dress of their group. This consisted of turbans, tunics, baggy ‘harem’ trousers, and sticks worn by them on the streets after visiting a mosque. The Court emphasized that this case concerned punishment for the wearing of particular dress in public areas that were open to all and not, as in other cases before the court on religious dress, the regulation of wearing religious symbols in public establishments, where religious neutrality might take precedence over the right to manifest one’s religion. These bans and convictions were not necessary in a democratic society. Disappointingly, the Court in *S.A.S.*, whilst expressing awareness that the ban was broad and affected mainly Muslim women, thought it significant that the ban is not expressly based on the religious connotation of the clothing but solely on the fact that it conceals the face, and on this basis distinguished it from *Arslan*.<sup>62</sup>

In *Vajnai v Hungary* criminal proceedings were brought against the applicant for wearing a five-pointed red star as a symbol of the international workers’ movement at a lawful political meeting.<sup>63</sup> Article 10 was found to have been violated. The Court ruled that:

when freedom of expression is exercised as political speech – as in the present case – limitations are justified only in so far as there exists a clear, pressing and specific social need.

<sup>58</sup> See commentary by E Brems ‘Ebrahimian v France: Headscarf Ban Upheld for Entire Public Sector’ (Strasbourg Observers 27 November 2015) available at <<https://strasbourgobservers.com/2015/11/27/ebrahimian-v-france-headscarf-ban-upheld-for-entire-public-sector/>> accessed 26 April 2016.

<sup>59</sup> For a brief summary of a country by country situation see *Article 19 Legal Comment, Bans on the Full Face Veil and Human Rights, A Freedom of Expression Perspective*, December 2010. For a timeline on the burqa bans in Europe, see generally <<http://strasbourgconsortium.org/index.php?pageId=14&contentId=29&blurbId=1245>>. In the UK, a private member’s bill was introduced for a first reading on 24 June 2013 and is due for a second reading on 28 February 2014: <<http://services.parliament.uk/bills/2010-11/facecoveringsregulation.html>> accessed 20 December 2013. UK Conservative Communities’ secretary Eric Pickles MP described the French law as ‘incomprehensible’ and asserted that the British government had no intention to follow it: as conveyed in a Press Release by the non-governmental organisation, Liberty, on 21 May 2012. Liberty has intervened in the case of *S.A.S v France* Application no. 43835/11.

<sup>60</sup> *Karaduman v Turkey* Appl. No. 16278/90, 3 May 1993; *Dahlab v Switzerland*, Appl. No. 42393/98, 15 February 2001; *Sahin v Turkey* Application no. 44774/98, Grand Chamber Judgment 10 November 2005; *Dogru v France* Appl. No. 27058/05, 2008 ECHR 1579.

<sup>61</sup> Application no 41135/98 ECHR 23 February 2010.

<sup>62</sup> *S.A.S.* (n59) [151].

<sup>63</sup> *Vajnai v Hungary* [2008] ECHR 33629/06 (8 July 2008).

Consequently, utmost care and caution must be observed in applying any restrictions, particularly when the case involves symbols, which have multiple meanings. Society, the Court said, must remain reasonable. To hold otherwise, the Court asserted, would mean that freedom of speech and opinion is subjected to the ‘heckler’s veto’. The joint partly dissenting opinion of Judges Nussberger and Jaderblom in *S.A.S.* take a position in line with this reasoning. They say describing the face veil, as happened in the case, as a sign of ‘dehumanising violence,’ ‘effacement’ and ‘subservience’, is disputed by the applicant and many women like her who say they freely choose to wear a full face veil. They state that even assuming these are correct, the previous case law of the ECtHR shows that the Convention does not provide a right not to be shocked or provoked by different models of cultural or religious identity. The Convention protects not only opinions:

that are favourably received or regarded as inoffensive or as a matter of indifference, but also . . . those that offend, shock and disturb.’ such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”<sup>64</sup>

This applies to dress codes demonstrating radical opinions. It is also a protected right not to communicate and not to enter into contact with others in public places; what the dissenting judges call “the right to be an outsider”.<sup>65</sup>

The ICCPR’s Human Rights Committee (HRC) has found a violation of Article 18’s freedom of religious expression by France when it refused to grant a turban wearing Sikh man an identity card.<sup>66</sup> Because he had no card, he had no access to free public health care and other benefits. He particularly needed these as he was suffering from ill health.<sup>67</sup> The HRC decided that wearing a turban is regarded as a religious duty and is tied in with a person’s identity. The complainant had argued that there were violations of a variety of provisions of the ICCPR due to the refusal to grant him the necessary identity card.<sup>68</sup> He argued that wearing a turban is a religious obligation, an integral part of Sikhism, closely intertwined with faith and personal identity. The removal of his turban could be viewed as a rejection of his faith. He had a “deep attachment to using a turban because of his religion”. A photograph of him bareheaded would be “an affront to his religion and ethnic identity”.<sup>69</sup> As he explained it, appearing in public bareheaded is deeply humiliating for Sikhs and an identity photograph showing him this way would produce feelings of shame and degradation every time it was viewed.<sup>70</sup> If he did have the photograph taken without the turban, he would have to repeatedly remove it each time the card was checked which would be humiliating.<sup>71</sup>

Interestingly, this applicant argued that wearing a turban and its impact on identification ought to be compared to cutting, growing out or colouring hair and beards, wearing a wig, shaving one’s head or wearing heavy makeup. All of these, he argued, would have an impact on the ease of identification whilst the turban would not. And none of these are prohibited;<sup>72</sup> or, at least, not yet.

<sup>64</sup> *S.A.S.* (n59) dissenting opinion [7].

<sup>65</sup> *Ibid.*

<sup>66</sup> *Singh v France* Communication no 1876/2009 HRC ICCPR 22 July 2011. See generally HRC General Comment 22 of 1993 which clarifies that the wearing of distinctive headgear is a protected form of religious practice.

<sup>67</sup> General comment No 18 1989 para 9.

<sup>68</sup> Arts 2, 12, 18 and 26 of UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <<http://www.refworld.org/docid/3ae6b3aa0.html>>. He cited in support of his arguments General Comment No 18 of 1989 on Article 26 which explained that wearing a turban is an integral part of a Sikh’s identity. He also referred to the Concluding observations of the Committee on Economic Social and Cultural Rights E/C.12/1/Add.72, 2001 paras 15 and 25.

<sup>69</sup> *Singh* (n66) [6.5].

<sup>70</sup> *Ibid* [3.1].

<sup>71</sup> *Ibid* [3.4].

<sup>72</sup> *Ibid* [6.3].

## BAN CLOTHING AND LIVE TOGETHER WITH A PERMISSIBLE IDENTITY

As already noted, the 2014 *S.A.S.* decision relies on the importance of a concept largely unheard of in human rights language ‘living together’. In seeking to uphold the ban, the French government invoked, as legitimate aims, public safety and ensuring “respect for the minimum set of values of an open and democratic society”. In addressing this second aim, the French government referred to three values: human dignity, gender equality and respect for the minimum requirements of life in society – the concept of ‘living together’.<sup>73</sup> Public safety and living together were considered to be legitimate aims by the ECtHR. Human dignity and gender equality were not. Respect for human dignity, the Court said, could not justify a blanket ban on the wearing of the veil in public. The Court did not see it as expressing contempt for others in a manner than offends against the dignity of others.<sup>74</sup> This is a welcome interpretation of human dignity.<sup>75</sup> Likewise, on gender equality, the Court expresses a different view to that of the majority in *Sahin*. The Court was not convinced in *S.A.S.* that gender equality justified this interference. The Court said that a state cannot invoke gender equality to ban a practice that is defended by women, including the applicant, as exercising their own rights and freedoms.<sup>76</sup>

Whilst finding the bans interfered with Article 8 and Article 9 rights, the court found that under certain conditions the “respect for the minimum requirements of life in society” referred to by the French government or of ‘living together’ as stated in the explanatory memorandum accompanying the Bill can be linked to the legitimate aim of the ‘protection of the rights and freedoms of others’<sup>77</sup> The Court was swayed by the French view that the face plays an important role in social interaction. It understood the view that individuals who are present in places open to all may not wish to see practices and attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships which by virtue of an established consensus forms an indispensable element of community life within the society in question. The Court therefore accepted the French argument that:

the barrier raised against others by a veil concealing the face is perceived by [France] as breaching the right of others to live in a space of socialisation which makes living together easier.<sup>78</sup>

The Court found that it falls on the state to secure conditions such that individuals can live together in their diversity. The Court accepted that a State may find it essential to give particular weight to the interaction between individuals and may consider this to be adversely affected by the fact that some conceal their faces in public places.<sup>79</sup>

## CONCLUSION: IDENTITY RIGHTS AND PERSONAL FREEDOM

Article 22 of the UDHR states that everyone is entitled to the realisation of the rights needed for one’s dignity and the free development of their personality.<sup>80</sup> At Article

<sup>73</sup> *S.A.S.* (n59) [113ff].

<sup>74</sup> *Ibid* [120].

<sup>75</sup> On this, see further J Marshall *Human Rights Law and Personal Identity* (Routledge 2014).

<sup>76</sup> *S.A.S.* (n59) [119].

<sup>77</sup> *Ibid* [121].

<sup>78</sup> *Ibid* [122].

<sup>79</sup> *Ibid* [141].

<sup>80</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

29, the Declaration states that “everyone has duties to the community in which alone the free and full development of his personality is possible”. It is therefore clear that the existence of a personality or identity does not ‘just happen’ or take place in a vacuum, without assistance, or support from, or interconnection with, other people. The realisation of one’s dignity and freedom of personality formation takes place in a social setting. John Eekelaar has argued that people have rights to the extent that their own identification of what enhances their well-being is socially recognised.<sup>81</sup> This is premised on the capacity of the individual to have a genuine appreciation of his or her goals, and the assumption that the individual is fully competent and acting in conditions of freedom. In this analysis, the idea of human rights is said to be a central element in the development of an international morality.<sup>82</sup> The object of rights is the identification of end states necessary to promote well-being:

[r]ights protect the well-being of the right holder. Well being includes . . . the opportunity to establish and maintain important personal relationships, the ability to benefit from educational, social and economic activity, to integrate into society and to achieve life plans.<sup>83</sup>

Eekelaar observes that the language of rights is an instrument by which individuals claim the power to determine, themselves, what promotes their well-being. This implies an instrumental use of rights to lead to freedom. The object of respect, including self-respect, is an agent’s capacity to raise and defend claims discursively, or, more generally, an agent’s status as responsible. This capacity can only become a basis for self-respect if it can be exercised. The importance of rights in connection with self-respect lies in the fact that rights ensure the real opportunity to exercise the universal capacities constitutive of personhood. In Axel Honneth’s language, this means that the fullest form of ‘self-respecting autonomous agency’ can only be realized when one is recognized as possessing the capacities of legal persons: of morally responsible agents.<sup>84</sup> This recognition occurs by having in place a political and legal structure that enables meaningful choice and toleration of different viewpoints, in my view including different forms of dress, having appropriate conditions available to re-examine ways of life and projects.

We have plural identities but our ability to discern this and to choose what to make of the identities needs to be fostered by liberal democracies, not restricted through dress bans. On the cover of Mel Thompson’s *Art of Living* book entitled *Me* is a picture of a freestanding round bathroom mirror with the word ‘me’ written backwards. Other people, ‘the other’, will never see exactly who you are to yourself. They see a reflection, a representation, a persona. It is this fundamental problem that means we will never have our subjectivities fully protected by law. The law could be said to react to us as we present ourselves to be or as those in power perceive us to be. If focusing on how we present ourselves, this is mainly through our actions: our speech, our expressions, our movements, and other communications that others can see and feel and touch. However, the law tries to capture some sense of our unique individual identities. It has tried, through the use of anti-discrimination laws and through qualified rights. These show that through law’s introduction of objectivity, including a notion of ‘reasonable accommodation’, and the necessity to fit within certain ‘grounds’ of discrimination, the protection of the manifestation of our identity is incomplete and unsatisfactory. This is particularly so when one’s way of life, and form of dress, is not the same as that of the majority.

<sup>81</sup> J Eekelaar, ‘Personal Rights and Human Rights’ (2002) 2(2) HRLR 181, 185.

<sup>82</sup> *Ibid* 181.

<sup>83</sup> *Ibid* 185.

<sup>84</sup> A Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge: Polity Press 1992), xv.