

# ISLAMIC DRESS, PERSONAL AUTONOMY AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

La vestimenta islámica, la autonomía personal y el Convenio Europeo de Derechos Humanos

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## I. INTRODUCTION

The issue of the Islamic headscarf has generated much controversy in Europe in recent years. What for some is just a piece of cloth worn as a positive declaration of faith is, for others, a sinister public statement associated with radical forms of Islam.

It was the introduction of a law in France four years ago, banning the display of “conspicuous” religious symbols from the classrooms of all French public schools, which first brought the issue of religious dress to wider public attention in Europe.<sup>1</sup> Yet Islamic dress codes have long been controversial,<sup>2</sup> having led to disputes in other parts of Europe (e.g., the UK,<sup>3</sup> Germany,<sup>4</sup> Denmark<sup>5</sup>) as well as further a field (e.g., North America,<sup>6</sup> the former USSR,<sup>7</sup> and South East Asia<sup>8</sup>).

At the very heart of the controversy surrounding the Islamic headscarf is the issue of female autonomy.<sup>9</sup> Yet autonomy is especially hard to define in this context. By wearing a hijab (or other forms of garments associated with Islam), is an adult female exercising her autonomy to dress as she sees fit – or is her “choice” merely illusory, because it disguises the fact that such forms of dress are (at least for some) formally

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<sup>1</sup> Law No. 2004-228, of 15<sup>th</sup> March, 2004.

<sup>2</sup> See F. MERNISSI, *Beyond the Veil* (Cambridge: Mass, USA, Schenkman, 1975).

<sup>3</sup> See L. GIES, “What Not To Wear: Islamic Dress and School Uniforms” *Feminist Legal Studies*, 14(3), 2006, pp. 377-389.

<sup>4</sup> See L. AUSLANDER, “Bavarian crucifixes and French headscarves: Religious Signs and the Postmodern European State”, *Cultural Dynamics*, 12(3), 2000, pp. 283-309.

<sup>5</sup> See TINA GUDRUN JENSEN, “Religious Authority and Autonomy Intertwined: The Case of Converts to Islam in Denmark”, *The Muslim World* 96 (4), 2006, pp. 643-660.

<sup>6</sup> See AMINAH B. MCCLOUD, “American Muslim Women and U. S. Society”, *Journal of Law and Religion*, 12 (1), 1995-1996, pp. 51-59.

<sup>7</sup> See *Hudoyberganova v Uzbekistan* (931/00) CCPR/C/82/D/931/2000, 18 January 2005.

<sup>8</sup> See LI-ANN THIO and JACLYN LING-CHIEN NEO, “Religious Dress In Schools: The Serban Controversy In Malaysia”, *International & Comparative Law Quarterly*, 55(3), 2006, pp.671-688.

<sup>9</sup> For example, see PAT MULE and DIANE BARTHEL, “The return to the veil: Individual autonomy vs. Social Esteem”, *Sociological Forum*, 7(2), June 1992, pp. 323-332.

mandated by the tenets of their faith? In seeking answers to such questions, an obvious reference point is the European Convention on Human Rights (the ECHR) and its associated case law.

In recent years the European Court of Human Rights (the Court) has considered several cases brought by those challenging state restrictions on religious dress. In a continent where there are radically different approaches to such matters,<sup>10</sup> the Court has the difficult task of ensuring that the ECHR is applied fairly and consistently.

The aim of this short article is to examine the approach of the Court to state imposed curbs on Islamic dress. We consider the relevant jurisprudence and suggest that the Court has struggled to offer adequate protection to Muslim women who wish to manifest their religious belief through their choice of clothing, as guaranteed by Article 9(1) of the ECHR. This is, of course, a highly emotive and extremely complex issue, which was always likely to generate controversy when it came to the Court's attention. However, we suggest that one particular problem experienced by the Court in this area is the challenge of having to balance the autonomy of an individual (or group) and the values of a secular state. We point out that the Court's approach to autonomy in respect of religious dress (under Article 9 of the ECHR) is in marked contrast to that in other areas such as sexuality and sexual identity (under Article 8 of the ECHR), where the Court grants the state a much narrower margin of appreciation.

We acknowledge that the European Court faces difficult choices when adjudicating in this area, but suggest that its approach has been overly restrictive and conservative to date. Moreover, with an increasing number of (mainly young) "European Muslims" evidently choosing to express their faith in the form of the clothes they wear,<sup>11</sup> we argue that the Court should be more sensitive to the different ways in which religious groups generally, and Muslims in particular, manifest their religion or belief.

## II. CONVENTION JURISPRUDENCE ON RELIGIOUS SYMBOLS

The European Court of Human Rights has emphasised that freedom of thought, conscience and religion is "one of the foundations of a 'democratic society' [and is] one of the most vital elements that go to make up the identity of believers and their conception of life".<sup>12</sup> Thus, perhaps unsurprisingly, there have been several cases where Muslim women have challenged a state's restrictions on what they can wear before the Strasbourg bodies.

In *Karaduman v Turkey*<sup>13</sup> a student who had successfully completed her studies at Ankara University was refused a degree certificate because she refused to submit a photograph of herself bare-headed. Her claim of a breach of Article 9 was rejected by the Commission (as it then was) which found there to have been no interference with her Article 9 rights which did "not always guarantee the right to behave in public in a

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<sup>10</sup> See S. POULTER, "Muslim Headscarves in School: Contrasting legal approaches in England and France", *Oxford Journal of Legal Studies*, 17, 1997, p. 43.

<sup>11</sup> See T. RAMADAN, *To be a European Muslim: A Study of Islamic Sources in the European Context* (Markfield: Leicestershire, UK, Islamic Foundation, 1999).

<sup>12</sup> *Kokkinakis v Greece* (1993) 17 EHRR 397, para. 31.

<sup>13</sup> *Karaduman v Turkey*, App. No. 16278/90 May 1993, 74 DR, 93.

way dictated by this conviction”. The Commission stated that the term “practice” in Article 9(1) did not cover all acts motivated or inspired by a religion or conviction, and furthermore the applicant had “chosen” to attend a secular university and this “naturally” implied an acquiescence in certain rules established to preserve the secular nature of the institution and the peaceful coexistence between students of different beliefs.<sup>14</sup> Consequently the Commission held that “having regard to the requirements of secular university system ... regulating student’s dress and refusing them administrative services, for as long as they [did] not comply with such regulations [did] not as such, constitute an interference with freedom of religion and conscience”.<sup>15</sup> Thus, the Commission held that the refusal did not contravene Article 9(1), so the permissible restrictions under 9(2) were not even considered.

In the admissibility decision of *Dahlab v Switzerland*<sup>16</sup> a primary school teacher, Lucia Dahlab, was dismissed because she insisted on wearing a Muslim headscarf. In this case the Court *did* find that the dismissal constituted an *interference* with the manifestation of religion and therefore did go on to consider the justifications for such under Article 9(2). However the Court, having regard to the denominational neutrality of the Swiss education system, the “tender age” of the pupils concerned and the margin of appreciation in matters of religion, held that the action was not a disproportionate interference, but was rather “necessary in [Switzerland’s] democratic society”.<sup>17</sup> The Court held that the applicant’s decision to wear the headscarf “might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Qur’an [which] is hard to square with the principle of gender equality.”<sup>18</sup> The Court therefore concluded that it was “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>19</sup>

The most important case on Islamic dress to come before the Court has been *Şahin v Turkey*.<sup>20</sup> In August 1997 Leyla Şahin, a medical student, enrolled at Istanbul University. In February 1998 the Vice Chancellor of the University issued a circular prohibiting the wearing on campus of the Islamic headscarf. Subsequently Şahin was refused access to lectures and examinations and refused enrolment on account of her wearing an Islamic headscarf. Disciplinary proceedings were brought against her for participating in an unauthorised demonstration against the ban and she was suspended from the university for a semester, although an amnesty was later issued revoking this penalty. Her attempts to have the circular set aside by the Turkish courts failed. In September 1999 she transferred to Vienna University in order to be able to continue her studies. She applied to the European Court of Human Rights claiming *inter alia* a breach of Article 9.<sup>21</sup> The Chamber of the Court found there to have been no breach

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<sup>14</sup> *Ibid.*, pp. 6-7

<sup>15</sup> *Ibid.*, p.7.

<sup>16</sup> *Dahlab v Switzerland*, App No 42393/98, ECHR 2001-V.

<sup>17</sup> *Ibid.*, p. 15.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.* For comment on both *Karaduman* and *Dahlab* see D. LYON and D. SPINI, “Unveiling the Headscarf Debate” *Feminist Legal Studies*, 12(3), 2004, p. 333.

<sup>20</sup> (2007) 44 EHRR 5 (Grand Chamber).

<sup>21</sup> She also claimed that her right to education under Article 2 Protocol 1 ECHR had been breached as well as her rights under Articles 8, 10 and 14 ECHR.

of her rights<sup>22</sup> but her request to have the case referred to the Grand Chamber was accepted.

The Turkish government argued that the headscarf ban in universities was necessary, primarily, to protect the constitutional value of secularism.<sup>23</sup> The principle of secularism had been stated by the Turkish Constitutional Court to be: the guarantor of democratic values; the meeting point of liberty and equality; a check on the state according preference to a particular religion; and a safeguard which protected the individual from arbitrary interference from the state or extremist movements.<sup>24</sup> Furthermore, and perhaps most critically, the Turkish government stressed that:

“the principle of secularism was a *preliminary requisite for a liberal pluralist democracy* and that there were factors peculiar to Turkey that meant that the principle of secularism had assumed particular importance there compared to other democracies . . . [T]he fact that Turkey was the only Muslim country to have adopted a liberal democracy . . . was explained by the fact that it had strictly applied the principle of secularism . . . *protection of the secular State was an essential prerequisite to the application of the Convention in Turkey.*” [our emphasis]<sup>25</sup>

The government thus raised a sinister prospect for the Court to contemplate: that democracy itself, and the human rights protection for which it was a prerequisite, would be seriously eroded if the constitutional principle of secularism was not assiduously guarded.

Faced with the threat of such grave consequences the Court was not inclined to second guess the state. It observed that this notion of secularism, one of the foundational principles of the Turkish state, was consistent with the values underpinning the Convention, in harmony with the rule of law, crucial for the respect of human rights, and necessary to protect democracy. Indeed, the Court noted that:

“there must be borne in mind the impact wearing [the headscarf], presented as a compulsory religious duty, may have on those who choose not to wear it . . . the issues at stake include the protection of the ‘rights and freedoms of others’ and the ‘maintenance of public order’.”<sup>26</sup>

The Strasbourg judges therefore held that because the headscarf had taken on a “political significance” in recent years, the restrictions imposed on those wishing to wear it were justified by “a pressing social need”. After all, the Court was aware of the threat of “extremist political movements” seeking “to impose on society as a whole their religious symbols and conception of society founded on religious precepts.”<sup>27</sup> Accordingly, it was legitimate for the state to take a stance against such movements and the headscarf regulations had to be viewed in this context as a

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<sup>22</sup> (2005) 41 EHRR 8.

<sup>23</sup> Article 2 of the Turkish Constitution states “the Republic of Turkey is a democratic, secular (*laik*) and social state based on the rule of law, respectful of human rights in a spirit of social peace...”. On 6<sup>th</sup> February 2008 the Turkish parliament voted to amend the Constitution so as to allow a relaxation of the ban, see <http://news.bbc.co.uk/1/hi/world/europe/7230075.stm>.

<sup>24</sup> Judgment of 7 March 1989 quoted at para. 113 of the Grand Chamber judgment.

<sup>25</sup> See the Chamber judgment, para. 91. Before the Grand Chamber the Turkish government merely asked the Court to endorse the finding of the Chamber, para 74.

<sup>26</sup> *Şahin* (GC), para. 115, quoting para. 107-9 of the Chamber judgment.

<sup>27</sup> *Ibid.*

measure intended to achieve the legitimate aim of preserving pluralism in the university.<sup>28</sup> It was understandable that the university authorities should wish to preserve the secular nature of the institution and so “consider it contrary to such values to allow religious attire, including the Islamic headscarf, to be worn”. Crucially, in matters of religion the state was entitled to a margin of appreciation.<sup>29</sup> Thus, the Court held that:

“[b]y reason of their direct and continuous contact with the education community the university authorities [were] in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course . . . [and that] Article 9 [did] not always confer a right to behave in a manner governed by religious belief and [did] not confer on people who [did] so the right to disregard rules that have proved to be justified”.<sup>30</sup>

Yet in *Şahin* there was no suggestion that the applicant *herself* had in any way posed a threat to the values of secularism, nor was there evidence that her wearing of the Islamic scarf had provoked disorderly conduct or caused disruption to the everyday life of the University.<sup>31</sup> Nonetheless, the Court accepted the state’s claim that this fact-insensitive law was, in essence, necessary to protect the nation’s secular values – and critical for the survival of Turkish democracy. By a majority of sixteen votes to one the Grand Chamber of the Court therefore concluded that the measures were a proportionate interference with Leyla Şahin’s Article 9 rights.<sup>32</sup>

### III. SECULARISM AND AUTONOMY

The right to manifest religious belief through dress poses some major challenges to the European Convention system for the protection of human rights. These challenges, it is submitted, originate with a central paradox: that whilst the majority of human rights instruments expressly protect freedom of religion and belief as a human right, human rights doctrine itself is “essentially ‘secular’ in nature”.<sup>33</sup> Modern human rights are, at root, a product of the “shift from a religious to a secular culture at the time of the Enlightenment in eighteenth-century Europe”.<sup>34</sup>

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<sup>28</sup> *Ibid.*, para. 115, quoting para. 108-9 of the Chamber judgment. The Court referred to its earlier decision in *Refah Partisi (Welfare Party) v Turkey* (2003) 37 EHRR 1 in which the Grand Chamber had found that the banning of a political party whose members had been elected to government, had called for the introduction of *sharia* law and criticised democracy, had not breached, *inter alia*, Article 11 ECHR. In that case the Court had stated that the prohibition of the headscarf may be legitimate if necessary to protect the freedoms of others or public order, para. 92.

<sup>29</sup> The margin of appreciation is an international doctrine of judicial ‘deference’, which accords a degree of latitude to states as to how they protect the individual rights set out in the Convention. On it generally see Y. ARAI-TAKAHASHI, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp-Oxford, Intersentia, 2002).

<sup>30</sup> *Şahin* (GC), para. 121.

<sup>31</sup> *Şahin* (GC), Judge Tulkens, dissenting, para. 8.

<sup>32</sup> There was found to be no breach of the right to education (paras. 152 – 162), or of Articles 8, 10 or 14 (paras. 163-166).

<sup>33</sup> M. EVANS, “Religion law and human rights: locating the debate” in P.W. EDGE and G. HARVEY (eds.) *Law and Religion in Contemporary Society* (Aldershot, Ashgate, 2000), p. 182.

<sup>34</sup> F. RADAY, “Culture, Religion and Gender”, *International Journal of Constitutional Law*, 4, 2003, p. 663.

The principle of secularism is, in essence, a formal mechanism by which there is a formal demarcation between the role and function of religion and the state. As a consequence, religion is (as a general rule) confined to the private sphere, whereas the state agrees not to engage in coercion on matters of belief or conscience. The European Court of Human Rights has endorsed this view, emphasizing that the State should be:

“the neutral and impartial organiser of the exercise of various religions, faiths and beliefs [and that] 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 or the ways those beliefs are expressed.”<sup>35</sup>

Inextricably connected with the principle of secularism in liberal thought is the notion of individual autonomy – the notion that “freedom of will and a capacity for self directed action within a social environment are the most important of human characteristics”.<sup>36</sup> One of the reasons why the state is expected to refrain from attempting to impose its own views in respect of religion is that to do so would run counter to the liberal paradigm that individuals are autonomous agents who should be allowed to make their own choices about differing life paths. For Joseph Raz “[t]he ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives” in contrast to “a life of coerced choices” or “a life of no choices, or of drifting through life without ever exercising one’s capacity to choose.”<sup>37</sup> Religions (and their associated practices – including the choice of one’s dress) are but one choice available to autonomous individuals, and the state’s role is to provide a neutral framework within which that choice may be exercised. A necessary concomitant of a commitment to personal autonomy is some form of value pluralism. The principle of autonomy thus presupposes that an individual is accorded a plurality of life paths from which to choose. A secular state is one way to achieve this liberal ideal in which the autonomous choices of individuals are fostered and respected.

Although this view is reflected in the case law of the European Court,<sup>38</sup> this liberal discourse of autonomy is difficult to square with the reasons why many believers engage in religious practices. Very often religious practice is not the result of the exercise of rational decision making between a plurality of competing life paths. From the believer’s perspective it may instead just be a matter of obedience to the “will of God”.<sup>39</sup> Of course, it must be acknowledged that Muslim women are likely

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<sup>35</sup> *Şahin* (GC) at para. 107. See also *Hassan and Chaush v Bulgaria* (2000) 30 EHRR 50, para. 78; *Serif v Greece* (2001) 31 EHRR 20, para. 57.

<sup>36</sup> D. FELDMAN, *Civil Liberties and Human Rights in England and Wales* (Oxford, OUP, 2002), p. 9.

<sup>37</sup> J. RAZ, *The Morality of Freedom* (Oxford, Clarendon Press, 1986), pp. 369–71. See also R. DWORKIN, *Taking Rights Seriously* (London, Duckworth, 1977), p. 272, and J. RAWLS, *A Theory of Justice* (Oxford, Clarendon Press, 1999), pp. 17-22.

<sup>38</sup> See *Serif v Greece*, (2001) 31 EHRR 20, para. 53; and *Şahin* (GC), para. 107.

<sup>39</sup> For example the literal meaning of “Islam” is “surrender [to the will of God]”. See K. ARMSTRONG, *The Battle for God* (London, Harper Collins, 2000), p. 375. Some commentators have argued that the whole notion of individual rights sits uneasily with some religious cultures. For example, the Islamic concept of *ummah* or community raises potential difficulties for Muslims bringing individual human rights claims – see A. BRADNEY, “Law and Religion in Great Britain at the End of the Second Christian Millennium” in P.W. EDGE and G. HARVEY, *Law and Religion in Contemporary Society* (Aldershot, Ashgate, 2000), pp. 24 – 6.

to wear the hijab for a wide variety of complex reasons.<sup>40</sup> But for some, at the very least, it is because of their belief that it is *required* by a divine obligation. After all, the Qur'an (believed by Muslims to be the will of God revealed through his prophet Muhammad) commands:

And tell believing women that they should lower their glances, guard their private parts, and not display their charms beyond what [it is acceptable] to reveal; they should let their headscarves fall to cover their necklines and not reveal their charms except to their husbands, their fathers, their husbands' fathers, their sons . . .<sup>41</sup>

and

Prophet, tell your wives, your daughters, and women believers to make their outer garments hang low over them so as to be recognised and not insulted.<sup>42</sup>

The liberal language of autonomy, so central to human rights doctrine, therefore, may not be adequate to explain the obligation on the wearer of the hijab.

It may be that because of this dissonance between the theoretical principles underpinning human rights doctrine and the supposed reasons for the wearing of the hijab, that the Court has accorded comparatively little weight to autonomy arguments when hearing religious dress claims. In *Şahin* the Grand Chamber, citing with approval the view of the Turkish Constitutional Court and the Chamber reiterated that “in the Turkish context” the Islamic headscarf was “presented as a compulsory religious duty”, and its impact had to be born in mind on those who “[chose] not to wear it”.<sup>43</sup> The autonomy based arguments of women claiming a breach of their religious rights are therefore seriously undermined. Only the dissenting judge, Judge Tulkens, made reference to the autonomous choice of the applicant:

“The applicant, a young adult university student said – and there is nothing to suggest that she was not telling the truth – that *she wore the headscarf of her own free will*. . . I fail to see how the principle of sexual equality can justify prohibiting a woman from following a practice which, *in the absence of proof to the contrary, she must be taken to have freely adopted*. . . *Paternalism of this sort runs counter to the case law of the Court, which has developed a real right to personal autonomy on the basis of Article 8*”. (our emphasis)<sup>44</sup>

This doctrinal uncertainty – and the issue whether the exercise of autonomy can be a valid argument for a woman claiming the *right* to wear the hijab because of divine *obligation* – is one of the components that is reflected in the widened margin of appreciation afforded to states when dealing with religious dress. This is evident when comparing the Court's approach to cases brought under Article 8 of the ECHR in which, as Judge Tulkens noted, the principle of autonomy has been fully

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<sup>40</sup> See further, D. McGOLDRICK, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford, Hart, 2007).

<sup>41</sup> *The Qur'an*, XXIV (“the Light”) Verse 31.

<sup>42</sup> *The Qur'an*, XXIII (“the Clans”) Verse 59. There are many translations of these verses. The above are taken from M.A.S. ABDEL HALEEM *The Qur'an* (Oxford, OUP, 2004).

<sup>43</sup> *Şahin* (GC), para. [115].

<sup>44</sup> *Şahin* (GC), Judge Tulkens, dissenting, para. 12. This was in response to the majority's finding that the ban was necessary to protect gender equality.

recognised.<sup>45</sup> Thus, in cases involving the “most intimate aspect of private life” – such as those concerning sexual orientation and gender identity – the Court has found that there have to “exist particularly serious reasons before interferences by public authorities [can] be legitimate”.<sup>46</sup> For example, in *Goodwin v UK*, a case concerning legal recognition of change in gender, the Court stated that:

“Under Article 8 of the Convention ... the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings.”<sup>47</sup>

The language of autonomy is one which the European Court readily understands when invoked in Article 8 claims. Its invocation clearly has the effect of narrowing the margin of appreciation that the Court is willing to allow and thereby increase the protection that is accorded to claimants. In contrast to Article 8 however, the use of the language of autonomy to under-gird arguments relating to religious dress under Article 9, tends to be much less well received by the Court.

#### IV. CONCLUSION

Whilst secularism is increasingly dominant in many parts of Europe – particularly as long-established Christian churches often struggle to retain members<sup>48</sup> – faiths such as Islam have experienced a period of rapid growth on the continent in recent years.<sup>49</sup> Thus, in having to balance secular and religious values, the European Court has an undeniably formidable task. However, in performing this task, the Court has tended to give the impression that religion – or rather the manifestation of religious belief through symbol and dress – is relatively unimportant in contemporary Europe. It may be that the tensions discussed above provide some clue as to why this may be the case. The language of divine obligation, of doing “God’s will” is (perhaps unsurprisingly) not readily graspable by the Court. It sits uneasily with those notions of individual autonomy that are central to human rights doctrine. In contrast, where the principle of autonomy can be invoked with relative ease – such as in the case of Article 8 claims involving sexuality – the Court has been assiduous in its protection of individual freedoms.

The apparent unwillingness of the Court to afford recognition to the principle of autonomy in those cases in which Muslim women are claiming the right to wear types of religious dress (notwithstanding the fact that these women *themselves* are bringing these cases), means that these rights are awarded lower levels of protection. There is nothing in the text of the Convention to suggest this kind of hierarchy of rights, yet it is the clear inference to be drawn from the case law. To Muslim women such as

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<sup>45</sup> *Ibid.*

<sup>46</sup> *Dudgeon v UK* (1982) 4 EHRR 149, para. 52. See also *Norris v Ireland* (1991) 13 EHRR 186, para. 46; and *Smith and Grady v UK* (1999) 29 EHRR 493, para. 89.

<sup>47</sup> *Goodwin v UK* (1996) 22 EHRR 123, para. 90. See also *Keenan v UK* (2001) 33 EHRR 38, para. 92; and *Pretty v UK* (2002) 35 EHRR 1, para. 61.

<sup>48</sup> For example, see C. G. BROWN, *The Death of Christian Britain* (London, Routledge, 2001).

<sup>49</sup> Some even claim that Islam is the “world’s fastest growing religion”. On this generally see ROBERT A. MOREY, *The Islamic Invasion: Confronting the World’s Fastest Growing Religion* (Eugene: Oregon, USA, Harvest House, 1992).



Leyla Şahin and Lucia Dahlab, as well as those they represent, the text of the European Convention appears to protect their rights. But the Court, the pre-eminent guardian of human rights in Europe, appears not to take their rights seriously, especially in comparison to those bringing claims more readily understood in terms of autonomy. Such women might be forgiven for perceiving this approach as indicative of western “double standards” – differential protection benefiting claimants whose claimed rights are closer to the underpinning secular human rights values beloved of the Court.

The fact that many young Muslims in parts of Europe are apparently disenchanted with secular liberal values has already been well chronicled.<sup>50</sup> With Islam often portrayed negatively in Europe’s press,<sup>51</sup> and claims that Islamophobia is rife in parts of the continent,<sup>52</sup> a significant proportion of Muslims in Europe have evidently little faith that Europe’s governments are committed to defending their interests.<sup>53</sup> It is in this political context that the European Court’s recent rulings on religious dress must be viewed. It would thus be tragic if the Court’s approach to Islamic dress in the cases discussed above were to exacerbate, rather than ameliorate, the sense of alienation of many of Europe’s Muslims.

#### **ABSTRACT:**

In this paper we examine, critically, the jurisprudence of the European Court of Human Rights on the issue of religious dress. We focus on the ruling of the Grand Chamber of the Court in *Şahin v Turkey*, and suggest that it demonstrates the challenge of balancing the autonomy of an individual (or group) and the values of a secular state. We argue that the balance struck by the Grand Chamber in *Şahin* is less than satisfactory, and open to serious criticism on the ground that it appears to trivialise the manifestation of religious belief.

**Key words:** *European Court of Human Rights – Islamic dress - Personal autonomy – Religious belief – Religious symbols -*

#### **RESUMEN:**

Analizamos en este artículo de forma crítica la jurisprudencia del Tribunal Europeo de Derechos Humanos acerca de la vestimenta o indumentaria religiosa. Nos centramos en la decisión del Pleno del Tribunal en el asunto *Sakin v Turkey*, que demuestra el reto de hallar un equilibrio entre la autonomía de la persona (o grupo) y los valores de un Estado laico o secular. Mantenemos que el equilibrio pretendido por el tribunal en el caso *Sakin* no es satisfactorio y justifica una seria crítica, en la medida en que trivializa la manifestación de las creencias religiosas.

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<sup>50</sup>. See PETER NESSER, “Jihadism in Western Europe after the invasion of Iraq: Tracing motivational influences from the Iraq war on jihadist terrorism in Western Europe”, *Studies in Conflict and Terrorism* 29 (4), 2006, pp. 323-342.

<sup>51</sup>. See J.E. RICHARDSON, *(Mis)representing Islam: the racism and rhetoric of British broadsheet newspapers* (Amsterdam, John Benjamins, 2004); and E. QURESHI and M. SELLS, *The new crusades: constructing the Muslim enemy* (New York: Colombia University Press, 2003).

<sup>52</sup>. See C. ALLEN and J. NIELSEN, *Summary Report on Islamophobia in the EU after 11 September 2001* (Vienna: European Monitoring Centre on Racism and Xenophobia, May 2002).

<sup>53</sup>. See SHANE BRIGHTON, “British Muslims, multiculturalism and UK foreign policy: ‘integration’ and ‘cohesion’ in and beyond the state”, *International Affairs* 83 (1), 2007, 1–17.

**Palabras clave:** *Autonomía personal – Creencias religiosas - Símbolos religiosos -Tribunal Europeo de Derechos Humanos – Vestimenta islámica -*