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Wearing of Religious Symbols in Public Areas.”**

Security and Human Rights, v.21(2), pp.142-146
(2010)

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Citation for this version:

Bowring, B.

Review: Malcolm D. Evans – “Manual on the Wearing of Religious Symbols in Public Areas.”

London: Birkbeck ePrints. Available at: <http://eprints.bbk.ac.uk/2839>

Citation for publisher’s version:

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“Malcolm D. Evans: Manual on the Wearing of Religious Symbols in Public Areas” v.21 n.2 (2010) *Security and Human Rights* pp.142-146

Malcolm D. Evans
Manual on the Wearing of Religious Symbols in Public Areas
Security and Human Rights Review

Council of Europe
Martinus Nijhoff Publishers, Leiden and Boston
2009
126 pages
£28 in the UK

On 10 November 2005 the Grand Chamber of the European Court of Human Rights (ECtHR, or Strasbourg Court) delivered its judgment in the case of *Leyla Şahin v Turkey*.¹ By 16 votes to one, they held that a ban on wearing a headscarf in institutions of higher education in Turkey did not violate Article 9² of the European Convention of Human Rights, and other articles.

One US academic commentator on the Chamber judgment, which the Grand Chamber followed, described it as “a massive blow to freedom of religious expression in Europe... The holding acknowledges and approves of a government’s use of theocratic secularism as a weapon in the battle against Islamic fundamentalism.” He further described the Chamber’s decisions as “legally flawed and politically motivated”, and hoped for better things from the Grand Chamber.³

The passage cited shows that the wearing of religious symbols, such as the Muslim headscarf, in public areas has become one of the more emotive issues to confront the ECtHR in recent years.⁴ Is this commentator accurate in his assessment; or is the Grand Chamber’s judgment based on a more sophisticated and principled jurisprudence? He would now be even more alarmed. On 24

¹ Application no. 44774/98

² Article 9 provides:

Freedom of thought, conscience and religion

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 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.

³ Benjamin Bleiberg “Unveiling the real issue: evaluating the European Court of Human Rights’ decision to enforce the Turkish headscarf ban in *Leyla Şahin v Turkey* ((2005) v.91 *Cornell Law Review* pp.129-168, at 168

⁴ See for example Dominic McGoldrick *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford, Hart Publishing: 2006). The literature also includes Carolyn Evans *Freedom of religion under the European Convention on Human Rights* (Oxford, Oxford University Press, 2001) and Paul Taylor *Freedom of Religion. UN and European Human Rights Law and Practice* (Cambridge, Cambridge University Press: 2005

January 2006, in *Köse and others v Turkey*, the ECtHR adopted the same approach in upholding the legitimacy of a ban on headscarves imposed on teenagers at a lycée in Istanbul.⁵

Malcolm Evans' new Council of Europe Manual is therefore a welcome addition to the Council's indispensable series of manuals and handbooks on human rights issues.⁶ Professor Evans is highly qualified for this task: he is the author of the best introduction to the topic, *Religious Liberty and International Law in Europe* (2008)⁷. That work explores the world history of freedom of religion, as well as each of the international and regional instruments and mechanisms by which the right is protected.

The scope of the Manual under review is much narrower: it is aimed primarily at practitioners and policy makers, and its scope is limited to the territory of the Council of Europe, and the work of the Strasbourg Court in interpreting the ECHR. Of course, that is already a very large territory, with 47 member states and a population in excess of 811 million, of all religions, including a very large number of Muslims. There are estimated to be at least 20 million Muslims in the European Union: the Council of Europe, with states such as Azerbaijan, the Russian Federation (with at least 16 million) and Turkey must have several times that number.

Evans considerably directs the professional reader who may have very little time straight to his Section VII(b) (Manual, p.87), where he sets out seven "questions to be thought about" by decision-makers placing restrictions on the wearing of religious clothes and artefacts. He emphasises that the relevant question is not whether a restriction is 'reasonable' in the circumstances of a particular case, but whether it is 'necessary'.

At least half of the Manual is taken up by an excellent summary of the approach taken by the Strasbourg Court to freedom of religion, before turning to the question of "wearing religious symbols." Evans does not engage with the scholarly literature concerning the right and its application; that is not his purpose in this eminently practical text, directed at professionals and practitioners.

Evans' starting point for an examination of the case-law is the often repeated passage from the Court's 1993 judgment in *Kokkinakis v Greece*⁸, the case concerning the conviction for unlawful proselytism of a member of the Jehovah's witnesses:

"As enshrined in Article 9 (art. 9), freedom 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

⁵ Application no. 26625/02

⁶ Other recent publications include manuals on hate speech and environmental issues.

⁷ Malcolm D. Evans *Religious Liberty and International Law in Europe* (Cambridge, Cambridge University Press: 2008)

⁸ Application no. 14307/88, judgment of 25 May 1993

most vital elements that go to make up the identity of believers and their 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 the centuries, depends on it.”

As Evans emphasises, this short passage acknowledges the significance of these freedoms to the individual, as well as how important it is that there is space for recognition of these freedoms if democracy is to flourish. Furthermore, a democratic society must be open and inclusive.

How, then, did the Grand Chamber arrive at its judgment in *Leyla Şahin*?

Evans explains (Manual, p. 106) that the Court accepted that such a restriction might legitimately be placed on students at University “if this were motivated by the desire to uphold the secular nature of the institution, a matter falling within the “margin of appreciation” of the state concerned. The key passage in the Court’s judgment was as follows (para 116):

“...it is the principle of secularism... which is the paramount consideration underlying the ban... In such a context, where the values of pluralism, respect for the rights of others, and in particular equality between 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.. and so consider it contrary to such values to allow religious attire.”

The dissenting judge in *Leyla Şahin* was the Belgian judge, Françoise Tulkens, who has been a Judge of the Court since 1998, and since 2007 has been President of a Section. Her Dissenting Opinion is substantial and closely argued, and, unlike the majority, draws on scholarly literature – many references to scholarship are to be found in Evans’ recent book, although of course not in the Manual under review. She agreed (para. 2) with the majority that the Court “must seek to reconcile universality and diversity, and that it is not its role to express an opinion on any religious model whatsoever.” She parted company with the majority, however, on the question of the margin of appreciation. While she agreed with the principles of ‘secularism’ and ‘equality’, she could not agree with the manner in which they were applied by the majority. She was especially concerned by the majority’s reference to *Dahlab v. Switzerland*⁹, a case concerning a primary school teacher, in which the court stressed the “powerful external symbol” which her wearing a headscarf represented, and questioned whether it might have some kind of proselytising effect, seeing that it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality.

One academic commentator, Anastasia Vakulenko, in a strong critique of the majority, remarks that in both *Dahlab* and *Şahin*, “the headscarf was attributed a highly abstract and essentialized meaning of a religious item extremely detrimental to gender equality.”¹⁰ In another powerful analysis, Jill Marshall points to the majority’s “disappointing view of equality”, which leaves

⁹ No. 42393/98, decision of 15 February 2001

¹⁰ Anastasia Vakulenko “ ‘Islamic Headscarves’ and the European Convention on Human Rights: An Intersectional Perspective” v.16 n.2 (2007) *Social and Legal Studies* pp.183-192, at 192

out substantive equality. How does preventing a woman from doing what she wishes lead to equality?¹¹

Judge Tulkens much preferred the approach of the German Constitutional Court in its judgment on 24 September 2003¹², that “wearing the headscarf has no single meaning: it is a practice that is engaged in for a variety of reasons, and does not necessarily symbolise the submission of women to men. Thus, for Judge Tulkens, the ban on wearing the headscarf on university premises was not based on reasons that were relevant and sufficient, and could not be considered “necessary in a democratic society” (para.13). She added:

“more fundamentally, by accepting the applicant’s exclusion from the university in the name of secularism and equality, the majority have accepted her exclusion from precisely the type of liberated environment in which the true meaning of those values can take shape and develop.”

Finally, she expressed concern about the climate of hostility, identified by the European Commission against Racism and Intolerance (ECRI) in 2005¹³, existing against persons who are or are believed to be Muslims. Her implication is that the majority’s opinion was influenced by that climate.

Evans does not note or discuss Judge Tulkens’ dissent, or indeed the approach of the German court, and he is not at all to be criticised for that. His purpose is, as accurately as possible, to summarise the law as it is; and it is indeed commendable that the Strasbourg Court has developed, on the basis of the minimalist language of Article 9, a sophisticated and wide-ranging jurisprudence. For the purpose of this review I have focused on the most controversial issues. The Manual is, within the limitations it has set itself, to be recommended without hesitation.

¹¹ Jill Marshall “Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate” v.30 (2008) pp.631-654, 649

¹² Federal Constitutional Court of Germany, judgment of the Second Division of 24 September 2003, 2BvR 1436/042.

¹³ European Commission against Racism and Intolerance, “Annual report on ECRI’s activities covering the period from 1 January to 31 December 2004”, doc. CRI (2005)36, Strasbourg, June 2005.