RELIGIOUS PLURALISM AND NATIONAL DIVERSITIES:
DILEMMAS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE

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Abstract

The essay analyses the relationship between religious pluralism and social cohesion in Europe through the lens of national and trans-national human rights jurisprudence. Comparing the German and the French regulation of the display of religious symbols in educational institutions, it argues that national models of social cohesion exhibit defensive attitudes towards religious diversity that conflict with the European Court of Human Rights (ECtHR) appraisal of religious pluralism. The ECtHR tackles this problem by avoiding it, emphasising its limited role in implementing a common minimum standard of freedom of religion as correlative to a wide national margin of appreciation. The essay concludes that the diversity of *national* approaches to social cohesion prevents the court from ensuring an effective *trans-national* protection of *religious* pluralism.

1. Introduction

Freedom of religion, in the words of the ECtHR, is 'one of the foundations of a democratic society'. From the perspective of the individual, it embodies 'one of the most vital elements that go to make up the identity of believers and their conceptions of life'; from the perspective of society as a whole, it avouches 'the pluralism indissociable from a democratic society, which has been dearly won over the centuries'.[1] The ECtHR's treatment of religious pluralism has a descriptive and a normative dimension: it acknowledges the fact that European societies have become increasingly religiously diverse; but it also portrays religious diversity as something valuable and precious: religious diversity lies at the heart of pluralism that, in turn, is intrinsically tied to democracy. However, the freedom to manifest one's beliefs, and therewith the extent to which religious diversity may manifest itself in a democratic society, is not unlimited but can be restricted in order to 'reconcile the interests of the various groups and ensure that everyone's beliefs are respected.[2]

I shall focus on one particular limitation of freedom of religion that is often justified on grounds of protecting 'public order' and 'the rights and freedoms of others' (Art. 9 II ECHR): social cohesion. In submit that, on the one hand, national interpretations of the 'social cohesion limitation' of freedom of religion exhibit common defensive attitudes towards religious diversity. On the other hand, because these defensive attitudes are entrenched in different national traditions, the ECtHR is disinclined to develop a robust trans-national vindication of religious pluralism.

2. Germany v. France: Two Competing National Models of Social Cohesion

The German 'headscarf controversy' was sparked by a school board decision rejecting the application of a Muslim teacher unwilling to refrain from wearing her headscarf in class. This decision was upheld by two lower administrative courts and the Federal Administrative Court.[3] The latter held that wearing a headscarf in public schools was not reconcilable with the principle of state neutrality that, given increasing religious diversity in Germany, had to be interpreted in a restrictive way. Moreover, because young children were not yet sufficiently educated in mutual respect and tolerance, a negative impact of Islam as 'symbolised' by the headscarf 'could not be excluded'.[4]

The German Federal Constitutional Court, distinguishing between the crucifix in classrooms as a symbol associated with the state[5] and the headscarf as an individual statement of the person concerned, held that the latter was in principle covered by the teacher's fundamental right to freedom of religion. Accordingly, it ruled that the headscarf could not be prohibited through an administrative decree but only by

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[1] *Kokkinakis v. Greece*, Application No 14307/88 (1993), para 31

[2] *Ibid*, para 33

[3] VG Stuttgart, 15 K 532/99; VGH Baden-Wuerttemberg, 4 S 1439/00; BVerwG, 2 C 21.01 (2002)

[4] BVerwG, above n 3 at 7, 8

[5] See BVerfG, 1 BvR 1087/91 of 16 May 1995 (Kruzifix)

means of a parliamentary statute.[6] The dissenting judges drew a different distinction. On the one hand, they considered the crucifix a (merely) cultural symbol that, while 'stemming from' and 'bound by' Judeo-Christian values, also stood also for 'openness' and 'tolerance'.[7] On the other hand, they stressed that such openness and tolerance could not extend to symbols as the headscarf that challenged dominant value standards and that were therefore prone to provoking conflicts.[8]

By now, many of the German *Länder* have enacted legislation banning the headscarf while still sanctioning nuns teaching in their traditional costume. The laws of Hesse and Baden-Württemberg, for instance, provide that teachers shall not demonstrate any religious convictions that would contravene the principle of state neutrality. Manifestations of Christianity, however, are taken to be compatible with this requirement because they reflect the *Länder* Christian traditions and fulfil the educational mandate conferred upon the state.[9] Similar laws have been passed in Lower Saxony, Saarland, and Bavaria. In two recent decisions, the *Verwaltungsgerichtshof* Baden-Württemberg and the Bavarian Constitutional Court confirmed that the preferential treatment of Christian symbols was compatible with the principle of state neutrality because a Muslim teacher could not credibly convey to her pupils the Christian values and traditions anchored in the *Länder* constitutions and the respective school laws.[10]

Thus, on the one hand, the state is required to protect children's freedom of religion which, by implication, justifies the ban of headscarves from school. On the other hand, the state is encouraged to promote Germany's majoritarian Christian culture and tradition so that it may justifiably discriminate between the Muslim headscarf and the Christian habit. While, as Gerstenberg says,

> a distinctive feature of the German approach is the emphasis of freedom of conscience as a principle, another feature of the German approach is the assumption that Christian culture occupies a privileged place in German public life and is, indeed, a postulate of German political identity and social cohesion.[11]

Accordingly, while not hostile towards religion *per se*, the German model of social cohesion portrays religious *diversity* as something unwelcome and disruptive that needs to be concealed, if not assimilated to the national majoritarian Christian tradition.

In France, social cohesion is interpreted in the light of the laic-republican tradition that elevates French republican identity and secular state neutrality over and above the recognition of religious diversity. The principle of *laïcité* that commits French public schools to a strictly secular education was challenged in 1989 when three

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[6] BVerfG, 2 BvR 1436/02 of 03 June 2003 (Kopftuch Ludin)
[7] *Ibid*, para 113
[8] *Ibid*, para 125
[9] § 86 (3) Hessisches Schulgesetz; § 38 (2) Schulgesetz Baden-Württemberg
[10] Verwaltungsgerichtshof Baden-Württemberg, 14 March 2007, 4 S 516/07; Bayerischer Verfassungsgerichtshof, 15 January 2007, Vf. 11-VII-05
[11] O. Gerstenberg, 'Freedom of Conscience in Public Schools' 3 *I.CON* (2005) 94 at 96

school girls insisted on wearing headscarves in class. After the headmaster had suspended the girls, the *Conseil d'État* gave a legal opinion holding that the display of religious symbols in public schools was not *per se* incompatible with the principle of *laïcité*, and could only be restricted in case it (among others) constituted an act of pressure or provocation, or perturbed the school order.[12] In the following years, the court reversed a number of school decisions suspending students who had refused to remove their headscarves.[13]

On occasion of the publication of the *Stasi Report* in December 2003,[14] Jacques Chirac called in a controversial speech for a national mobilization in defence of the republic's secular values. The Stasi Report, after asserting that the principle of *laïcité* required a complete neutrality of the state in religious matters, had recommended that educational institutions provide better instruction on the values of republicanism and secularism, and that 'ostentatious' religious symbols be banned from public schools to prevent 'identity conflicts' between pupils.[15] In the following year, the French parliament eventually passed a law prohibiting the wearing of all ostentatious signs manifesting a religious affiliation in public schools.[16] Whatever other concerns eventually motivated the ban, considerations of social cohesion played a significant role. As Gilbert Le Bris, member of the *Assemblée Nationale* explained using his '*bon sens paysan*': 'Islam has settled rather recently in our country. Its faith is absolutely respectable. But its adherents, as everybody else, have to adapt to our values and traditions, not the other way around.'[17]

Still, the French model of social cohesion may appear more accommodating of religious diversity than the German one. After all, limits on the exercise of religion in the public sphere are justified on the basis of secular state neutrality that, in turn, is meant to ensure the equal protection of religious freedom in the private sphere. However, such argument overlooks that *laïcité* proves less neutral, and consequently the republican assimilist project more pervasive, than they purport. *Laïcité* is a non-neutral principle in a twofold sense: most obviously, while it claims to treat different religions equally it cannot be neutral with regard to religious and secular doctrines as such. Yet insomuch as the rationale for *laïcité* is to secure a neutral and non-sectarian public sphere, it is seriously flawed once secular neutrality appears just another sectarian doctrine. But *laïcité* even fails on the weaker claim of neutrality between different religions. Put crudely, European Christians will find it much easier to accept the public-private divide with its privatization of religious faith than other religious communities simply because they contributed to its creation in the first place – hence today the awkward alliance against the headscarf between French left-wing secular Republicanism and right-wing Christian Catholicism.[18]

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[12] Conseil d'État, Avis No 346893, 27 November 1989

[13] See Conseil d'État, *Kherouaa, Kachour, Balo, Kizic*, No 130.394, 2 November 1992, but also *Aoukili*, No 159.981, 10 March 1995

[14] Available at http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf

[15] *Ibid*, at 13, 51, 56-8

[16] Loi no 2004-225 of 15 March 2004

[17] Journal Officiel de la République Française 2004 – No 17 [2] A.N. (C.R.) p. 1463

[18] N. Moruzzi, 'A Problem with Headscarves. Contemporary Complexities of Political and Social Identity' 4 *Political Theory* (1994) 653 at 664

It is crucial to understand how the two senses in which *laïcité* is non-neutral are connected: its 'indirect' Christian bias is reinforced through its 'direct' secular bias. As a consequence, the French model of social cohesion is not restricted to the 'secular' public sphere, but extends deep into the 'religious' private sphere.

3. Trans-national Human Rights Jurisprudence: Mediating the Tensions?

While both the German and the French model of social cohesion exhibit defensive attitudes towards religious diversity, they also appear irreconcilable *inter se* because they are deeply embedded in different national traditions. Put cynically, what became apparent in the controversy about including a reference to Christianity in the proposed European Constitution is that the greatest common denominator the European nation-states could consent to is to discriminate against their non-Christian populations.

This diversity of national interpretations of the 'social cohesion limitation' of freedom of religion poses considerable problems for an effective trans-national vindication of religious pluralism. The ECtHR pronounced several times on the display of religious symbols in educational institutions. What is remarkable, yet perhaps unsurprising, is the court's unwillingness to engage with the concrete submissions of the parties. As a consequence, the judgements suffer from undue deference to the views of national governments, and a want of evidence and balance in the court's proportionality test.

In *Şahin*, the ECtHR uncritically endorses the government's unsubstantiated submission that Muslim women wearing a headscarf are prone to force their views on others.[19] Cursorily observing that 'the impugned interference primarily pursued the legitimate aim of protecting the rights and freedoms of others and of protecting public order', the majority of judges flatly states that 'it is not open to the Court to apply the criterion of proportionality in a way that would make the notion of an institution's "internal rules" devoid of purpose'.[20] Similarly in *Dahlab*, the ECtHR's analysis of the symbolic significance and social impact of the headscarf is entirely detached from the concrete person and behaviour of the wearer. 'Weighing' the right of the teacher to manifest her religion against the need to protect pupils by 'preserving religious harmony', the judges conclude that it is 'difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others, and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils'.[21]

In *Dogru* and *Kervanci* the ECtHR recognises that 'the wearing of religious signs [is] not inherently incompatible with the principle of secularism in schools'.[22] However, this promise of a more case-sensitive approach is immediately mitigated by the court's statement that because 'the ban was limited to the physical education class,

[19] *Şahin v. Turkey*, 44774/98 (2005) para 115
[20] *Ibid*, para 99, 121
[21] *Dahlab v. Switzerland*, 42393/98 (2001) para 8
[22] *Dogru v France*, 27058/05 (2008); *Kervanci v. France*, Application no 31645/04 (2008) para 70

[it] cannot be regarded as a ban in the strict sense of the term'.[23] Accordingly, rather than scrutinising the proportionality of the ban in the light of the alleged health and safety concerns, the ECtHR contends itself with noting that it was 'not unreasonable'.[24] Having stressed that the headscarf controversy created a 'general atmosphere of tension' within the school, the court does not inquire the proper source of this tension but jumps to the conclusion that the 'principle of pluralism' provides a legitimate ground for suspending pupils.[25]

The ECtHR's supervisory role is limited to ensuring a common minimum standard of freedom of religion, leaving its member states free to provide higher levels of protection at the national level (Art. 60 ECHR). Where national models diverge on a contentious issue such as the headscarf, this minimum approach results in the court granting its member states a particularly wide margin of appreciation. The ECtHR's dictum in *Dogru* is representative in this regard:

> Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance. This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions, in respect of which the approaches in Europe are diverse. Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order.[26]

Such deference to *national diversity* undermines an effective trans-national protection of freedom of religion against the backdrop of majoritarian national traditions that continue to ensure 'respect' for everyone's belief through strategies of disaffirmation of *religious diversity* which range from (passive) disregard and discouragement to (active) assimilation and suppression. The ECtHR's use of the margin of appreciation doctrine waters down the high burden of 'necessity' of interference to be discharged by national governments. The uncritical endorsement of national social cohesion limitations of freedom of religion cuts across the court's professed commitment to religious pluralism. The majority in *Şahin* idly remarks that the 'State's role as the neutral and impartial organiser of the exercise of various religions' should not be discharged by way of removing 'the cause of tension by eliminating pluralism' but through ensuring that 'the competing groups tolerate each other'.[27] The ECtHR's actual headscarf jurisprudence speaks to different concerns.

[23] *Ibid*, para 74
[24] *Ibid*, para 73
[25] *Ibid*, para 67
[26] *Ibid*, para 63
[27] *Şahin*, above n 19 para 107

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