Routledge Handbook of Law and Religion

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Curbs and turbans

Publication details


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Published online on: 16 Mar 2015

How to cite:
Hana M. A. E. van Ooijen. 16 Mar 2015, Curbs and turbans from: Routledge Handbook of Law and Religion Routledge
Accessed on: 11 Oct 2023

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Introduction: an unorthodox religious item

A sieve is commonly used to pour off spaghetti. Not so for true Pastafarians who manifest their adherence to the Church of the Flying Spaghetti Monster by wearing a sieve on their heads. In 2011, an Austrian Pastafarian, Mr Alm, was exempted from the regulations for an identity photograph on his driver’s licence so that he could wear a sieve for confessional reasons on this photograph.¹ Satiric as it may be, this accomplishment sheds a ludic (some would say ludicrous) light on pertinent questions regarding religious symbols.² Such questions have defined the challenges posed in societies, within Europe and beyond,³ whenever claims to display religious symbols have been made, during (at least) the last decade. Considered the limited scope of this contribution, three of these questions are focused on.⁴

Firstly, the example of the sieve shows that religious symbols put to the test national arrangements of religion in public space. Apparently, in Austria, headgear was allowed on official photographs only when worn for confessional reasons. Alm framed his claim within the exemption in asserting that as a committed atheist, he wore his sieve for confessional reasons. This raises the question how the authorities are to test whether a claim should be brought within the exemption. More generally, it can be asked how national authorities should reconcile claims regarding religious symbols with their national arrangements of religion in public space.

Secondly, the rule in the Austrian regulations is probably that headgear on official photographs is not allowed. An exemption is made for those who wear headgear for confessional reasons. It is

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¹ BBC News Europe 2011. All websites were last accessed on 8 March 2014.
² See www.venganza.org for more information on this initiative. The ability of the community to conjure up questions about the intricate (and yet conflicting) relation between the freedom of religion and the freedom of speech was clear from a recent incident where posters of the community were banned. See ‘Free Speech Outcry as Images of the Flying Spaghetti Monster are Banned from London South Bank University for Offending Religious People’ 2014.
³ For instance, also in India, turbans were banned from a (Catholic) school due to dress regulations (United Sikhs 2013). In Africa, there have been rows around rasta at schools, e.g. Lameck 2013.
⁴ These questions build on the author’s doctoral study, and other publications, such as van Ooijen 2012a.
thus recognised that the wearers of religious headgear have a special interest in being able to wear their headgear. Accordingly, it is regulated in such a way that the possible interest of the state in not allowing headgear on official photographs gives way to the wearers’ interest. Claims involving religious symbols are oftentimes in conflict with other interests. As solving this conflict depends on how the different interests involved are defined and balanced, it can be asked how this should be done.

One of the subheadings in the news report on the Austrian Pastafarian reads ‘Straining credulity.’ Later on, it qualifies the sieve as an ‘unorthodox item of religious headgear.’ Indeed, it can hardly be believed that Alm walks around in daily life wearing his religious headgear. Then again, even if he would, it can be asked whether we would believe that he does so as an expression of a religion. It is here that the Pastafarians touch on a sensitive, yet crucial point in the issue of religious symbols. How to define a religious symbol in the first place? Is the symbol truly expressing adherence to the underlying religion or belief? Is there even an underlying religion or belief? Should these questions even matter?

The three questions addressed in the present contribution illustrate the richness of the debate on religious symbols. Although the discussion on religious symbols may seem of limited meaning, perhaps even trivial, it serves to lay bare fundamental questions. As stated, the present contribution focuses on highlighting the three questions and placing them in a wider context. In order to give an idea of how these questions can play out in practice, the contribution begins by discussing some international decisions. The inclusion of these cases serves as an illustration and subsequently as a point of reference to discuss the three questions. Therefore, after a brief factual description of the cases, the analysis of the cases discusses how the three questions figure in the cases and what we can learn from these cases regarding these questions. The following section first discusses two sets of cases, one concerning official documents and one concerning public schools.

**Turbans in lawsuits (international decisions)**

**Two sets of cases**

Contrary to Mr Alm, Mr Mann Singh did not receive his driver’s license when providing an identity photograph on which he wore his turban. In the end, he brought a claim before the European Court of Human Rights (‘the Court’) as well as to the Human Rights Committee (‘Committee’). Whereas the former institution rejected his claim, the latter found a violation of his right to religious freedom. Both of his cases are discussed in conjunction with another decision of the Committee. It was not the first time that the views of the Committee sharply contrasted with a decision of the Court on a similar issue. Already in 2012, the Committee had found a violation of Article 18 of the International Covenant on Civil and Political Rights (‘Covenant’) in the case of Bikramjit Singh who had been expelled from school for wearing a religious symbol. In 2009, the Court had declared similar applications to be inadmissible.

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5 Cf. van Ooijen (2012b: 2): ‘Specific as it may seem, the issue of religious symbols in public functions thus harbours some important wider questions. It is precisely this specificity which allows these wider questions to be examined in depth.’


The Bikramjit Singh case is discussed in conjunction with an earlier contrasting Court decision in the Jasvir Singh case.8

The decisions are suited for the present contribution in representing some of the most recent international cases regarding religious symbols. Furthermore, they clearly bring out the contrast between two international judicial institutions and thus demonstrate how different the issue of religious symbols can be approached. Finally, these decisions aptly illustrate the questions central to this contribution.

As to the first question of national arrangements, it should be noticed that the Contracting State in question, France, represents a clear approach towards religious symbols (Van Ooijen 2012b: 14–5): in the public space, symbols are excluded on the basis of constitutional principles. This clear exclusive approach is the reason that, within Europe, France is generally represented as one side of the spectrum.9 Especially in France, claims to wear religious symbols strain the national arrangements of religion in public space. Therefore, it is instructive to see how the French authorities deal with such claims. As to the question of interests, it is helpful to examine in the cases discussed how the different interests have been invoked in two contexts: official documents and public schools. As the interests of the state regarding these two contexts are different, the reasons that have been put forward as grounds of limitation, are different. The stakeholders also differ, which raises the question of how that affects the balancing of interests. As to the last question, regarding the religious symbol itself, the cases offer a chance to examine how the authorities dealt with questions on the religious significance of the turban. In the following section, the facts of the cases are briefly described.

**Turbans on official documents (Mann Singh, Ranjit Singh and Mann Singh II)**

This paragraph is devoted to three cases, yet involving two applicants: Mann Singh and Ranjit Singh. One of Mann Singh’s cases was ruled by the Court, the other two cases were dealt with by the Committee. As an observing Sikh, Mann Singh wore a turban. By misfortune, Mann Singh was robbed of his driver’s licence. A request in April 2004 for a duplicate driver’s licence was rejected because the identity photographs that Mann Singh provided showed him wearing a turban. Previously his turban on the identity photograph had not barred renewal of his former driver’s licences which had been issued from 1987 onwards.

In 2005, a circular was sent to prefects by the Minister of Transport, Public Works, Tourism and the Sea in which it was stipulated that identity photographs for e.g. driver’s licences had to show the individual bareheaded and facing forward. Mann Singh’s attempts to have the rejection of his request reversed were unsuccessful. The Court considered the matter to fall within the margin of appreciation of the state and in referring to its own case law decided in 2008 that the complaint was manifestly ill-founded.11

Ranjit Singh had encountered similar problems as Mann Singh in having his residence card renewed. The former had obtained refugee status in France since 1992. In 2002, he needed to

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8 ECHR, Jasvir Singh v. France (available in French only), Application no. 25463/08, 30 June 2009.
9 Cf. van Ooijen (2012b: 163): ‘In religion-related matters, France is seen as exemplifying an uncompromisingly exclusionary stance towards religion’, with reference to e.g. Temperman 2010.
11 Generally speaking, the line of case law is that the Contracting Parties are granted leeway to impose limitations on religious manifestations for purposes of necessary identification, unless manifestly unreasonable or disproportionate (see Buyse 2008).
renew his residence permit and to this end provided two photographs that showed him wearing a turban. While Ranjit Singh had posed no problems for his first application, this time he was informed that the photographs did not comply with the regulations that required individuals to appear full face and bareheaded. His request to be exempted from these requirements was rejected. Ranjit Singh’s attempts to challenge the authorities’ refusal to renew his residence card were unsuccessful. In contrast with Mann Singh, Ranjit Singh decided to lodge his complaint with the Committee instead of with the Court.

As noted above, the decision of the Committee contrasted with the one of the Court. Mid-2011, the Committee found a violation of Article 18 of the Covenant. Whereas the Court referred to the discretion of the French state to strike the balance of interests as it did, the Committee noted that the state party had not demonstrated that the limitation in question complied with the grounds of limitations in the Covenant.

Coincidentally, Mann Singh had lodged a complaint with the Committee as well. In principle, an applicant cannot have a complaint examined twice by different international human rights bodies. Mann Singh cleverly circumvented this mandatory ground for inadmissibility by complaining about a related but different problem, i.e. the refusal of the authorities to issue a passport. Apparently, shortly after the Court had dealt with his complaint regarding his driving licence, Mann Singh lodged his second complaint with the Committee.

Having been naturalised in 1989, Mann Singh did not come across any problems at that time in obtaining a passport. Requests for renewal of his passport had neither been refused before. For all clarity, Mann Singh had been wearing his turban all the time (also on the identity photographs) in these years as well. In the year after he had experienced the previously described problems with obtaining a driver’s license, Mann Singh was refused renewal of his passport.

The Committee pursued the line of reasoning it had applied in the case of Ranjit Singh. Instead of merely establishing that it was within the discretion of the state to determine that limitations have been rightly imposed to ensure safety and public order, the Committee questioned why the turban would compromise these aims. As it did in the case of Ranjit Singh, it focused specifically on the question of how a turban which only covered the top of the head and part of the forehead, could impede proper identification of the wearer. The Committee concluded that a violation of Article 18 of the Covenant had occurred. Remarkably, the conclusion of the Committee pertains not only to the specific refusal, but to the regulation which is at the basis of the refusal.

Turbans at public schools (Jasvir Singh and Bikramjit Singh)

In France, 2004 marked the entry into force of an Act (‘2004 Act’) which stirred public debate and became the emblem of France’s reputation as a hardliner towards religious symbols. The 2004 Act was often referred to as the ‘headscarf ban’, although it prohibited pupils wearing symbols

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12 See the Optional Protocol to the International Covenant on Civil and Political Rights, Article 2:
‘The Committee shall not consider any communication from an individual unless it has ascertained that:
(a) The same matter is not being examined under another procedure of international investigation or settlement.’

13 The difference between the approach of the Court and the Committee is thus remarkable and raises questions on the compatibility of their respective case law and on whose ‘plate’ topical questions will end up, see e.g. Ouald Chaib 2013.
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which ‘conspicuously manifested their religious adherence’. Accordingly, not only headscarves were banned, but turbans, big crosses, and yarmulkes as well. Before 2004, there had already been cases involving religious symbols, some of which made their way to the Court as well. Not unexpectedly, the judicial challenges continued after 2004. Some of these challenges reached the Court in 2008 and were dealt with by the Court in brief admissibility decisions. The Jasvir Singh case was one of those cases.

As a 14-year-old pupil, Jasvir Singh reported to school with a mini-turban, a keski, in September 2004. This was the first school year in which the religious symbols ban was in place. Accordingly, J. Singh was asked to remove his keski and when not doing so, he was refused access to the classroom. Subsequent meetings to find a solution were unsuccessful and disciplinary proceedings followed suit, which resulted in the pupil’s definite expulsion. As in the other inadmissibility decisions, the Court referred to the wide margin of appreciation and ruled that the ban fell within this margin. Accordingly, J. Singh’s expulsion was deemed to be in accordance with the grounds of limitations laid down in the Convention.

Long before the Court decisions, Bikramjit Singh lodged his complaint with the Committee, only one day after Mann Singh and Ranjit Singh had done so. The facts of B. Singh’s case were similar to those in the case of J. Singh. B. Singh was also a pupil who was refused access to the school in 2004. In the years before, he had been able to wear the keski, but as a direct result of the 2004 Act, he was no longer admitted to the school. As a temporary compromise, B. Singh could pursue his education separately in the school canteen, but shortly after, disciplinary proceedings followed, as a result of which B. Singh was expelled.

As in its other decisions, the Committee did not shy away from critically examining the state’s legislation and application thereof. In line with its other decisions, the Committee ruled that the Contracting Party had not shown why B. Singh would pose a threat to the rights and freedoms of others or to the public order at school by wearing his keski. Thus establishing that the measure of expulsion was disproportionate, the Committee concluded that a violation of Article 18 of the Covenant had taken place.

In the next sections, the cases serve as a peg to hang on the previously discussed questions. Firstly, it is examined in which way the questions figured in the cases. Additionally, the questions are placed within a wider context leading to more insight in what we can learn from the cases in which the questions have emerged.

14 ‘Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit.’
16 E.g. ECtHR, Dogru v. France, Application no. 27058/05, 4 December 2008 in which the dispute went back to 1999.
17 The Court simultaneously issued inadmissibility decisions in six cases, see e.g. Press release issued by the Registrar, The Court gives several decisions on conspicuous religious symbols, 17 July 2009.
18 Among the six decisions, there was another case involving a turban, i.e. Ranjit Singh v. France (27561/08). Considering the similarity to the facts in the Jasvir Singh case, this case is not included in the analysis in this contribution.
19 Perhaps counsel Mr Stephen Grosz had drawn his conclusions after having represented Mr Mann Singh before the Court and decided to go to the Committee. In general, the difference of the two institutions will probably be a factor for those seeking judicial decisions. See Cranmer 2013.
Turbans in context (first question)

In a country where the national arrangements of religion in public space envisage exclusion, claims to wear religious symbols obviously put pressure on these arrangements. It also appears that France is little inclined to accommodate such claims. With the help of the cases, it is explained that the French approach rests on abstract and simple reasoning which defines the depth and detail of the debate. It should be noted that the French reasoning is intertwined with how the public domain is perceived.

Abstract reasoning

The debate on the French public schools exemplifies the perception of the public domain and the central role of the constitutional principle of *laïcité*. The way in which France handles the public–private divide and applies *laïcité* to the public space is determinant for the level on which the debate takes place, which is paradoxical in being both more profound and yet more superficial. It is more profound because the ground of limitation is a principle deeply embedded in the French constitution and the French conception of the state. At the same time, it is this very principle that bars a meaningful discussion on the specific circumstances. In the *Jasvir Singh* decision, reference is made to the Ministerial Circular of 2005 which includes the following stipulations:

La loi du 15 mars 2004 est prise en application du principe constitutionnel de laïcité qui est un des fondements de l’école publique. Ce principe, fruit d’une longue histoire, repose sur le respect de la liberté de conscience et sur l’affirmation de valeurs communes qui fondent l’unité nationale par-delà les appartenances particulières. (emphasis added)

The wording of the Circular illustrates that *laïcité*, its significance, and its scope are no minor matter.\(^{20}\) The very rationale of *laïcité* in the French conception is to safeguard religious freedom and common values.\(^ {21}\) By excluding religious symbols, schools can assure that everyone enjoys religious freedom and is protected from discrimination.

En préservant les écoles … qui ont vocation à accueillir tous les enfants, qu’ils soient croyants ou non croyants et quelles que soient leurs convictions religieuses ou philosophiques, des pressions qui peuvent résulter des manifestations ostensibles des appartenances religieuses, la loi garantit la liberté de conscience de chacun … Parce qu’elle repose sur le respect des personnes et de leurs convictions, la laïcité ne se conçoit pas sans une lutte déterminée contre toutes les formes de discrimination …

It can be derived from this citation that the fear of (improper) proselytism played a role in the 2004 Act. Indeed, the records of the Stasi Commission which had been especially put in place to conduct investigations on the issue of religious symbols at public schools, signalled an increasing number of incidents at schools where claims to wear religious symbols led to pressure on other

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\(^{20}\) Cf. van Ooijen (2012b: 178): ‘*laïcité* has remained the corner stone of French society.’

\(^{21}\) van Ooijen (2012b: 177): ‘guaranteeing freedom of conscience is often considered to constitute the very rationale of the principle of *laïcité*.’
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pupils and social unrest.\textsuperscript{22} The argument of protecting pupils against improper proselytism has thus been one of the driving forces in applying the principle of laïcité to pupils. Traditionally, laïcité exclusively applied to the so-called agents of the public services, whereas pupils would rather qualify as ‘users’\textsuperscript{23} of the public services. The 2004 Act thus – arguably – marked a rupture with the already strict French policy in extending the scope of application of laïcité.\textsuperscript{24}

It can be said that the French approach is principle-based and informed by the institutional public–private divide; accordingly, justifications for limitations emanating from that policy remain on an abstract level. As can be derived from the citation above, laïcité is considered to inherently protect religious freedom. In excluding religious symbols, the policy based on laïcité is seen as protecting religious freedom. There is little to no room to putting this assumption to the test of reality, i.e. whether the ban actually does further the religious freedom of pupils. It can also be wondered whether there is room in practice to bring it up for discussion in specific cases. The Circular implementing the 2004 Act provides for the possibility of dialogue once a conflict involving religious symbols arises.

Lorsqu’un élève inscrit dans l’établissement se présente avec un signe ou une tenue susceptible de tomber sous le coup de l’interdiction, il importe d’engager immédiatement le dialogue avec lui . . .

The subsequent phrase, however, suggests that the dialogue does not necessarily imply mutual communication.

Le dialogue doit permettre d’expliquer à l’élève et à ses parents que le respect de la loi n’est pas un renoncement à leurs convictions.

It cannot be derived from the facts of the Jasvir Singh or Bikramjit Singh cases whether there was room in the dialogue to discuss possible solutions. The Committee was sceptical about this:

The Committee is not convinced . . . that the dialogue between the school authorities and the author truly took into consideration his particular interests and circumstances.

Regardless of what was discussed exactly during the dialogue, it is clear that it led to no avail in the Jasvir Singh case. Moreover, it can be questioned whether the school would have allowed for pragmatic solutions. The facts reveal that after the dialogue Mr Jasvir Singh wore a hat (couvre-chef) which can hardly be considered to be a conspicuous religious symbol. That being so, Mr Jasvir Singh was still expelled from school. The facts seem to reveal that the school did not verify whether the wearing of the hat or keski in this particular case led to pressure on others or to social unrest. The framing of the 2004 Act no longer required such verification. Because the very rationale of the 2004 Act was that exclusion of religious symbols served to protect the pupils’ religious freedom, it was not necessary for the school to deliver evidence that the ban effectively attained that objective.


\textsuperscript{23} Which is a rather inadequate translation of the French ‘usager’.

\textsuperscript{24} The conception of the public–private divide and the application of laïcité continues to be contested. Laws to ban religious symbols in private nurseries are in the making, see Lentze 2013; Devers 2013.
How such evidence could be delivered can be derived from an English case, where observations were carried out to gauge the actual effect of the wearing of a religious symbol. This case concerned the wearing of a face veil by a teaching assistant, where assumptions on the effect on pupils seem more evident than the assumption that the turban would have an effect on other pupils. Even so, the authorities took the effort to objectify this assumption with evidence:

Mrs Maher observed two lessons... She commented on the difference between this and the other lesson less than two hours later [with the veil]. Mrs Maher found that the Appellant was much quieter and did not talk as much. Furthermore, the children did not engage with her to the same extent as they had done in the earlier lesson. She noted that the children did not react to the Appellant's verbal praise since they were not able to obtain visual clues from her facial expression.

Because an important reason to ban religious symbols is social unrest, it is conceivable that in a particular case the court wants to verify whether this effect is indeed taking place. However, because of the abstract and general nature of the 2004 Act, such verification is basically rendered redundant. In the Jasvir Singh case, the Court deemed that France's abstract approach fell within its margin of appreciation.

The Committee was more intrusive in the Bikramjit Singh case, and questioned the very assumption of the French policy by dryly establishing that:

[T]he Committee is of the view that the State party has not furnished compelling evidence that by wearing his keski the author would have posed a threat to the rights and freedoms of other pupils or to order at the school.

While the Court accepted laïcité as a satisfactory explanation for the pupil's expulsion, the Committee considered that despite the constitutionality of the principle, evidence in the particular case was still required to establish that the expulsion was proportional.

Formal reasoning

Apart from the abstract, principle-based nature of the French policy, its formal approach bars more detailed reasoning. From all cases, it becomes clear that France prefers a clear, general policy where equality for all means formal equality: one kind of approach for all, regardless of individual differences. In the Mann Singh case before the Committee, one of the submissions of the state as to the merits demonstrates this clearly:

By applying a simple rule setting out this obligation, the regulations allow the administrative authorities to avoid having to engage in troublesome assessments of whether one or another type of head covering, offering more or less facial coverage, allows for reliable identification

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of the person in question. It thus ensures public safety and order, and also the equality of all citizens before the law.26

This citation reveals a two-pronged justification: a pragmatic one and a principled one. As to the pragmatic one, the rule avoids that the state needs to carry out ‘troublesome’ individual assessments. The rule is simply always the same and thus requires little attention when being applied. The same care for simplicity and unburdening the administration speaks from the Bikramjit Singh judgment:

In this regard, the Committee notes the State party’s assertion that the broad extension of the category of persons forbidden to comply with their religious duties simplifies the administration of the restrictive policy.27

The principled justification is that the application of the same rule to all individuals guarantees equality of all citizens. However, this idea ignores that applying the same rule to all might not ensure equality of all citizens. It ignores that possibly differentiation between a hat worn for fashionable reasons and a hat worn for religious reasons is needed. As a consequence, it ignores that the rule might mean a larger infringement on one person’s freedoms than on another person’s freedoms. No less than the principle-based aspect of the policy, the formality of the approach stands in the way of concrete assessment. Indeed, the Committee notes:

Moreover, the State party imposed this harmful sanction on the author, not because his personal conduct created any concrete risk, but solely because of his inclusion in a broad category of persons defined by their religious conduct.28

In the same vein, the debate regarding the identity photograph does not manage to go beyond a certain level, as the mere argument of public order and safety impedes a more profound debate. The requirement of the bareheaded identity photograph was considered to ensure public safety and the protection of public order. In this way, the authorities could verify at identity checks that drivers were actually entitled to drive the vehicle in question. Proper identification was all the more important to prevent fraud of falsification of the document.

[A] bareheaded identity photograph was required on the driver’s licence for the authorities in charge of ensuring public safety and the protection of public order, in particular for identity checks carried out to identify drivers and ensure that they were entitled to drive the vehicle in question . . . the impugned regulation had been tightened up because of the increased risk of fraud or falsification of driver’s licences.29

In this case, it can be observed that the state had considered the impact on the applicant’s religious freedom in concrete. To this end, the state had considered that the requirement to appear bareheaded on the photograph was only incidental. Striking the balance, the state was

26 CCPR, Mann Singh, para. 6.6.
27 CCPR, Bikramjit Singh, para. 8.7.
28 Ibidem.
29 CCPR, Mann Singh, para. 6.4.
of the opinion that the ‘nuisance’ for the applicant does not weigh up against the general interest of combating passport falsification. The state had considered:

People who consider themselves duty-bound to wear turbans are not obliged definitively or even repeatedly to refrain from doing so, but to do so just once, for the short time required to take a photograph.\(^{30}\)

The Committee reverted to the starting point by questioning whether a turban actually prevented the wearer being properly identified. Like in the school cases, the Committee questioned this assumption of the state.

The Committee observes, however, that the State party has not explained why the wearing of a Sikh turban covering the top of the head and a portion of the forehead, but leaving the rest of the face clearly visible, would make it more difficult to identify the author, who wears his turban at all times, than if he were to appear bareheaded.\(^{31}\)

Moreover, the Committee pointed out an interesting inconsistency in the state’s reasoning. The identity photograph regulations are aimed at safeguarding identification. How could a Sikh be properly identified when there would always be a discrepancy between how he is portrayed on the photograph – without a turban – and how he goes around in real life – with a turban?

Nor has the State party explained in specific terms how bareheaded identity photographs of people who always appear in public with their heads covered help to facilitate their identification in everyday life and to avert the risk of fraud or falsification of passports.\(^{32}\)

Anticipating on what this rule could lead to, the Committee pointed out that it may well occur that precisely the discrepancy between the identity photograph and real life would result in the applicant being compelled to remove his turban at every check.\(^{33}\) This possibility thus impacts on the proportionality of the measure.

Colliding interests (second question)

A key question regarding bans on religious symbols is how the various interests involved should be assessed and consequently balanced. On the one hand, there is the individual interest of the wearer. In none of the cases, it is disputed that the turban is worn for religious reasons. It can be seen, though, that the weight of the wearer’s interests is assessed differently. In the *Jasvir Singh* case, the Court denoted the applicant’s interest in manifesting his religion by wearing his turban as a general reiteration of the significance of the turban:

La Cour rappelle avoir déjà jugé que le port du turban par les hommes de confession sikhe pouvait être considéré comme «un acte motivé ou inspiré par une religion ou une

\(^{30}\) Ibidem, para. 6.7.
\(^{31}\) Ibidem, para. 9.4.
\(^{32}\) Ibidem.
\(^{33}\) Ibidem, para. 9.5.
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conviction religieuse», la religion sikhe imposant en effet à ces derniers le port du turban en toutes circonstances.\textsuperscript{34}

This is no more than a statement that the Sikh religion imposes the requirement to wear the turban. The Committee reiterates in the \textit{Bikramjit Singh} case how the applicant experiences the significance of the turban which sounds slightly more compelling:

[F]or Sikhs males, wearing a keski or turban is not simply a religious symbol, but an essential component of their identity and a mandatory religious precept.\textsuperscript{35}

On the other hand, there is a variety of interests on the side of the state to impose limitations on the wearing of the turban. In the cases discussed, these interests are public order and safety, and the rights and freedoms of others. In the previous sections, it was already discussed how a particular approach can involve a more or less thorough assessment of the interests. In the present section, the role of the interests in the balancing exercise is further elaborated on.

\textit{Balancing exercise}

In the school cases, it is the state’s contention that banning religious symbols safeguards the rights and freedoms of others. This contention is part of the wider assertion that the mere visibility of religious symbols within the school environment is capable of exerting inadmissible influence on other pupils. Furthermore, such influence is taken to provoke social unrest and pose a danger to pluralism:

[I]l incombait aux autorités nationales, dans le cadre de la marge d’appréciation dont elles jouissent, de veiller avec une grande vigilance à ce que, dans le respect du pluralisme et de la liberté d’autrui, la manifestation par les élèves de leurs croyances religieuses à l’intérieur des établissements scolaires ne se transforme pas en un acte ostentatoire, qui constituerait une source de pression et d’exclusion.\textsuperscript{36}

Incidents had occurred at French schools. However, once the 2004 Act had entered into force, the actual occurrence of improper proselytism or social unrest had become of little importance to arising conflicts. As previously stated, the Act in itself rendered unnecessary any thorough assessment of the interests involved, as it was the very premise of the Act that religious symbols infringed on the rights and freedoms of others. It can indeed be observed in the \textit{Jasvir Singh} and \textit{Bikramjit Singh} cases that the authorities no longer seemed to really look into whether the rights and freedoms of others were actually infringed on. Furthermore, in preventing a more concrete assessment, the Act did not require an examination of the particular school environment, e.g. the composition of the school population as to religious plurality, the age of the pupils or the general room at school for religious manifestations.

It could be imagined that assessing the relation between those wearing religious symbols and those whose rights and freedoms are possibly infringed on is relevant for establishing such an infringement in the first place. A comparison with teachers wearing religious symbols puts this

\textsuperscript{34} ECtHR, \textit{Jasvir Singh}, p. 6.
\textsuperscript{35} CCPR, \textit{Bikramjit Singh}, para. 8.7.
\textsuperscript{36} ECtHR, \textit{Jasvir Singh}, p. 7.
statement in perspective. One of the arguments against teachers wearing religious symbols is that as a figure of authority, teachers pose a significant example for their pupils. Accordingly, when teachers would wear a religious symbol, this could convey an influential message to their pupils. Reference can be made here to other Court cases where such factors were explicitly weighed in the balance. See, for instance, the Dahlab decision where the relatively young age of the pupils was included in the conclusion in that these pupils were impressionable by religious symbols:

The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant’s pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils.\(^{37}\)

Also here, it is really only an assumption that pupils of young age are especially vulnerable to religious influences, but at least, this particular factor is made explicit. When applying this argument \textit{a contrario} to pupils among themselves, it can be questioned whether the influence of pupils on each other is really such that it is capable of constituting improper proselytism. Still, even if it would, the necessity and proportionality of a general ban can still be questioned.

The Lautsi case is another example where other factors were included in the balance struck between the right to religious freedom and the interest of the state. The question whether a crucifix on the school wall infringed on pupils’ religious freedom was answered by engaging other factors such as the school curriculum and the variety of religious events celebrated at the school:

74. Moreover, the effects of the greater visibility which the presence of the crucifix gives to Christianity in schools needs to be further placed in perspective by consideration of the following points. Firstly, the presence of crucifixes is not associated with compulsory teaching about Christianity … Secondly, according to the indications provided by the Government, Italy opens up the school environment in parallel to other religions. The Government indicated in this connection that it was not forbidden for pupils to wear Islamic headscarves or other symbols or apparel having a religious connotation; alternative arrangements were possible to help schooling fit in with non-majority religious practices; the beginning and end of Ramadan were ‘often celebrated’ in schools; and optional religious education could be organised in schools for ‘all recognised religious creeds’ … Moreover, there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions.\(^{38}\)

The heart of the matter is that including relevant circumstantial factors in the balance allows for a more specific balancing exercise which rests less on general notions. If it is considered that the wearer of religious symbols infringes on the rights of others, while acting in contact with them, it is justified to ask what the nature, the frequency and the purpose is of that contact. It is these specifications of the contacts which determine whether a religious symbol can be rightly considered as infringing on others’ rights. Put differently, such specifications allow for ‘objectifying’

\(^{37}\) Dahlab, p. 13.
\(^{38}\) EctHR, \textit{Lautsi v. Italy}, Application no. 30814/06, 18 March 2011.
such assumed infringement. Moreover, they are instrumental in assessing the proportionality of an interference with a person’s religious freedom.

In the official documents cases, the state contended that the religious symbols in question were not in keeping with the regulations on identification. The state advanced that the rule that people appear bareheaded on the identity photograph safeguarded public safety. The logic was that only in that way could people be properly identified, which then also prevented falsification and fraud. It was already shown how the Committee removed the basis of that logic by questioning how a head covering could stand in the way of identification. Moreover, by extrapolating the consequences of the ban, the Committee showed clearly that the regulations were not subsidiary and proportional to their purpose.

Indeed, the interests for an individual to wear his religious symbol may be so entwined with other interests that testing the proportionality of bans should have regard for these other interests as well. Non-compliance may have extensive consequences for the wearer, such as expulsion or dismissal of the wearer who is thus denied access to education or work. In the identity photograph cases, Ranjit Singh’s non-compliance with the identity photograph regulation not only caused him to lose legal residence, but also access to the free public healthcare system, and social benefits.

Simply maintaining that the wearer can take off his religious symbol in order to prevent this from happening runs the risk of unjustifiably ignoring relevant factors, although it has been standing case law of the Court to apply such reasoning. The main consideration in this ‘particular regime–case law’ was indeed that ultimately, religious freedom was safeguarded by the liberty to leave a regime, by resignation or otherwise. The point of departure was that when someone voluntarily chose to be part of a particular school or work environment, that person implicitly complied with the inherent limitation of that regime. See, for example, the very early case *Senay Karaduman* before the European Commission on Human Rights:

In choosing to pursue his studies at a secular university, a student submits himself to the university regulations. It would be sensible to see the argument that someone chose to be part of a particular regime in connection with the question whether an applicant actually had a choice, or put otherwise, to what extent an applicant actually had an alternative available:

The applicant further maintained that, contrary to the Government’s submissions, she had no choice but to teach within the State school system. In practice, State schools had a virtual monopoly on infant classes . . . accordingly, they were not accessible to her. Unfortunately, this argument of Dahlab on this point was ignored.

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39 See also Ouald Chaib 2012, in which she states: ‘However, the Court very often does not ask the right necessity questions in these kind of cases.’

40 Also labelled as the ‘specific situation rule’, especially by British authors, Hill 2013: 197; Pearson 2013: 591.


42 *Dahlab*, p. 10.
Religious symbolism (third question)

The example at the outset of this chapter regarding the sieve as a religious item brings up a delicate subject, i.e. the nature of the symbol itself. Because of its ‘unorthodox’ nature, the item was sceptically scrutinised for its religious character. Pastafarians in any case manage to rethink what makes a symbol a religious symbol. There is a wide variety of possible religious symbols, in divergent religions and beliefs, worn in different manners, in different times and for different reasons. The Muslim headscarf, the hijab, has been at the forefront of legal debate, just as the Muslim face veil, the niqab. Already for that reason, the cases discussed in the present chapter are interesting for including a symbol which has incited just a little less controversy.

Untraditional symbol

Interestingly, the turban is a symbol of one of the world religions, just like the headscarf. Furthermore, the turban could – arguably – be said to be part of a religion that is not considered as traditionally belonging to (in this case) France’s legacy. The fact that the turban has not been part of this legacy for so long yet may play into the strain which it puts on the French arrangements of religion in public space. It can be observed that the 2004 Act was the result of a gradual development of the sentiment that non-established religions were claiming an inappropriate amount of space. While the headscarf was prominently referred to, turbans were put on a par with headscarves, in being considered ‘conspicuous religious symbols’.

What is remarkable of the official document cases is that the turban apparently did not pose any problems in many years before. As described in the facts of the cases, both Mann Singh and Ranjit Singh had no problems in obtaining official documents which portrayed them wearing turbans. The government brushed away this fact by stating that ‘such previous tolerance’ does not detract from the possibility of imposing these regulations anyhow. Evidently, the developments around the 2004 Act played a role here as well.

A difficult question is how to define a symbol as religious or whether such definition is even necessary, feasible or desirable. Interestingly, the 2004 Act literally speaks of ‘symbols which ostensibly manifest religion’. This description has resulted in a distinction between ‘conspicuous’ and ‘discrete’ religious symbols. The school cases demonstrate that this distinction is not self-explanatory. On the face of it, and also on the basis of the Ministerial Circular, one would think that the distinction refers to the size of the symbol and not to the character of the symbol. However, the fact that the pupils in the cases discussed wore a modest version of the turban, and even a hat, throws doubts on this thought. The government reasoned that despite the lack of an inherent religious character, the hat was obviously worn for religious reasons. This reasoning suggests attributing a religious character to seemingly common garb which smacks of theological interpretation.

Interpreting symbols

In principle, (judicial) authorities should be wary in stipulating interpretations of religion and religious symbols. It has been formulated clearly by the Court itself in the Kosteski case:

43 Although in England, it has been central to some seminal cases, such as Mandla and another v. Dowell Lee and another [UKHL 7, 1982].
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Through the years, the Court has developed general principles for dealing with definitions. Reference can be made here to the criteria for a religion or belief in the case of Cosans and Campbell. Furthermore, the Arrowsmith case has been crucial for articulating the ‘necessary link’ between a religion or belief and a manifestation. This line of case law confirms that the Court has been reluctant in providing substantial definitions of key concepts. In a way, the ‘particular regime-approach’ can be seen as circumventing definitional questions as well.

In the previously mentioned Dahlab case, though, the controversial statements on the significance of the headscarf (repeated in the later Sahin case) seemed to break with the Court’s usual deference. In more recent cases, the Court seems to have reverted to this deference. In the cases of Lautsi and Eweida, both involving Christian symbols, the Court was not lured into making theological assessments of the religious significance. In Lautsi, the Court did not follow the state’s elaborate exposé on the significance of the crucifix, and briefly accepted the religious significance. In Eweida, the Court reaffirmed that state neutrality precludes the state from ‘assessing the legitimacy of religious beliefs or the way those beliefs are expressed’ (see also Hill 2013: 194). Furthermore, an echo of the Arrowsmith criterion can be seen in the Court’s statement that there needs to be ‘a sufficiently close and direct nexus between the act and the underlying belief’.

As to the cases discussed, the focus of the judicial assessment, of the Court as well as of the Committee, was not on whether the turbans could be qualified as religious symbols. Rather, after accepting that they are religious symbols, the judicial reasoning relied on the balancing test. That said, the school cases do reveal that the domestic authorities struggled with applying the definition of discrete symbol.

Conclusion: future (tur)bans

What can seem like a piece of cloth to one person, is the carrier of faith for another. Where a sieve is seen as kitchen tool to some, it is employed as a tool to make a point by others. While the issue of religious symbols seems to be in relatively calm waters for now, it will certainly remain reason for battles to come. The present contribution has singled out some questions which can be expected to be of relevance in these battles, and illustrated those questions with case examples.

One of the things which (implicitly) came to the fore was the challenge for states to regulate religion in public space to begin with. Because religious freedom has been acknowledged as a fundamental right, it occupies a special position regarding, for instance, the grounds for exemption of rules. Inevitably, this acknowledgement creates tension while at the same time religious

44 ECtHR, Kosteski v. ‘The Former Yugoslav Republic of Macedonia’ Application no. 55170/00, 13 April 2006, para. 39.
45 Thus far, the ECHR case law included quite a number of cases on head coverings (i.e. the headscarf or items allegedly replacing the headscarf, cf. the multiple cases against France in 2008, e.g. Gamaleddyn) and turbans (e.g. Shingara Mann Singh v. France, also in 2008). In 2011, the previously mentioned Lautsi affair added a case involving a crucifix on the wall of a public school, see van Ooijen 2013.
46 Despite the government’s contentious on the character of the crucifix, Lautsi, para. 66. In Eweida, they accepted that the crosses worn by the applicants qualify as religious symbols under Article 9, para. 89.
47 Eweida, para. 82.
freedom encompasses such a wide range of convictions that it can be questioned whether this tension is valid. That said, it does not go without saying that the wide range of convictions are treated similarly, even leaving open the question of what can be considered similar. While the French idea of equality presents a rather straightforward conception of equality, it can be questioned whether the result can be necessarily considered equality. In England, a substantive idea equality holds sway, but sentiments of inequality as well.\textsuperscript{48} In any case, regardless of arrangements of religion in public space, claims involving religious symbols do not always fit into these arrangements.\textsuperscript{49}

It was shown how important proportionality of limitations on religious symbols for assessing (or imposing, for that matter) these limitations are. Proportionality is key to striking the proper balance between the various interests involved, and to attuning a balancing test to specific situations. The entire wording of the limitation clauses in the legal provisions of religious freedom has already included the proportionality test. The actual application of proportionality, however, has not always been employed optimally.\textsuperscript{50} The \textit{Eweida} case signalled a shift back of the Court to attributing more weight to the proportionality test.\textsuperscript{51} This trend has been confirmed in other contexts of recent cases such as \textit{Vartic v. Romania} in which the religious dietary requirements of a detainee were at issue.\textsuperscript{52}

The renewed emphasis on proportionality is to be welcomed as it allows for sound reasoning which after all is the foundation of the legal point of view on specific problems. Furthermore, focus on the balancing of interests can avoid unnecessary complications on questions concerning religion and religious symbols. Moreover, it allows for pragmatic solutions which avoid dogmatic reasoning. That must surely reassure Pastafarians.

\[\text{Author's note: Hana van Ooijen has conducted her doctoral research at the Netherlands Institute of Human Rights (Utrecht University). Her dissertation 'Religious Symbols in Public Functions: Unveiling State Neutrality' was published in 2012 by Intersentia. The present contribution partly draws on the author's doctoral research.}\]

\[\text{Bibliography}\]


\textsuperscript{48} E.g. in the \textit{Eweida} case, the applicant had pointed out that headscarves and Sikh bracelets, \textit{karas}, were accommodated whereas crosses were not.

\textsuperscript{49} A point which has not been elaborated is the difference in approaching the issue of religious symbols from the perspective of religious freedom or (also) from the perspective of non-discrimination. In England, these different approaches have led to different results, e.g. van Ooijen 2012a.

\textsuperscript{50} In the ECHR case law, the margin of appreciation has reduced the application of the proportionality test. The Court offered the following consideration in para. 121 of the \textit{Sahin} case: ‘Besides, having found that the regulations pursued a legitimate aim, 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.’

\textsuperscript{51} Cf. Hill (2013: 199): ‘the juridical battleground will be firmly sited within Article 9 (2).’

\textsuperscript{52} ECtHR, \textit{Vartic v. Romania}, (no. 2), Application no. 14150/08, 17 December 2013. Sāïla Ouald Chaib (2014) does place critical comments to this judgment regarding the application of a ‘significant disadvantage’, a criterion which was also at play in \textit{Eweida}. These comments seem to be validated by the judgment of the Court in the case of the \textit{Church of Jesus Christ of Latter-Day Saints v. the United Kingdom}, Application no. 7552/09, 4 March 2014, where the Court deemed the refusal of tax exemption within the state’s margin of appreciation \textit{inter alia} because of the lack of a significant disadvantage.
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