

“Human Rights in an Age of Ambiguity

“Living Together”, Apart: The Growing Divide Between the European Court of Human Rights and the UN Committee on Human Rights in relation to the Right to Freedom of Religion.’

Abstract

This paper argues that ‘Orientalist’ discourses in rights adjudication under the European Court of Human Rights has led to a series of restrictive cases on the right to religion. While a recent case, *SAS v France* (2014), claimed that a restrictive approach to freedom of religion was necessary in the interests of “living together”: we have to ask what is the global impact of such an approach? This paper suggests that the growing divergence between rights adjudication from the European Court of Human rights and UN bodies on the right to religion is a worrying trend which undermines universalism and threatens the mutually supportive role of regional and international human rights institutions, calling the very nature of human rights into question.

1. Introduction

The European Convention on Human Rights and Fundamental Freedoms developed in the post-World War II period as a response to the atrocities in wartime and pre-war Europe. Significant of course amongst these atrocities was the persecution of the 6 million Jewish people murdered and the Jewish people forcibly imprisoned across Europe because of their religion and ethnicity. Other persecutions on religious grounds included for example that of the Russian Orthodox Church, and the Eastern Orthodox Church in Serbia and Croatia, and the suppression of the Protestant Churches in Germany and Italy.¹ It is therefore perhaps unsurprising then that the Convention contained both a right to 'Freedom of Religion' and a right to manifest that freedom.²

Both the content of the right to freedom of religion and any limitation clause were heavily³ and passionately debated during the drafting process.⁴ The wording of Article 9 of the Convention is closely based on Article 18 of the UN Declaration of Human Rights, and both were based on the same source the United Kingdom draft of an International Bill of Rights.⁵ In particular debate over the scope and nature of freedom of religion in Europe focussed on the extent to which a right to religion could be limited.⁶ An attempt to add in a clause limiting for the support of 'national unity' was expressly rejected⁷ as were exemptions from protections for non-state religions in Sweden and Cyprus.⁸

¹ See for example, Walters, P (1986) 'The Russian Orthodox Church and the Soviet State' *The Annals of the American Academy of Political and Social Science*, Vol 483, 135-145, and Zanin, P (2015) "Twenty Years of Persecution of Pentecostalism in Italy: 1935- 1955" *Journal of Modern Italian Studies*, 20:5 686-707.

² Article 9(1) and 9(2) ECHR.

³ Evans, C (2001) *Freedom of Religion Under the European Convention on Human Rights*, OUP Oxford. P.45 :

⁴ Bratza, N (2012) ' "The Precious Asset": Freedom of Religion Under the European Convention on Human Rights' *Ecclesiastical Law Journal* 14:2 256 - 271

⁵ British Draft International Bill of Rights submission, UN Economic And Social Council E/CN.4/AC.1/4 5 June 1947, See also Marston for British influence on drafting of ECHR, Marston, G (1993) 'The United Kingdom's Part in the Preparation of the European Convention on Human Rights , 1950' *ICLQ* 42:4 796-826

⁶ Travaux Préparatoire on Freedom of Religion available on the Council of Europe website [http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART9-DH\(56\)14-EN1338892.pdf](http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART9-DH(56)14-EN1338892.pdf)

⁷ Carolyn Evans op cit p45.

⁸ Travaux Préparatoire on Freedom of Religion available on the Council of Europe website [http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART9-DH\(56\)14-EN1338892.pdf](http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART9-DH(56)14-EN1338892.pdf)

Despite the shared genesis of Article 18 in the UN Declaration and ICCPR and Article 9 of the ECHR case law under the UN Human Rights Committee and the European Court of Human Rights⁹ has developed very differently and we can now see a clear divergence of approach. Particularly in relation to the acceptance of state justification for rights infringements in relation to visible-Muslim women and religious dress for other religious minorities. Section 2 of this paper highlights the restrictive case law that has developed within the European Court of Human Rights jurisprudence and traces the ‘Orientalist’ rhetoric which has informed the approach taken by the Court. Section 3 focuses on how this ECHR caselaw diverges from the UN Committee decisions and recommendations in the wider International system . In 4 the paper argues that that this divergence has a negative impact for the human rights system as a whole and at 5 concludes. A postscript provides a pessimistic view of whether this might change in the near future.

⁹ European Human Rights Commission up until 2011

2.

2.1 The European Court of Human Rights

Despite the recognition of the importance of the Right to Religion during the drafting process it is notable that there was no case where the right to religion was found to have been breached until 1993.¹⁰ Marie Benedicte Dembour writing about the dearth of case law under the ECHR finds it extraordinary that it was ‘... over 30 years before the Court identified that something had gone wrong in Europe as far as freedom of Religion was concerned.’¹¹ This is something which for Dembour calls into question the seriousness with which the admissibility of applications on the right to religion was initially viewed by the European Commission on Human Rights.¹² Janis et al suggest that ‘even after Kokkinakis the court has not been overly eager to deal with Article 9.’¹³ Paul Marshall noted an ongoing problem with adjudication within the European region. Finding that the right to religion a less protected human right globally and noting that in Europe there was a particular distinction between the ‘health’ of human rights in general and the right to religion for members of non-majority religions and members of ‘sects.’¹⁴ This can be contrasted with the controversial protections offered to State religions.¹⁵

¹⁰*Kokkinaskis v Greece*[1993] 17 EHRR 397

¹¹ Dembour, Marie Benedicte,(2000) ‘The Cases That Were Not To Be: Religious Freedom and the European Court of Human Rights’ in Italo Pardo (ed.) *Morals of Legitimacy: Between Agency and System*. Oxford: Berghahn Books, 2000. P208

¹² *ibid*. It was the Commission until Protocol 11 came into force who determined the admissibility of cases now it is the court itself who decides this.

¹³ Janis, M, R Kay, A Bradley (2008) *European Human Rights Law*, OUP, p. 334.

¹⁴ Marshall, P ‘Religious Freedom’ in Liam Gearon (ed.) *Human Rights and Religion: A Reader*. Brighton: Sussex Academic Press, 2002.

¹⁵ See *Otto-Premiger v Austria* and *Lautsi v Italy* citations

2.2 ‘Orientalism’ in Europe

The problem lies in both the failure of the European Court of Human Rights to find cases ‘admissible’¹⁶ and in the adjudication process applied. This paper argues that in both the admissibility and adjudication process it is possible to see the impact of ‘Orientalist’ discourses occluding the ability of the court to recognise the harms being done in relation to the claimant by the restrictions imposed by the state, and supplanting the requirement for states to evidence and reasonably justify those restrictions on religious freedom. These discourses are most likely to be found where the rights being adjudicated involved highly ‘visible’ manifestations of the right to religion.

Other authors have suggested that the European Court is influenced by Europe’s colonial past. In ‘Postcolonial Denial: Why the European Court Finds it so Difficult to Acknowledge Racism’ Dembour applies a post-colonial analysis to the European Court’s reluctance to find that European states have been involved in racial discrimination.¹⁷

Although elsewhere I have explored Orientalist constructions of both the state and claimant as a determinative factor in finding rights breaches,¹⁸ this paper is limited to looking at the European Court’s construction of the claimants.

2.2.2 Orientalism

Edward Said,¹⁹ who published the seminal work, *Orientalism* in 1978, ascribes three understandings to his use of the term Orientalism. Firstly in the sense of a body of writing, research and teaching about the orient across a range of disciplines.²⁰ In this sense any author or academic who engages in this nature of enquiry or production of knowledge about the Orient would be an Orientalist. Secondly as a ‘style of thought’ that distinguishes the

¹⁶ This is also true of the European Commission on Human Rights which held this role before Protocol 11.

¹⁷ Marie-Benedicte Dembour (2010) ‘Postcolonial Denial: Why the European Court Finds it so Difficult to Acknowledge Racism’ in Mark Goodale, and K Clarke (eds.) *Mirrors of Justice: Law and Power in the Post-Cold War Period*, CUP.

¹⁸ Skeet, C (2015) “Orientalism in the European Court of Human Rights” Forthcoming 2016.

¹⁹ Edward Said *Orientalism* (Penguin 2003).

²⁰ *ibid*, 3

Orient and Occident, basing its epistemology on the distinctions between the two.²¹ Thirdly as a ‘corporate institution for dealing with the orient’ a ‘Western style for dominating, restructuring, and having authority over the orient’ through ‘making statements about it, authorizing views of it, describing it, by teaching it, settling it and ruling over it’.²² Said’s work in *Orientalism* details the visual depictions, literature, academic treatises and travel writing on the orient through the post-enlightenment period, drawing out reoccurring discourses that shape and define both the “Orient” and Islam as “Other.” In doing this he argues that these discourses also define the Occident as holding “an intellectual authority over the orient within western culture.”²³ Orientalism in this sense can be classed as a variant of colonial discourse which essentialises and systematically conditions understandings of non-western peoples as other and inferior and created the justification both for colonial power and a continuing hegemonic influence. “The relationship between the Orient and Occident is a relationship of power, of domination, of varying degrees of a complex hegemony.”²⁴ Arguably there is no actual Orient– beyond its creation through Orientalism and similarly no Occident or Europe of the Orientalists beyond what is thrown into relief through the creation of these series of contrasts and comparisons. To expand on this Said argues it is this historical defining of the Orient that is responsible for creating a modern understanding of Europe – as a defined cultural space which is not the Orient - ‘Orientalism is never far from the idea of Europe, a collective notion identifying “us” Europeans against all “those” non-Europeans’²⁵ Meyda Yeğenoğlu supports this contention arguing that European identity is always constructed by reference to elements outside Europe and Islam serves as a constant constitutive element in this process, and therefore itself becomes identified with exteriority and exclusion.²⁶

²¹ Ibid 3

²² Ibid 3

²³ Ibid 19

²⁴

²⁵

²⁶ Meyda Yeğenoğlu, *Colonial Fantasies: Towards a Feminist Reading of Orientalism* (CUP 1998)

In a modern context this ‘Orientalist’ approach to constituting Europe can be illustrated in Seidentop’s work. He posits a strong relationship between rights liberalism in Europe and Europe’s Christian foundations which he believes ‘western culture’ ignores at its peril.²⁷ While Delanty recognises that this is not the only approach to constituting the nature of European identity he states that it is certainly very prevalent.²⁸ A further illustration of this foundational logic can be seen in the draft *Treaty Establishing a Constitution for Europe* 2003, where there was an attempt to ‘fix’ Europe as a Christian entity. This came both in the form of explicit reference to Judeo - Christian heritage in the values of the European Union, and under s.152 of the draft constitution ‘Churches’ were singled out for ‘regular dialogue’. This suggested a preference for dialogue with established Christian churches rather than other religious or secular groups, and it was viewed as an attempt to construct Islam and other non-Christian religions as ‘Other’ within Europe.²⁹

2.2.3 ‘Orientalist’ Rhetoric Within The Caselaw

It is possible to find three recurring tropes in Edward Said’s work on Orientalism.³⁰ The first is the presentation of the Orient and ‘non- European’ religions as essentialised and homogenised.³¹ This trope is found particularly in the case law on the right to wear the headscarf like the inadmissible cases of *Dahlab*, *Karadduman* and the Grand Chamber decision in *Sahin*.³² Second importantly Said’s work finds that these essentialising constructions of the Orient often presented as binary with the ‘Oriental’ characteristic

²⁷ L. Seidentop, *Democracy in Europe* (Penguin, 2000) p. 213.

²⁸ Though Delanty himself recognises the contribution of Islam to the creation of European culture and civilisation and does not find either Christianity or secularism a credible basis for a shared European identity. See Delanty (2005) “What Does it Mean to be a ‘European’?” *Innovation*18:1 pp.11-22

²⁹ This and the attempt to assert any religious foundation to Europe was resisted strongly by women’s groups see C Skeet ‘Gender and Modern Constitutionalism: The Treaty Establishing a Constitution for Europe’ (2007) *NILQ* vol. 58:2 p142 -, pp 157 - 159

³⁰ Edward Said (2003) *Orientalism*, Penguin London.

³¹ Edward Said, *Covering Islam: How the Media and Experts Determine How we see the Rest of the World* (Vintage 1997), Edward Said *Culture and Imperialism* (Vintage 1994); R Kabbani, *Imperial Fictions: Europe’s Myths of the Orient* (McMillian 2008).

³²

portrayed as exterior and inferior in each case to ‘European’ society, religions, characters etc. Orientalism is in this sense a style of thought or knowledge ‘... based on an ontological and epistemological distinction made between the Orient and (most of the time) the Occident.’³³ This is often used to devalue the claim being put forward as against a value put forward by the state – equality, security etc., whether or not there is any evidence that these are really in competition. This can be illustrated by *Shingara Mann Singh v France*³⁴ where the Court found Mann Singh’s claim that he should not have to remove his turban for a driving licence photo ‘inadmissible’ because they gave no real weight to the impact that removing it would have on him. The court also placed his right in competition with the rights of others to ‘security’ by accepting without challenge the French state’s claim that they could not ‘identify’ people if they were wearing turbans. Another example is *Dahlab* where the Commission places her right to wear a headscarf in conflict with democracy and gender equality.³⁵ Stating that ‘... it cannot be denied outright that the wearing of a 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 Koran and which as the Swiss Federal Court noted, is hard to square with the principle of gender equality.’³⁶ This, it was said by the Commission in *Dahlab*, ‘could not easily be reconciled with the message of tolerance, respect for others and, above all equality and non-discrimination that all teachers in a democratic society should convey to their pupils.’

The example of positional superiority is also shown in *Lautsi* where the Court balanced a complaint against a crucifix in a classroom with the state’s right to display its ‘heritage’. The court made a distinction between the crucifix as an ‘essentially... passive symbol...’ and not an ‘external symbol’³⁷ as the headscarf in *Dahlab* had been described. *Lautsi* justifies the

³³ *ibid* 2.

³⁴ Application no 24479/07, ECHR 1523, “7 November 2008

³⁵

³⁶ P15

³⁷ Para 72

different interpretation of these religious symbols by emphasising the ‘threat’ that the Islamic headscarf posed to the religious beliefs of the children and parents in a classroom,³⁸ in contrast to the lack of a threat posed by a crucifix.³⁹

Thirdly Orientalism operates through methodology which is cumulative and accumulative⁴⁰ and which reconstructs and repeats ‘knowledge’ about the Orient and presents these as knowledge.⁴¹ Partial observations when reiterated in later literatures become ‘truths’ which are strengthened and reinforced each time the reference is given. We see this particularly in the caselaw of the European Court of Human Rights where earlier unevidenced determinations favouring state restriction over the claimants right to religion are used to support new limitations as if those cases had established facts. This same approach can be found in a range of cases where restrictions were placed in workplaces , classrooms, public buildings sporting activities etc.

2.2.3 SAS and France

In the recent case of *SAS v France*⁴² limited Freedom of Religion on the justification of ‘living together.’ In *SAS v France* a woman living in France challenged the ban on wearing the burqua in a public space. The court recognised that the ban interfered with the right to religion of the women concerned, but spent time in considering whether the limitation was justified. Unlike the earlier case of *Sahin* this case received a number of third party

³⁸ Para 73

³⁹ It should be noted that the Ontario Court of Appeal in Canada found that even without any directly coercive or aggressive element, it is the normalisation of a particular religion in the classroom and the embarrassment of non-conformity that acts as barrier to a child seeking exemption from religious exercises. In this view an individual’s religious symbol of any type would pose no problem but the states installation of crucifixes in the classroom would form an additional pressure against non-conformism in relation to Christian practices and optional prayers *Zylberberg v Sudbury Board of Education* (1988) 65 O.R. (2d) 641 (CA) and *Canadian Civil Liberties Association v Ontario* (1990) 71 O.R. (2d) 341 (CA)

⁴⁰ *ibid* 122.

⁴¹ *ibid* 122- 123.

⁴² Application 43835/11 | July 2014

interventions which successfully challenged the French government’s argument that the French state needed to limit the rights of women to wear the burqua in order to facilitate women’s rights.⁴³ The argument in relation to security was also rejected by the court.⁴⁴ Since there was no specific threat to public safety. Rather than being required to allow identification where necessary, this was a much more fundamental limitation on any form of dress fully or partially covering the face.⁴⁵ Despite the very promising questioning of the French case by the ECHR judges, the court found in favour the French state’s limitation: which they justified on the basis of the need for limitation on the grounds of the ‘rights and freedoms of others.’ The Court found that ‘French society’ had a right to ‘...fraternity’ and a minimum level of ‘...civility’ in order to ‘...live together.’⁴⁶ A limitation which looks much less as if it is motivated by protecting ‘rights and freedoms of others’ and more as if it is a limitation based on the ground of ‘national unity’ – a limitation so clearly rejected in the drafts of the ECHR.⁴⁷ The European Court of Human Rights noted that all the advice from ‘a large number of actors international and national, in the field of fundamental rights protection ...’ was that a ‘blanket ban was disproportionate.’⁴⁸ Despite this the court considered that they had a duty to ‘...exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question.’⁴⁹ This respect for the ‘democratic process’ over fundamental rights was found despite the recognition that this democratic process had been accompanied by a ‘political rhetoric specifically targeting women wearing an Islamic face veil, thus reinforcing negative stereotypes and Islamophobia.’⁵⁰ It is concerning that the Court were also motivated by the fact that the ‘...criminal sanctions’ were ‘the lightest that could be

⁴³ Ibid para 137

⁴⁴ para 139

⁴⁵ Ibid para 139.

⁴⁶ Paragraph 141.

⁴⁷ See footnote 3.

⁴⁸ *SAS v France (op cit)* Paragraph 147.

⁴⁹ Ibid para 154.

⁵⁰ Ibid para 98 and 149.

envisaged’ – a fine or the imposition of a citizenship course instead.⁵¹ Yet the Court did not consider what would happen if someone prosecuted refused to pay the fine or attend the citizenship course. Ultimately of course sanction would lead to imprisonment. Moreover forced citizenship courses for adult citizens would also infringe the right to ‘freedom of expression.’⁵²

2.2.4 -The Misapplication of the Margin of Appreciation in SAS and the other Cases. .

To be added.

⁵¹ Ibid para 152.
⁵²

3.1 Right to Religion in the UN System

To examine how the UN Committee on Human Rights and the European Court of Human Rights have diverged this section selects a few cases from the Human Rights Committee which have examined either the same claims as the ECHR or claims which are structured in a similar way. In the cases I have selected it is notable that either the state itself or dissenting judgements in favour of the state cite the jurisprudence from the ECHR as justification for the limitation of freedom of religion. The fact that the UN Committee expressly rejects these arguments makes the divergence between the two systems very very clear.

3.2 Direct Refutations in the Case Law

In *Dahlab*, *Karudamann*, and *Sahin* the European Court had rejected the rights of the claimants to wear their headscarfs finding in each case that the principles of democracy and equality and security outweighed any interference. In *Hudoyberganova v Uzbekistan*,⁵³ the UN Committee required the state to do more than just name the basis for restriction. They asked for evidence that it was necessary to achieve that aim by limiting her right.⁵⁴ In the absence of any evidence for the justification for the ban they found in *Hudoyberganova*'s favour. This requirement for evidence of justification was the approach which Françoise Tulkens' dissenting judgement in *Sahin* had argued for. Uzbekistan did not directly refer to

⁵³ Communication No. 931/2000 UN Doc.CCPR/C/82/D/931/200 (2004).

⁵⁴ *ibid* para 6.2

the ECHR case of *Sahin v Turkey*⁵⁵ in their justification for limiting students dress but Ruth Wedgewood did so in her dissenting judgement in *Hudoyberganova*.

In the cases of *Bikramjit Singh*- a child expelled from a public school for wearing a religious symbol; ⁵⁶ *Ranjit Singh v France* – refusal to issue a residence permit without a turbanless photo,⁵⁷ *Shingara Mann Singh* – refusal to accept a passport photo taken with the applicant wearing a turban⁵⁸ argued in front of the UN Committee on Human Rights the French state itself used the caselaw on similar cases from the ECHR to argue for the validity of their position. ⁵⁹The difference in the hearing of those cases was that the UN Committee required France to furnish ‘evidence’ to support their case. In neither case could the French state provide evidence of the need for their policies. The Human Rights committee therefore concluded in each case that the infringements on freedom of religion could not be justified. The Committee found in the case of *Bikramjit Singh* that the State had imposed a 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.’⁶⁰ Recognising therefore that what also affected the applicant’s individual right to his Freedom of Religion also constituted group discrimination on grounds of religion.

⁵⁵ Op cit.

⁵⁶ *Bikramjit Singh v France* CCPR/C/106/D/1852/2008 4th February 2013

⁵⁷ *Ranjit Singh v France* CCPR/ C/102/D/1876/2009 26th September 2013

⁵⁸ *Shingara Mann Singh v France* CCPR C108/D/1928/2010 26th September 2013

⁵⁹ Add further references to the specific citations.

⁶⁰ *Bikramjit Singh v France* (op cit) para 8.7.

4.1 Impact of Divergence on the Global Human Rights System and Universalism of Human Rights

The understanding of universalism as a concept at the time the UN Declaration was drafted was not as uniformity or homogeneity⁶¹ but rather of a common standard which might be applied with ‘a legitimate pluralism’ in the forms of its freedom.⁶² Even still when regional human rights systems were first established the UN feared that their development might lead to a dilution of universalism.⁶³ Now it is now recognised that in general⁶⁴ regional systems are mutually supportive and tend to reinforce respect for human rights.

On the whole the European Court of Human Rights within the Council of Europe system is praised for its highly developed individual petition system and relatively good levels of compliance. Janis, Kay and Bradley even start their text with the grand claim that the European Convention ‘...establishes not only the world’s most successful system of international law for the protection of human rights, but one of the most advanced forms of any kind of international process.’⁶⁵ In relation to the right to religion the courts position is problematic for several reasons.

4.2 The ECHR ‘s Claim To a Different Position

Earlier cases like *Sahin* did not appear to recognise this divergence in the case text. Third party interventions were not submitted. The Court in *Sahin* praised the Turkish state for promoting equality and accepted their claims that the headscarf ban in universities supported this. There was no awareness that the Committee for the Elimination of all Forms

⁶¹ Glendon, Mary Ann (2015) ‘Is Religious Freedom an Orphaned Right?’ in Evans, M P Petkoff and J Rivers (eds.) *The Changing Nature of Religious Rights Under International Law*, OUP

⁶² Ibid p6.

⁶³ Vasak, K and Alston, P (Eds.) *The International Dimensions of Human Rights*.

⁶⁴ Note however the disdain and suspicion shown by many NGOs for the ASEAN Declaration on Human Rights in 2012. Amnesty Press Release ‘Postpone Deeply Flawed ASEAN Human Rights Declaration’ <https://www.amnesty.org/en/press-releases/2012/11/postpone-deeply-flawed-asean-human-rights-declaration/> 5th November 2012

⁶⁵ Janis, M, R Kay, A Bradley (2008) *European Human Rights Law*, OUP, p 3.

of Discrimination against Women had registered concern about the numbers of women being pushed out of Universities and required the Turkish state to report on the impact of the ban.⁶⁶ Other cases on the right to religion also seemed similarly free of reference to other international standards.

In other areas of caselaw – for example in relation to violence against women we can see the Court take on board international standards and develop their position accordingly when these are presented to them in support of a claimants case.⁶⁷ So it was expected that when the court was provided with this wider context in *SAS v France* they might reconsider their earlier position in relation to state latitude. Yet although the wider standards on right to religion were very clearly drawn to Court's attention through both the third party interventions and by the claimants' advocates. These standards included those set by various UN Committees, Rapporteurs and The Council of Europe itself. All argued against clothing bans and presented the position that blanket bans were disproportionate. The European Court still came to their very different position, taking it seems some comfort from the fact that despite all the indications the UN Human Rights Committee had not actually ruled on a ban imposed on full face coverings, though their General Comment 28 in relation to Equality of Rights between men and women gave a clear indication that they felt such bans would be contrary not only rights to religion but also gender equality.⁶⁸ If the a body of jurists can so clearly ignore all the available advice re the content and standard of international (and regional) norms on both equality and right to Freedom of Religion it sets a very poor message to other States and human rights bodies. It also suggests that the European Court sees 'European democratic' states as no longer subject the same rights standards as the rest of the world.

⁶⁶ The Report can be found at - <http://www.un.org/womenwatch/daw/cedaw/cedaw32/conclude-comments/Turkey/CEDAW-CCTUR-0523813E.pdf> November 2008 <http://www.un.org/womenwatch/daw/cedaw/cedaw32/conclude-comments/Turkey/CEDAW-CCTUR-0523813E.pdf> para. 34 at November 2008.

⁶⁷ See for example *MC v Bulgaria* and *Opuz v Turkey* where reference to international standards in third party interventions led to positive developments in states accountability for violence against women.

⁶⁸ *SAS v France* (op cit) para 38.

This undermines the very role that human rights should serve within democracies of protecting minority groups from the ‘tyranny’ of majoritarian views.⁶⁹

4.3 Support for Repression

Given the global respect for the European Court of Human Rights, it seems all the more problematic that this relatively well-resourced system is producing decisions which justify restrictions on rights to religion. These decisions are not just applicable to Council of Europe members but can also be cited outside the system as ‘respectable’ authority for State repression provided it has been carried out through a ‘democratic process.’

The earlier case law from the ECtHR and the former Commission encouraged the further bans on religious symbols, put in place by France and Belgium. The link between earlier the Commission and ECtHR cases and Turkey’s move to renew the prohibition on headscarves is clear. The Circular which renewed the prohibition and led to Sahin’s expulsion explicitly stated that it was regulating students’ clothing ‘by virtue of the Constitution, the law and regulations, and in accordance with the case-law of the Supreme Administrative Court and the European Commission of Human Rights...’⁷⁰

AS discussed in 3.2 France explicitly used the European Court decisions on its various limitations on Freedom of religion to justify subsequent policies.

4.4 Universalism of Rights called into Question.

The partial decisions of the European Court of Human Rights in this area also call into question the understanding of human rights as ‘Universal’ and available for all. Following the

⁶⁹

⁷⁰ *Sahin* Chamber decision 2004, para 12.

decision by the Grand Chamber in *Sahin*, the Turkish ‘Virtue Party’ which had been dissolved by Turkey in 2001, withdrew its appeal to the ECtHR.⁷¹ The case had been pending since 2001. Nicholas Gibson notes that the reason given for the withdrawal was that the Party did not think it would get a fair hearing since the ECtHR had adopted a double standard when dealing with ‘European Muslims [who are] confronted by injustice because of their beliefs.’⁷² As Gibson suggests, whether or not you believe it to be true, this ‘perception’ is problematic in ensuring respect for the rule of law.⁷³

⁷¹ COE Press Release Issued by the Registrar: Chamber Judgements Concerning Greece, Italy, Russia, Slovenia, and Turkey 245, 27.4.2006.
<http://www.echr.coe.int/Eng/Press/2006/April/Chamberjudgments270406.htm> , 3 at 13 November

⁷² Para 9 of App No. 1444/02 only available in French cited by Nicholas Gibson, ‘Faith in the Courts: Religious Dress and Human Rights,’ (2007)66 (3), *Cambridge Law Journal* 657 at 696.

⁷³ Gibson, ‘Faith in the Courts: Religious Dress and Human Rights,’ (2007)66 (3), *Cambridge Law Journal* 657 at 696.

5. Conclusion

NGOs like Amnesty International⁷⁴ and the Minority Rights Group⁷⁵ along with the OSCE⁷⁶ and Council of Europe and EU organs⁷⁷ and national organisations have recognised the increasing intolerance towards religious minorities in Europe since 9/11. The humanitarian crisis for migrants coming to Europe has also been exploited by right wing groups who have orchestrated attacks against existing ethnic and religious minority groups. Religious freedom is an end in itself and support for the rights of minorities to religious freedom is an important part of preventing wider discrimination against minorities.

Positively, irrespective of the decisions emanating from the European Court of Human Rights some Constitutional Courts in European countries are recognising the unconstitutionality of such restrictions.⁷⁸ There have also been some very strong dissenting judgements from judges in the European Court of Human Rights who recognise the problematic position taken by the majority in relation to Freedom of Religion.

This paper argued that this divergence in the approach to the right to religion is problematic for the rights of individuals and groups in Europe to Freedom of Religion. Moreover it undermines the legitimacy of the European human rights system.

⁷⁴Choice and Prejudice Discrimination against Muslims in Europe.

<http://www.amnesty.eu/content/assets/REPORT.pdf>.

⁷⁵ Minority Rights Group International press release 1st July 2010 <http://minorityrights.org/2010/07/01/rise-of-far-right-in-europe-fuels-spread-of-intolerance-towards-religious-minorities-new-report/>

⁷⁶ <http://www.osce.org/odihr/106027?download=true>

⁷⁷ Council of the European Union, EU Guidelines on the Promotion and Protection of Freedom of Religion or belief; Racist Crime in Europe: ENAR Shadow Report 2013- 2014 (ENAR 2014) http://enar.eu.org/IMG/pdf/shadowreport_2013-14_en_final_lowres-2.pdf accessed May 2015;

⁷⁸ See Germany re note that in Begum v Denbigh in the UK the court also adopted an evidenced based approach to restrictions.

More than this the paper has argued that divergence of universal standards by such a significant human rights organisation as the European Court of Human Rights affects the global health of Freedom of Religion as an international right. The clear and direct rejection of established standards as inapplicable to European states sends out a clear message to states who wish to justify their decision to disregard human rights standards.

Ironically the limitation on the right to Freedom of Religion within Europe in the name of 'living together' seems to be a concept which will only serve to further distance the European human rights regime from the rest of the world

Post Script

When I first put in this paper I had a little more optimism about the right to freedom of religion for minorities in Europe. My optimism was based on the increasing attention to human rights from the EU organs and the belief that two cases coming before the Court of Justice of the EU might set a standard in relation to modern workplace practices and rights to religious symbols that the ECHR might find hard to ignore. The two cases are *Asma Bougnaoui*, *Association de défense des droits de l'homme (ADDH) v Micropole Univers SA*,⁷⁹ and *Samira Achbita*, *Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*.⁸⁰

The *Achbita* reference asked whether Article 2(2)(a) of the Framework Employment Equality Directive 2000/78/EC should be interpreted "as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?" *Bougnaoui* asked whether Article 4(1) of the Framework Employment Equality Directive could be interpreted "... as meaning that

⁷⁹ C-188/15, lodged on 24 April 2015,

⁸⁰ C-157/15, lodged on 3 April 2015.

the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out.”

A preliminary finding on the case of Samira Achibita was issued by the Advocate General on the 31st May 2016. His findings are worrying and it is to be hoped that the full decision of the Court of Justice does not support this.

The Advocate General recognised that the ban on employees of G4 wearing obvious religious symbols in the workplace might ‘...constitute indirect discrimination based on religion under Article 2 (2) (b) of the Fundamental Rights - Employment Equality Directive.’⁸¹ Then he went on to say that such discrimination might be justified in order to enforce a policy of ‘religious and ideological neutrality pursued by the employer in the company concerned ...’⁸² He opined that whether this would be proportional would be determined by ‘ the size and conspicuousness of the religious symbol, the nature of the employee’s activity, the context in which she [sic] has to perform that activity, and the *national identity* [my emphasis] of the Member State concerned.’⁸³ Once again this suggests that the erosion of the principle of Universal protection of rights within Europe, the EU in this case. The identity of EU member states as determined by EU citizens’ rights is subjugated to a reassertion of majoritarian identity considerations within national states.

⁸¹Samira Achita (op cit) Opinion Of Advocate General Kokott delivered on 31st ay 2016 para 141(1)

⁸² Ibid para 141 (2).

⁸³ Ibid para 141 (2)

Bibliography and References - Incomplete

Bratza, Nicolas (2012) 'The Precious Asset: Freedom of Religion Under The European Convention on Human Rights' *Ecclesiastical Law Journal* 14: 2 256- 271

Dembour, Marie Benedicte (2000) 'The Cases That Were Not To Be: Religious Freedom and the European Court of Human Rights' in Italo Pardo (ed.) *Morals of Legitimacy: Between Agency and System*. Oxford: Berghahn Books,

Evans, C (2001) *Freedom of Religion Under the European Convention on Human Rights*, OUP Oxford.

Marshall, P, 'Religious Freedom' in Liam Gearon (ed.) *Human Rights and Religion: A Reader*. Brighton: Sussex Academic Press, 2002.

Poulter, S, *Ethnicity, Law and Human Rights: the English Experience*. Oxford: OUP, 1998.

Skeet , C (2009) "Globalisation of Women's Rights Norms: The Right to Manifest Religion, and 'Orientalism' in the Council of Europe" *Public Space: The Journal of Law and Social Justice*,4, 34-73

Skeet , C (2015) "Orientalism in the European Court of Human Rights" Forthcoming.

Uitz, R , *Freedom of Religion In European Constitutional and International Law*. Strasbourg: Council of Europe Publishing, 2007.

Vasak, K and Alston, P (eds) *The International Dimensions of Human Rights*

Walters, P (1986) 'The Russian Orthodox Church and the Soviet State' *The Annals of the American Academy of Political and Social Science*, Vol 483, 135-145.

Zanin, P (2015) “Twenty Years of Persecution of Pentecostalism in Italy: 1935- 1955” *Journal of Modern Italian Studies*, 20:5 686-707

Cases Referred To

Hudoyberganova Uzbekistan, Communication No. 931/2000 UN Doc. CCPR/C/82/D/931/200 (2004).

Kokkinaskis v Greece[1993] 17 EHRR 397

Sahin v Turkey (Application no 44774/98) to Grand Chamber Strasbourg 10 November 2005, [http://portal.coe.ge/downloads/Judgments/LEYLA_SAHIN v TURKEY.pdf](http://portal.coe.ge/downloads/Judgments/LEYLA_SAHIN_v_TURKEY.pdf) at 10 January 2006.

Bikramit Singh v France [2012] Communication no . 1852/2008 CCPR/C/106/D/1852/2008

Ranjit Singh v France [2011] Communication no 1876/2000 CCPR/C/102/D/1876/2009