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Freedom of Religion and Religious Symbols in the Public Sphere

Publication No. 2011-60-E
25 July 2011

Laura Barnett

Legal and Legislative Affairs Division
Parliamentary Information and Research Service

***Freedom of Religion and Religious Symbols
in the Public Sphere
(Background Paper)***

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Ce document est également publié en français.

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FREEDOM OF RELIGION AND RELIGIOUS SYMBOLS IN THE PUBLIC SPHERE

1 INTRODUCTION

The issue of religious symbols in the public sphere has given rise to widespread debate on the scope of freedom of religion in various countries around the world. In our modern environment of globalization and unprecedented international migration flows, traditionally homogenous nations face the blurring of established spheres of cultural identity, and, in some cases, governments are changing laws, policies, and politics in an effort to manage these shifts. The various political, legislative, and judicial treatments of this issue have given rise to differing interpretations of freedom of religion as defined through domestic and international laws.

Among the most prominent of the religious symbols at stake in current debates is the Islamic headscarf, or *hijab*. The headscarf is worn by a female over her head, generally covering her hair, ears, and neck. *Hijab* also has the meaning of female modesty in dress and, for some Muslim women, may involve wearing a large loose garment that can cover the hands and face – a *burqa*; or a veil that leaves only a slit for the eyes – a *niqab*. *Hijab* is an integral part of Qur'anic teachings for a large part of the Muslim world, but there is little agreement on whether it is absolutely prescribed.¹

Within the Sikh faith, the turban and kirpan are among the five religious obligations of Orthodox Sikh males. Sikh men must keep their hair uncut and wrapped in a turban as a symbol of respect for God. The kirpan is a curved ceremonial dagger, usually about 20 centimetres long with a blunt tip, which is generally worn underneath clothing. The kirpan serves as a reminder of the constant struggle between good and evil.²

In debates involving the Jewish faith, it is the kippa, or yarmulke, a small skullcap worn as a symbol of submission to God by some Jewish males, that is often at issue. In addition, some Orthodox Jews build succahs, structures made of wood and covered with cedar branches, to be used each year for nine days during the autumn festival of Sukkot to commemorate the difficult conditions Jews faced after fleeing Egypt.

An aspect of the more traditionally Western Christian faith, the crucifix is a representation of the Christian cross with a figure of Christ on it. Often hung on the wall, crucifixes may be found in churches, classrooms, courtrooms, and legislative buildings throughout the Western world. Crucifixes may also be worn as a pendant on a necklace.

The most prominent disputes over religious symbols in the public sphere have involved religious headcoverings – one of the most immediately obvious demonstrations of one's faith that automatically distinguishes Muslims, Sikhs, and Jews from the larger, mostly Christian population in the Western world. The recent

rise of immigrants in Europe has meant that headcoverings have become significant symbols of difference, provoking debate about their role in the public sphere.

2 CURRENT LAW AND PRACTICE

2.1 INTERNATIONAL LAW

Freedom of religion is firmly entrenched in international law and the constitutions of countries around the world. Sections 18 of both the *Universal Declaration of Human Rights* (1948) and the *International Covenant on Civil and Political Rights* (1976) (ICCPR) guarantee everyone the right to freedom of thought, conscience and religion, as well as the freedom to manifest his or her religion or belief in practice and observance. The United Nations Human Rights Committee has emphasized that this freedom encompasses the right to wear religiously distinctive clothing or headcoverings, although article 18(3) of the ICCPR does allow limitations to this freedom provided that they are prescribed by law and necessary to protect safety, public order, health, morals or the fundamental rights and freedoms of others.³ The United Nations *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981) also guarantees the freedom to practise one's religion and belief, and freedom from discrimination based on that religion or belief.

However, while international law in this area paints freedom of religion with broad brushstrokes, individual countries must apply this philosophy based on individual circumstances and interpret freedom of religion within domestic constitutional laws. Application of the law often depends on context and political culture.

This is particularly evident in Europe with respect to the European Court of Human Rights' (ECHR) application of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention). Under the European Convention, article 9(1) protects freedom of thought, conscience and religion, while subsection (2) permits restrictions on the manifestation of belief when dealing with concerns about public safety or public order, etc.

In interpreting this section, the ECHR grants state parties a "margin of appreciation" to assess national needs, allowing them to balance competing rights and interests in context. The margin of appreciation means that the ECHR plays a subsidiary role, as, in principle, national authorities are better placed than a supranational court to evaluate local needs and conditions; although these decisions are ultimately subject to review for conformity with the requirements of the European Convention.⁴

2.2 THE CANADIAN CONTEXT

2.2.1 FREEDOM OF RELIGION AND SECULAR POLICIES

Freedom of religion in Canada is informed, to a certain extent, by the fact that no policy exists to officially separate church and state. In general, the Canadian approach to religion has been to promote multiculturalism by celebrating the

expression of various religions while recognizing the supremacy of none – the government plays a role of neutral accommodation. The goal is not one of assimilation, but of integration based on differences.⁵ Although the Preamble to the *Canadian Charter of Rights and Freedoms*⁶ does refer to God, legal experts and the Supreme Court of Canada have agreed that this reference is merely symbolic and does not contradict the religious freedoms contained in the document itself.⁷

Sections 2(a) and 15 of the Charter lay out the right to freedom of religion and equal treatment in Canada. In the Supreme Court of Canada's seminal decision on freedom of religion, *R. v. Big M Drug Mart Ltd.*,⁸ Dickson J. said that:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

... Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.⁹

At its core, freedom of religion encompasses both a positive dimension – freedom to believe and to manifest one's religion; and a negative dimension – no one can be forced, directly or indirectly, to recognize a particular religion or to act contrary to what he or she believes.¹⁰

Freedom of religion in Canada has also been interpreted as necessitating the reasonable accommodation of minorities. This means that laws must be adjusted if they have even an indirect discriminatory effect on a person or group based on their particular characteristics. In this sense, Canada's form of religious neutrality attempts to make laws receptive to the particular needs of minorities, rather than espousing a more uniform conception of equality.

However, freedom of religion under the Charter's section 2(a) is not absolute. Rather, courts have the power to balance certain countervailing claims. Clearly offensive conduct or symbols that harm or constrain the freedoms or human dignity of others are not tolerated. These limitations are emphasized within the Charter itself. Section 15 highlights the fact that each religion is one of many vying for equality. Section 27 suggests that religion falls under the rubric of culture, and that the Charter seeks to preserve and protect all cultures. Finally, section 1 gives courts the discretion to qualify the fundamental freedom of religion by such reasonable limits as are prescribed by law and can be demonstrably justified in a free and democratic society.¹¹

As well, while the Charter contains strong freedoms to observe one's own religion, it provides less protection for individuals who may not wish to be exposed to other religions in the public sphere. Public schools are the only place in which it has been clearly determined by the courts and through legislation that religion cannot be present in any institutionalized sense.¹²

In addition to the courts, Canada allows provincial and federal human rights commissions to deal with many issues of discrimination on religious grounds, including the presence of religious symbols in the public sphere. For example, the Ontario Human Rights Commission's *Policy on Creed and the Accommodation of Religious Observances* states that, short of undue hardship, a school or organization has a duty to accommodate a person's religious headcovering and Sikh kirpans.¹³

2.2.2 HEADCOVERINGS

Canada has dealt with the religious symbols question in a wide variety of contexts, the trend being for courts to allow religious headcoverings in most situations unless there is a serious safety or public order issue at stake.

Most of the prominent Canadian headcovering cases have focussed on Sikh turbans. In 1988, the Ontario Human Rights Commission applied the Ontario *Human Rights Code*¹⁴ to find a prohibition on Sikh turbans in a public school to be religious discrimination.¹⁵ That same year, Human Rights Commissions in Alberta and again in Ontario used this interpretation of discrimination to overturn bans on uniformed employees wearing turbans on the job.¹⁶ Again, in a highly publicized case in 1995, the Federal Court of Appeal also upheld a Royal Canadian Mounted Police policy allowing Sikh officers to wear turbans as part of their uniform.¹⁷

However, once issues of safety and public order are thrown into the headcovering equation, the answer is no longer as clear in Canadian law. The British Columbia Human Rights Tribunal has upheld the right of a turbaned Sikh to ride a motorcycle without a helmet, finding that the discrimination involved in mandating the helmet despite the religious obligation to wear a turban is not justified by the marginal increase in risk to the person or increase in medical costs. The unhelmeted rider alone bears the risk.¹⁸ However, in 2008 the Ontario Court of Justice took the opposite position, stating that the province's need to uphold reasonable safety standards outweighed the Sikh motorcycle rider's right to wear a turban.¹⁹

Similarly, in *Bhinder v. Canadian National Railway Co.*,²⁰ the Supreme Court of Canada upheld a workplace policy that mandated hard hats, thus precluding Sikh turbans. The Supreme Court dismissed Bhinder's claim, as the *Canadian Human Rights Act*²¹ allows an exception to freedom of religion where there is a *bona fide* occupational requirement. Because the safety concerns at play in this case did make the hard hat a *bona fide* occupational requirement and CN had demonstrated no intention to discriminate, the policy was upheld.

Unlike other Canadian provinces, which have primarily focused on Sikh symbols and headcoverings, Quebec has dealt with the treatment of religious symbols in the public sphere in a variety of religious contexts. Quebec often practises a variant on the legal and political approach to minority issues adopted in the rest of Canada because of its *Charte des droits et libertés de la personne*;²² strong history of Catholicism; the influence of French principles of secularism which has resulted in a different approach to multiculturalism;²³ and significant control over immigration into the province.

Quebec first broached the issue of Islamic headscarves in the school system when a Muslim girl was expelled from her school for wearing one in 1994. Soon faced with a series of similar incidents, the Commission des droits de la personne et des droits de la jeunesse du Québec (the Commission) was asked to provide an opinion on the issue. In a non-binding report published in 1995, the Commission concluded that public schools were obliged to accept headscarves, provided that this freedom of religious expression did not constitute a real risk to personal safety or security of property. The Commission stated that prohibiting the headscarf was contrary to the Quebec Charter as a violation of both freedom of religion and the right to education. While schools may insist on certain dress codes, they must also seek reasonable accommodations with Muslim students who are discriminated against by the application of such codes. Dealing with the feminist equality argument that a headscarf ban is necessary to protect girls from an overly oppressive religious regime, the Commission was careful to state that unless it is shown that a specific girl is forced to wear the headscarf against her will, an absolute ban on the headscarf as a religious symbol is not the role of equality laws, and would be an insult to the independence of Muslim women. Rather, the Commission stated that social institutions play a key role in social integration and must not marginalize individuals by excluding them from public education.²⁴

Despite these rulings by the Quebec Commission, a marked difference has nevertheless become apparent between the federal and Quebec governments' approaches to face-covering veils: the *burqa* or *niqab*. In March 2010, following a series of incidents involving the expulsion of women wearing facial veils from government-sponsored French language classes, the Quebec government introduced a bill confirming government practice with respect to veils. The bill emphasizes the religious neutrality of the state and prohibits government employees and those accessing government services from wearing veils where issues of security, identification or communication are involved. Such government services include public schools and child care.²⁵

In addition, in 2007, the Quebec *Elections Act*²⁶ was amended to ensure that voters in Quebec elections show their faces to elections officials (i.e., no face-obscuring veil). By contrast, no such broad-based legislation is contemplated at the federal level, and the Chief Electoral Officer has confirmed that federal legislation does not require voters to reveal their faces – although, in practice, women have sometimes been requested to unveil in private.²⁷

Also in contrast with the Quebec government's absolute approach to the *niqab*, in 2010 the Ontario Court of Appeal issued a judgment²⁸ balancing the rights of a witness to wear a *niqab* against the constitutional right of the accused to a fair trial where the credibility of the veiled witness was in question. The court concluded that such issues must be determined on a case-by-case basis after a full investigation of each party's position. At the time of writing, that case was before the Supreme Court of Canada.

2.2.3 KIRPAN

When examining the question of kirpans in the public sphere, safety and security are of particular importance. Many court decisions have allowed kirpans in a variety of contexts provided that safety is not an issue of overriding importance and the blade is properly contained.

Kirpans have been specifically allowed in schools by the Supreme Court of Canada. In *Multani v. Commission scolaire Marguerite-Bourgeoys*,²⁹ the Supreme Court overturned a school board's prohibition on kirpans as part of the board's broader policy on weapons, holding that such a prohibition infringed the student's freedom of religion in a way that could not be justified under section 1 of the Charter. Although the prohibition was motivated by the objective of ensuring a reasonable level of safety at school, the court held that options were available that would have less impact on the student's freedom of religion, such as allowing the student to wear the kirpan under restrictions that would have ensured that it was carefully sealed within his clothing. The court noted that there was no evidence of violent incidents related to kirpans in schools across Canada, and other objects such as scissors and baseball bats could be much more easily obtained by any student with violent intentions.

Despite some evidence of resistance among the Quebec public,³⁰ this case nonetheless seemed to reflect the reality of compromise with respect to kirpans that already existed in school boards across Canada. Courts in British Columbia and Ontario had already specifically upheld similar policies.³¹ Using similar reasoning, the British Columbia Court of Appeal also upheld the right to wear a kirpan in a hospital in *British Columbia (Worker's Compensation Board) v. British Columbia (Council of Human Rights)*³² under (then) section 3 of the British Columbia *Human Rights Code*³³ prohibiting discrimination in the provision of accommodation and services.

As a matter of policy, Sikh members of Parliament are entitled to wear the kirpan to the Canadian House of Commons, and visitors may wear the kirpan in the public gallery. However, in this respect, Quebec legislators have, in the past, adopted a different approach to their federal counterparts. In early 2011, a Sikh delegation seeking to testify on Quebec's reasonable accommodation bill was denied entry to the National Assembly when its members refused to remove their kirpans.

Nevertheless, where safety is of real concern, it is clear that kirpans are prohibited despite provincial or federal laws protecting freedom of religion. For example, the Canadian Human Rights Tribunal has held that prohibiting kirpans during air travel is legitimate for the protection of passengers and staff.³⁴ Similarly, in order to protect personal security, public order and the administration of justice, the Manitoba Court of Appeal upheld the right of a judge to bar kirpans from the courtroom in *R. v. Hothi et al.*³⁵ While the court acknowledged that the kirpan was a religious symbol and not a weapon, it based its decision on the authority of a judge to maintain control of his or her courtroom. This authority has traditionally encompassed the right to ensure that there are no weapons whatsoever in the courtroom, as the presence of a weapon could thwart the process of justice by being perceived as an adverse

influence. Nevertheless, individuals involved in the Multani case were permitted to wear the kirpan during the hearing before the Supreme Court.

2.2.4 SUCCAH

In 2004, the Supreme Court of Canada in *Syndicat Northcrest v. Amselem*³⁶ also upheld the right of Orthodox Jews to construct succahs on their condo balconies to celebrate the autumn festival of Sukkot. This case is viewed as a seminal interpretation of the scope of freedom of religion. Despite the fact that the condominium ownership agreement prohibited decorations and constructions on balconies and proposed an alternative communal structure in the garden, the court held that religious freedoms must take precedence, and that the prohibition on the succahs was a non-trivial interference with religious freedoms. However, the court emphasized that the succahs must be erected in such a manner as not to pose a threat to safety by blocking doors or fire lanes. As much as possible, the succahs must also conform with the general aesthetics of the property.

2.3 UNITED STATES

The United States is founded upon a profound history of Protestantism in conjunction with a clear separation of church and state. One of the fundamental principles underlying the US Bill of Rights is religious freedom – the broad and absolute nature of this freedom is seen as one of the cornerstones of American society.³⁷ The First Amendment to the US Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...,” while the Fourteenth Amendment guarantees equal protection for all citizens. In addition, any form of discrimination on the grounds of religious belief is prohibited under the *Civil Rights Act*,³⁸ while the *Religious Freedom Restoration Act*³⁹ creates a heightened standard of scrutiny for federal government actions that interfere with an individual’s freedom of religion. As such, federal laws can constrain freedom of religion only if they use least restrictive means to further a compelling government interest. Upholding these values, the federal Equal Employment Opportunity Commission (EEOC) requires employers to accommodate workers’ religious beliefs unless doing so would cause an undue hardship. As in Canada, the government’s role is to accommodate religious expression in a neutral manner.⁴⁰

In terms of religious symbols, the government has made its wishes clear in the context of the public school system: attire that is “part of students’ religious practice,” including kirpans and headscarves, may not be prohibited.⁴¹ This policy has been dictated through a number of government and presidential directives, and re-emphasized through the Department of Justice’s interventions in a lawsuit involving a Muslim girl suspended from a public school in Oklahoma for wearing a headscarf and in overturning a historical ban on religious clothing for teachers in Oregon.⁴²

In the context of uniformed work where issues of public safety *may* be involved, the trend has also been to allow religious symbols. Courts have found that the turbans of Sikh traffic enforcement officers do not threaten public safety and that police departments must consider requests for accommodation.⁴³ The US Department of Justice has also become involved in lawsuits against metropolitan transport

authorities that are unwilling to accommodate Muslim and Sikh transit workers⁴⁴ as well as against the New Jersey Department of Corrections for failing to allow a correctional officer to wear a headscarf.⁴⁵

Nevertheless, as in Canada, American authorities have ensured that religious freedoms are not paramount in situations where public order and individual safety are clearly at stake. This issue came to the forefront in the context of the US military. In 1986, the US Supreme Court ruled that an Orthodox Jewish soldier could not wear a kippa.⁴⁶ Because the military prizes order, discipline and uniformity above all else, it was justified in demanding that religious headcoverings be removed from under military helmets. Similarly, turbaned Sikhs have effectively been denied membership in the US Army since a 1984 uniform policy exemption was eliminated.⁴⁷ However, in 2010 the first Sikh in decades was granted a waiver to attend training,⁴⁸ and in 2009, the Department of Defence issued a directive emphasizing that requests for religious accommodation should be granted where it would not have a negative impact on “mission accomplishment, military readiness, unit cohesion, standards, or discipline.”⁴⁹ As such, religious apparel may be worn unless it interferes with “the ability of the service member to perform military duties or if the item is not neat and conservative.”⁵⁰

2.4 WESTERN EUROPE

In Western Europe, a more recent destination for immigrants with diverse religious backgrounds, the debate over religious symbols in the public sphere has taken on added significance. Political culture in many European countries has had to either accommodate or find methods of dealing with “difference” within traditionally more homogenous societies. The following pages provide a brief overview of the ways in which various European countries have interpreted freedom of religion in this context.

2.4.1 EXAMPLES FROM ACROSS EUROPE

2.4.1.1 ENGLAND

In England, where there is no separation between church and state, the Queen is the titular head of both the Church of England and the government. However, this has had little effect on integration policies, in which cultural pluralism encourages ethnic minorities to practise their own faith. With no written constitution, the *Race Relations Act*,⁵¹ *Human Rights Act*,⁵² and *Employment Equity (Religion or Belief) Regulations 2003*⁵³ are left to set out England’s anti-discrimination laws dealing with freedom of religion and accommodation of difference.

In general, British courts have ensured that religion is accommodated in the public sphere, provided that there is no threat to security or the proper functioning of institutions.⁵⁴ Muslim headscarves and Sikh turbans are generally allowed in the schoolroom following a 1983 decision by the House of Lords which found a prohibition to be tantamount to racial discrimination.⁵⁵ However, where the headcovering goes beyond a turban or a scarf, courts are not necessarily as accommodating. In 2006 the House of Lords rejected the claim of a student who

wanted to wear a *jilbab* – a long, loose-fitting gown worn with a headscarf – to a school with an otherwise accommodating dress code.⁵⁶ Other courts have upheld school bans on a student's full-face veil, a teaching assistant's *niqab*, and a chastity ring.⁵⁷ In 2007, the UK Department for Children, Schools and Families established general guidelines on the issue, stating that schools should act reasonably in accommodating religious requirements, but can prohibit full-face veils in school.⁵⁸

In the employment context, the crucifix has come into question in recent years, with various courts upholding dress codes that prohibited such necklaces.⁵⁹ However, generally even security issues can be accommodated in the interests of freedom of religion – police officers, soldiers, motorcyclists and construction workers have all been permitted to wear religious headcoverings. Ultimately, English authorities tend to adopt a flexible case-by-case approach rather than applying blanket rules.⁶⁰

2.4.1.2 ITALY

Italy also has a recent history of tackling the religious symbols debate head on. Despite historically close ties to the Catholic Church, there is official separation of church and state in Italy, as well as a constitution that guarantees freedom of religion. Secularism – defined in Italy as embracing all religions – is one of the fundamental principles of the Italian legal system.⁶¹

In terms of specific religious symbols, Islamic headscarves are permissible in schools and public offices, provided that they do not threaten public order.⁶² However, 2005 antiterrorism legislation increased penalties for persons convicted of concealing their identity by wearing the *burqa*, while some local authorities have also brought in rules to prohibit the veil in public spaces. More recent controversy has focused on the presence of crucifixes in public spaces: in 2005, a court ruled that crucifixes may be present at voting sites maintained by the state; in 2007, the Minister of Justice decreed that the crucifix could be displayed in public buildings, as it was a symbol of Italian culture and values; and in 2009, the Minister of Education suspended a teacher who removed a crucifix from her classroom.⁶³ Interestingly, in 2011, the Grand Chamber of the ECHR issued a ruling upholding the presence of the crucifix in Italian public schools, stating that crucifixes were essentially a passive symbol in secular schools and that there was no breach of the European Convention's right to education. The ECHR found that it had a duty to respect the Italian government's position given the margin of appreciation accorded to the state.⁶⁴

2.4.1.3 NETHERLANDS

With a strong history of Protestantism, the Dutch government also emphasizes the strict separation of church and state. Dutch secularism is interpreted as a place in which all religions have an equal right to manifest themselves in public, and freedom of religion is a constitutionally protected right.⁶⁵ Building on a position first developed in the 1980s,⁶⁶ today, courts and the Equal Treatment Commission (ETC) apply a case-by-case approach to religious symbols and have repeatedly stated that headscarves may be banned from the public sphere only on narrow grounds, such as security or real inconsistency with official government uniform. The Ministry of Education issued guidelines in 2003 specifying that the aim of any policy restricting

religious symbols must be legitimate, appropriate means must be used, and the means must be necessary to achieve that goal.⁶⁷ Nevertheless, in March 2003, the ETC upheld an Amsterdam school's ban on *burqas*, holding that in this case, open interaction was more important than the right to wear a full *burqa*. The government has also considered the idea of implementing a limited ban on facial veils in public schools and government.

2.4.1.4 GERMANY

In Germany, there is no strict separation of church and state, and the country is bound by principles of secular neutrality. Freedom of religion is guaranteed by the Basic Law – the 1949 Constitution.⁶⁸ The headscarf issue achieved significant prominence in 2003, when the Federal Constitutional Court ruled that teachers could wear headscarves, as this did not in principle impede the values of the Constitution, but that individual states were free to prohibit public school teachers from wearing headscarves as they saw fit within their own borders. Since then, a number of states have passed their own legislation prohibiting religious symbols.⁶⁹

Ten years earlier, the Federal Constitutional Court also dealt with the issue of crucifixes when a 1995 Bavarian school ordinance required the display of a crucifix in every elementary school classroom. The court ultimately held that schools must not proselytize on behalf of a particular religious doctrine and that the display of crosses in the classroom exceeded the constitutionally established limits on freedom of religion, as the crucifix is a core symbol of the Christian faith and was being displayed in a public school where attendance is mandatory.⁷⁰

As such, the German position on religious symbols in the public sphere is not entirely clear. While the federal law apparently adopts a broad concept of freedom of religion, individual state application of the constitutional principles is strongly influenced by cultural traditions and local politics.

2.4.1.5 BELGIUM

Belgium has a strict policy on religious neutrality in the public sphere and its constitution clearly guarantees freedom of religion.⁷¹ Over the last 20 years, there has been significant debate about religious symbols in Belgium, particularly headscarves; however, until recently there has been little uniform policy or law on the issue. Both courts and the government have tended to deal with religious symbols on a case-by-case basis, rather than establishing a broader policy on freedom of religion. In terms of private employment, religious symbols are generally permitted, except where professional exigencies dictate otherwise, or there is a reasonable and objective justification. However, at the government level, wearing religious symbols is broadly prohibited for selected public service officials, such as judges and police,⁷² and a number of municipalities prohibit all employees from wearing religious symbols.⁷³

The issue of religious symbols in the school environment has proved complex, since 1989, when several schools banned Islamic headscarves. Those prohibitions were overturned in court, and the government has since issued a number of statements

emphasizing the power of school authorities to make such decisions and the fact that headscarves do not, in and of themselves, contradict the principle of neutrality unless they are worn for the purposes of provocation.⁷⁴ However, in 1994 a Liège Civil Tribunal upheld a ban on the headscarf, ruling that *hijab* is not a religious obligation, but rather stems from a personal or family conviction, and is thus not protected by the guarantee of freedom of religion.⁷⁵ As such, there is currently no central Belgian policy on headscarves in the classroom. This is strictly a matter left to the discretion of local authorities. In reality, most schools do prohibit headscarves for both students and teachers,⁷⁶ and Belgian courts have dismissed a number of discrimination complaints, frequently holding that the principles of equality and neutrality in the state educational system take precedence over freedom of religion.⁷⁷

This apparent shift towards emphasizing secularism over a positive interpretation of freedom of religion was confirmed in July 2011, when the Belgian Parliament brought into force a law banning the *burqa* in all public spaces. The new law threatens those who wear the *burqa* with a fine or imprisonment, and is the second such national ban on *burqas* in the Western world, following on the heels of legislative action taken in France earlier the same year (see the next section).

2.4.2 FRENCH LAÏCITÉ – *L’AFFAIRE DU FOULARD* AND BEYOND

2.4.2.1 THE LAW

In France, the headscarves debate – *l’affaire du foulard* – has taken on dramatic proportions due to the imposition of a country-wide ban on religious symbols in the classroom in 2004 and on full facial veils in public in 2011, sparking significant protest throughout the country. France’s historically based strict policy of secularism has been implemented within a political culture strongly influenced by reaction to the active presence of the largest Muslim population in Western Europe – approximately 8%–10% of the French population.⁷⁸

Of all states in the Western world, France’s conception of secularism is the most rigidly defined, with strictly enforced policies that keep religion out of the public sphere. France is a *laïc* state – *laïcité* being a complex term that officially refers to strict separation of church and state. However, in France, *laïcité* is interpreted in an active sense, whereby the state is promoted as fundamentally politically independent of any religious authority and in which a need for public order can be used to justify interference with freedom of religion. The result is that although France may have very strong notions of negative freedom, positive freedoms can also be significantly restrained.⁷⁹

A number of documents lay out the French conception of freedom of religion and state policy on *laïcité*. Article 10 of the 1789 *Declaration of the Rights of Man and of the Citizen* sets out a negative notion of freedom of religion as restricted by the need to keep the peace and maintain public order. The law of 9 December 1905 reiterates a similar concept, also setting out the state’s refusal to recognize any specific religion, as well as the formal separation of the church and state. This law is thus the basis of the *laïc* republican tradition in France.⁸⁰ Finally, the French Constitution of 1958 (as amended) establishes the basic concept of state *laïcité* in Article 1, binding

the concept of freedom of religion within its scope: state *laïcité* essentially means that the state supports no belief or particular ideology and cannot discriminate based on religion.⁸¹

This latter notion informs France's policy of immigrant assimilation. While France may be open to newcomers, its policy is to insist on the homogeneity of French culture, with assimilation as a condition of membership. France's *laïc* public schools are seen as a place where equality reigns and children can be safe from the exigencies of family and religion in order to become truly French.⁸²

2.4.2.2 IN PUBLIC SCHOOLS

The issue of the headscarf in French public schools exploded onto the national scene as a topic of heated debate in 1989 when three Muslim girls were suspended from class.⁸³ In response, the Minister of Education asked the Conseil d'État, the supreme administrative court in France, for an opinion. The Conseil's *avis*⁸⁴ stated that wearing Islamic headscarves was not fundamentally incompatible with French principles of *laïcité* and that any discrimination based on religion is unconstitutional. However, on a case-by-case basis, it may be valid to impose limitations on freedom of religion – for example, when students wear religious symbols that constitute an act of pressure, provocation, proselytism or propaganda.⁸⁵

The Minister of Education then issued a circular, reiterating these principles.⁸⁶ Faced with the guidelines' ambiguous nature, schools began to apply the limitations differently throughout the country. While some administrators felt that only a full *burqa* would breach the restrictions, other schools used the definition of propaganda, proselytism, and protest to justify a larger number of exclusions.

In 1992, the Conseil d'État issued a new decision on the headscarves issue. This time, faced with a specific case, the Conseil upheld the right of three girls to wear headscarves, as the school ban in question was overbroad.⁸⁷ Following this decision and in the midst of a wave of anti-Muslim sentiment in France, dozens more girls were barred from their classes across France and thousands of Muslim students began holding protests.⁸⁸

In an effort to bring the issue under closer regulation, the Ministry of Education issued a new circular in 1994 that in many ways contradicted the wide scope offered by the Conseil's approach. The circular emphasized that school is a place for integration and stated that conspicuous religious symbols could not be allowed, as this would effectively separate certain pupils from the general rules of communal life – the symbol itself would be an element of proselytism. The circular stated that schools should ban all conspicuous religious symbols that were not merely discreet representations of personal conviction. The political result of this circular was to provoke girls across the country to flout the prohibition and for schools to tighten their prohibitions.⁸⁹

In the following years the Conseil d'État was called on to provide rulings in more headscarf cases, and began turning away from the apparently wide scope afforded by its earlier decisions and relying on a need to protect public order as a justification

for upholding restrictions on religious symbols.⁹⁰ The Conseil applied the guidelines to teachers and school employees as well as students, holding that wearing religious symbols to work was a fundamental violation of one's duties in the French public service setting.⁹¹

Faced with ongoing popular and political unrest over the issue, President Jacques Chirac commissioned a study of the headscarves issue within the context of the burgeoning multi-ethnic presence in the school system and the French policy of *laïcité*. Published in 2003, the resulting Stasi Report recommended a law that would ban all religious symbols from the classroom. Despite massive protest across the country in 2004, the French National Assembly passed a law banning all conspicuous religious symbols from public primary and secondary schools. The law does not, however, prohibit more discreet symbols, such necklaces with a cross, Star of David, or hand of Fatima.⁹² To date, most schools in France have adopted the law's suggested model: "the wearing of symbols or clothing by which students conspicuously indicate their religious belief is prohibited." However, a small number of schools have opted for a more complete ban on all religious headcoverings in class, whether conspicuous or not.⁹³

The new law seems to have had some effect. Whereas in 2003, 1,500 students refused to remove religious symbols in class, when schools reopened in September 2004, the numbers were significantly smaller. Since then, a number of students have taken the issue to administrative tribunals, the Conseil d'État, and the ECHR – but without success.⁹⁴ The ECHR definitively held that a series of actions brought by Muslim and Sikh students were inadmissible, as the 2004 religious symbols law was consistent with France's constitutional secularism – the interference with freedom of religion was proportionate and justified given the public order aims pursued.⁹⁵ By September 2009, there were no reports of disciplinary cases brought under the 2004 law.⁹⁶

2.4.2.3 IN OTHER CONTEXTS

Although there is no similarly legislated direct ban on religious symbols in the French public service, the same strict principles of *laïcité* apply. In the public service, principles of *laïcité* mean that there must be neutrality in the hiring process and in dealing with individuals both within and outside public institutions. Government employees may not wear religious symbols at work. A number of court cases involving the public service have upheld these ideals.⁹⁷

Outside the public service, the ECHR has become involved in upholding bans on religious symbols in a variety of contexts. In 2008, the ECHR upheld a Conseil d'État ruling⁹⁸ that Sikhs must remove their turbans to be photographed for driver's licences, holding that this decision was a valid and proportionate restriction on freedom of religion that fell within France's margin of appreciation, given the public order and security requirements at play in combating fraud and falsification of documents.⁹⁹ Furthering such arguments about security, the ECHR also rejected the application of a Sikh who was obliged to remove his turban at airport security,¹⁰⁰ as well as that of a Muslim woman who was denied a visa to France when she refused to remove her headscarf for an identity check.¹⁰¹

2.4.2.4 THE FULL FACIAL VEIL

As in many other countries, the furore that began over the headscarf has spilled out of the classroom in France and into the arena of full facial veils in the public sphere. Women who wear the *burqa* or *niqab* are rare in France; nevertheless, the alleged anti-“French,” “anti-feminist threat” of the *burqa* has become a serious issue. Veiled women have been excluded from naturalization ceremonies¹⁰² and in 2008 a woman who wore a *niqab* was denied French citizenship due to her lack of integration into French culture. This decision was upheld by the Conseil d’État.¹⁰³

In 2011, France became the first country in the Western world to pass legislation outlawing full facial veils in public. Despite two *avis* issued by the Conseil d’État questioning the constitutionality of the proposed legislation, France’s highest constitutional court – the Conseil constitutionnel – gave the National Assembly the green light in late 2010.¹⁰⁴ Those who contravene the new law by covering their faces in public could face fines or be required to attend a citizenship course. The law also carries penalties for those who force others to cover their face. Passage of the law brought protesters into the streets around the world.

3 CONCLUSION

What becomes clear from this analysis is that while issues of freedom of religion are being debated in courts throughout the world in a variety of different contexts, the Islamic headscarf seems to have provoked cultural tensions in many European countries. One might argue that, backed by the ECHR, many states are turning to secularism as a protective shield in an attempt to guard society from the complexities of multiculturalism, effectively preventing the broad expression of a right that is guaranteed in international and domestic constitutional laws.

In countries such as Canada and the United States, the question of religious symbols has been significantly less contentious, perhaps because these two nations were built upon the foundations of immigration and have needed to accept difference in order to survive.¹⁰⁵ As a result, both Canada and the United States have a political and constitutional climate that has allowed their governments and courts to interpret freedom of religion in its broadest form, adopting an approach of neutral accommodation.

Thus, each country in the Western world essentially provides a very similar guarantee of freedom, using a very similar constitutional proportionality test based on strong principles of freedom of religion. However, that test tends to be applied differently depending on each country’s historical traditions and its social and political culture, which have a profound influence on legal arguments concerning the limiting scope of safety, security, and public order.

NOTES

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