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# Religious Freedom: Expressing Religion, Attire, and Public Spaces

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# RELIGIOUS FREEDOM: EXPRESSING RELIGION, ATTIRE, AND PUBLIC SPACES

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## INTRODUCTION

Religious expression has long been recognized as a fundamental element of the right to religious freedom. Article 18 of the International Covenant on Civil and Political Rights ("ICCPR")[1] and Article 9 European Convention on Human Rights ("ECHR")[2] both protect the right to freedom of thought, conscience, and religion, including the right to manifest religion in worship, observance, practice, and teaching. The expression of religion through religious attire is, in many cases, an important aspect of religious observance and practice, and thus comes within the protection of human rights law. As a result, the question of how to respond to religious attire in public spaces has traditionally been considered from a human rights perspective.

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[1] International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). Article 18 reads, in part:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching.

*Id.* at 178.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, § 1, art. 9, Nov. 4, 1950, 213 U.N.T.S. 230 [hereinafter European Convention on Human Rights].

Issues for debate have included the question of whether a dress code is religiously required,[3] and when the rights of others may prevail over the right of an individual to express their religion.[4] This Article revisits the debate over when religious attire may be restricted in the public space through the alternative, but complementary, perspective of equality. It suggests that viewing this issue through the lens of equality may provide additional insights for these debates, and argues that when assessing the proportionality of any restriction on religious expression, the interest in equality should be taken into account.

The Article focuses on the issue of religious dress as a form of religious expression. It begins by addressing the human rights approach to the protection of religious expression and discusses some of the difficulties which can arise from this approach, particularly with regard to the need to balance conflicting rights. It then discusses the ways in which an approach based on equality may provide additional insights into how to resolve some of those difficulties. It ends with a consideration of the factors that may be used when assessing the proportionality of restrictions on religious expression.

## I. HUMAN RIGHTS APPROACHES TO RELIGIOUS EXPRESSION

Viewed from a human rights perspective, religious dress is generally understood as an example of the manifestation of religion. This manifestation of religion and belief is given qualified protection in most human rights regimes.[5] Such a view allows plenty of scope for balancing human rights interests against other rights, such as rights to equality, and it is in this

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[3] The debate over whether practices have to be religiously required or merely religiously motivated is discussed in *Arrowsmith v. United Kingdom*, App. No. 7050/75, 3 Eur. H.R. Rep. 218 (1978).

[4] An example of how the "rights of others" may prevail over the right to religious expression can be seen in *Sahin v. Turkey*, 2005-XI Eur. Ct. H.R. 175, 206–07 and *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R 447, where the equality rights of others prevailed over Sahin's religious rights.

[5] *See* European Convention on Human Rights, *supra* note 2, art. 9; International Covenant on Civil and Political Rights, *supra* note 1, art. 18, § 3.

context that the interaction of rights related to religious expression via religious attire and the rights of others has traditionally been discussed. For example, under Article 9 of the ECHR the protection of religious expression is limited where necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. In the context of religious dress, these limitations could, for example, be used to justify the removal of face veils in order to ensure proper identification at national borders,[6] or to justify restrictions on flowing garments in order to limit infection control in hospitals.[7] Such examples are relatively uncontroversial. More contentious is when religious expression contests the broader category of "the rights and freedoms of others."[8] This raises a problem at the heart of religious freedom—whether the positive right to freedom of religion encompasses a corresponding negative right[9] to have no religion or to be free from religion. Recognition of a negative right to religious freedom potentially allows for sweeping restrictions on religious expression. According to this view, religious attire may be restricted in public in order to protect the rights of those who wish to enjoy a public space free from religion and religious symbols.[10]

In human rights law the method developed to manage the conflict between different rights is to undertake a balancing

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[6] *See* FOI Release, Guidance on How to Treat Women Wearing Clothing That Covers Their Face, UK Home Office (July 1, 2010), http://www.gov.uk/government/publications/guidance-on-how-to-treat-women-wearing-clothing-that-covers-their-face.

[7] Health and safety reasons were accepted by the European Court of Human Rights as a legitimate aim for restrictions on religious dress in a hospital in *Eweida v. United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10, and 36516/10, 2013 Eur. Ct. H.R.

[8] European Convention on Human Rights, *supra* note 2, art. 9.

[9] A "negative right" is a right not to do something, which in this case, is a right to be free from religion, or a right not to practice a religion.

[10] For examples of the European Court of Human Rights cases discussing an interest in being free from religious influence and referring to the fact that Muslims who wear the headscarf can put under pressure those Muslims who choose not to, see Sahin v. Turkey, 2005-XI Eur. Ct. H.R. 175, 206–07; Dahlab v. Switzerland, 2001-V Eur. Ct. H.R 447.

approach to determine where the correct boundaries of protection should lie. Human rights courts are experienced in seeking to resolve conflicting interests this way. Of course, such a balance can be hard to find, especially when human rights conventions are operating on a transnational level. In response, the European Court of Human Rights (hereinafter ECtHR) has developed the notion of the "margin of appreciation," which allows a degree of flexibility to member states in their observance of the ECHR. This mechanism provides the member states of the ECHR with a "margin of appreciation" in setting the parameters of their domestic law, and states that restrictions will only be found to breach human rights norms when they fall outside this margin.[11]

The margin of appreciation has particular significance with respect to freedom of religion cases and a fairly wide margin operates with regard to these cases in Europe, reflecting the lack of consensus about how freedom of religion cases should be treated.[12] Indeed, this flexible approach means that there is no uniform approach to religious attire in Europe, despite being governed by a common human rights code. Some member states of the ECHR such as Turkey, France, and Belgium impose significant restrictions on religious attire at work and in the public space more generally.[13] However, most other signatory states of the ECHR[14] allow religious attire in public, with the UK allowing

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[11] Handyside v. United Kingdom, App. No. 5493/72, 1 Eur. H.R. Rep. 737, 753 (1980).

[12] *See* CAROLYN EVANS, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 143–44 (2001). For example, in France the public sphere is strictly neutral, whereas the UK and Denmark have established churches.

[13] For an overview of the French position, see HANA VAN OOIJEN, RELIGIOUS SYMBOLS IN PUBLIC FUNCTIONS: UNVEILING STATE NEUTRALITY: A COMPARATIVE ANALYSIS OF DUTCH, ENGLISH AND FRENCH JUSTIFICATIONS FOR LIMITING THE FREEDOM OF PUBLIC OFFICIALS TO DISPLAY RELIGIOUS SYMBOLS (2012). The Turkish position is set out in *Sahin*, 2005-XI Eur. Ct. H.R. 17.

[14] The ECHR signatories include forty-seven member states, twenty-eight of which are members of the European Union. They are: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France,

perhaps the widest scope for when religious attire can be worn in public, including a range of public employment such as the police and judiciary.[15] This broad range of responses to the question of what is the proper scope for restricting religious attire in the public space can serve as an illustration of how the "margin of appreciation" works in that they show that all these different responses, from the most restrictive of religious dress to the most liberal, can be lawful responses to the requirement to provide protection for religious freedom under the ECHR. In effect, as long as the protection for religion does not fall outside the range, or margin, it will remain lawful under the ECHR. These mechanisms enable the ECtHR to support a range of responses with regard to the issue of religious symbols, while maintaining a human rights-based approach to the issue.

An example of this balancing mechanism can be found in the 2005 Grand Chamber judgment in the case of *Sahin v. Turkey*.[16] In this case, a university student objected to the prohibition on religious attire being worn in her university and the ECHR[17] balanced the religious freedom of the student against the Turkish government's interest in the protection of state neutrality.[18] In reaching the conclusion that the ban was compatible with the ECHR, the court relied on the mechanism of the margin of appreciation and gave a wide margin to the Turkish government to decide whether it was in fact "necessary" in the Turkish political and cultural context to prohibit the wearing of religious

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Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom.

[15] For an overview of the approaches to this matter in France, England, and the Netherlands, see VAN OOIJEN, *supra* note 13.

[16] 2005-XI Eur. Ct. H.R. 175.

[17] For a general introduction to the European Court of Human Rights, see THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Pieter van Dijk et al., eds., 4th ed. 2006) [hereinafter THEORY AND PRACTICE OF ECHR].

[18] *Sahin*, 2005-XI Eur. Ct. H.R. at 207–08.

symbols in teaching institutions. In the *Sahin* case, the ECHR recognized that the state's primary interest was the need to protect secularism in the public sphere. Similarly, with regard to the pending case regarding the "*burqa* ban," *S.A.S v. France*,[19] the state interest is framed in terms of security, the need to uphold gender equality, and to avoid Muslim women being cut off from society. These interests will need to be balanced against those of the individual women whose freedom of religious expression is severely limited by the ban.

Although the approach to conflicting rights based on the balancing of interests within a margin of appreciation approach is well established,[20] nonetheless profound questions remain about whether the resulting variety of practice across different countries should be acceptable within a single legal framework such as the ECHR. Greater clarity and consistency between different countries is desirable for a number of reasons. A key reason is because religious attire can form a significant element of religious identity, and it is important for individuals to have clarity about the extent to which this element of identity can be expressed in public. If religiously orthodox doctors and nurses, wishing to express religious faith through their attire, can do so in the U.K. but not in other parts of the E.U., then those same doctors and nurses are likely to not exercise the free movement of persons enjoyed by other citizens. Moreover, the need for consistency becomes particularly acute when the interference with religious freedom reaches beyond specific situations of work and education into the public sphere more generally. This can be seen through bans on the wearing of face coverings in public in France,

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[19] S.A.S. v. France, App. No. 43835/11; *see also* Press Release, Grand Chamber Hearing Concerning the Prohibition on Wearing the Full-Face Veil in Public in France, European Court of Human Rights (Nov. 27, 2013), http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-4584709-5542384.

[20] *See* THEORY AND PRACTICE OF ECHR, *supra* note 17; *see also* HOWARD C. YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (1996); Thomas A. O'Donnell, *The Margin of Appreciation Doctrine: Standard in the Jurisprudence of the European Court of Human Rights*, 4 HUM. RTS. Q. 474 (1982).

Belgium, and the Netherlands.[21]

However, there is danger inherent in forced clarity and consistency. Clarity and consistency in the legal treatment of religious attire might seem inherently desirable; certainly clarity will help both those subject to the law and those enforcing the law to be clear about what can and cannot be worn in public or at work. However, flexibility may be essential given the range of current practices across different jurisdictions and the lack of agreement about what should and should not be allowed in terms of religious dress. Moreover, the flexibility inherent in the balancing and "margin of appreciation" approach in human rights law remains attractive as it allows for a detailed examination of the facts of each case and for its context. One contextual issue that could be helpful in assessing how to treat religious attire is that of equality. In the next section of this article, I turn to consider the matter of religious attire from the perspective of equality, to consider whether arguments used in equality law can provide new ways to approach the debate.

## II. AN EQUALITY PERSPECTIVE ON RELIGIOUS ATTIRE

Approaching the issue of religious attire from a perspective of equality will involve considering whether restrictions on attire have a differential impact on individuals on equality grounds. For example, it may be that restrictions impact differently on men and women, or on those of one religion more than another. Where this is the case, it can be seen that restrictions not only have implications for religious freedom but for gender and religious equality too.

One particular concern related to religious freedom which may be viewed differently from an equality perspective is the issue of state neutrality. The need for a neutral public sphere is often viewed as in competition with claims for religious freedom.[22] However, it is important to note when considering restrictions on religious expression from an equality perspective

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[21] *See* VAN OOIJEN, *supra* note 13.

[22] *See, e.g.*, *Sahin*, 2005-XI Eur. Ct. H.R. at 175.

that legal arguments based on the value of "state neutrality" appear in a different light from when they are based on human rights perspectives. In effect, strict state neutrality fails to achieve equality because our social organization can never be truly "neutral." The reason for this is two-fold. First, a strict neutrality position tends to assume that we can make a clear separation between the public and private spheres, and that it actually is "neutral" if the public sphere is "neutral." However, if we consider lessons from equality jurisprudence, we can see that what may look "neutral" can in practice favor the dominant group. For example, in the U.S. it was recognized early on in discrimination jurisprudence that neutral rules can have a disparate impact on disadvantaged groups.[23] The resulting concept of indirect discrimination was imported into UK law in the Sex Discrimination Act of 1975, and then into EU law in the 1980s.[24] Thus, in the context of gender discrimination, it is well established that "neutral" norms tend in practice to be male norms, so that neutral rules requiring, for example, that workers be available to work full time, can be indirectly discriminatory on grounds of gender because fewer women than men can comply with them.

This issue with "neutrality" can clearly be seen in the context of religion and belief, where the social organization is largely "Christian" rather than neutral. This means that most workers enjoy a day off from work on Sundays, as well as time off at Christmas and Easter. Thus religiously observant Christians will rarely come across work rules and dress codes with which they cannot comply, unless they work in an area of work that requires staffing all week. This situation arises because of the historical dominance of Christianity in Europe and the U.S., creating a

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[23] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[24] Lord Lester of Herne Hill, *Equality and United Kingdom Law: Past, Present, and Future*, 2001 PUB. L. 77. *See also* Council Directive 76/207, O.J. L. 39/40 (1976) ("[T]"he principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly . . . ."). This directive is often referred to as the Equal Treatment Directive.

system where the wider society is organized in ways that are compatible with mainstream Christian practice.

Second, not only have the dominant social organizations adapted to accommodate mainstream Christian practice; but also Christianity itself has, arguably, adapted to the idea of the "secular" or at least "neutral" social model adopted in much of the EU and also in the U.S. This results, again, in Christians being able to comply more easily with workplace rules than individuals of other religions. A simple example illustrates the adaptability of Christianity: early Christians adapted the pagan winter festivals and turned those once pagan festivals into today what is known as Christmas. Arguably this helped the young religion gain acceptance in what was otherwise a hostile environment. Moreover, there is some Biblical authority which supports such an adaptive process: the command to "give to God what is God's and to Caesar what is Caesar's"[25] provides many Christians a relatively easy method to reconcile civic duty with religious duty.

In addition to these examples of Christianity's adaptability to secular power, Protestant Christianity in particular has developed a specific theology that makes it adaptive. This involves the idea of the separation between body and mind, with faith more a matter of the mind and its state of "righteousness" than a matter of the body.[26] This, again, arguably allows for greater accommodation of secularism within Christianity itself. A full theological discussion of these ideas is beyond the scope of this Article, but put simply, Christian theology is largely based on orthodoxy or "correct belief." Although debates of course continue within Christianity about the precise relationship between "faith" and "works," nonetheless, the religion is based less on what the individual does and more on what he or she believes (in religious terms, his or her relationship with God). This means that the focus is on belief, and so dress codes and

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[25] *Matthew* 22:21.

[26] *See generally* THE OXFORD HANDBOOK OF GLOBAL RELIGIONS (Mark Juergensmeyer ed., 2006).

rules of attire, together with strict dietary rules or prayer rituals, tend to be less central as signifiers of religious observance. In contrast, religions such as Judaism and Islam have a greater focus on orthopraxy: a concern for correct religious practice as signifiers of religious adherence. In these traditions, codes of conduct related to attire, diet, and prayers have greater prominence as means to practice and observe religion. It is these religious practices that can cause conflicts with the secular world. The greater focus on orthodoxy in Christianity, rather than orthopraxy, may provide an additional explanation of the relative lack of conflict between Christian practice and the secular world.

It is arguable, then, that the adaptive process between the secular Euro-American world and Christianity has been a two-way process. In part, the "world" has adapted to accommodate the dominant religion. One example is recognition of Sunday as the Sabbath day of Christianity and thus generally recognized as a day of rest. But in part, Christianity itself has adapted so that conflicts are reduced: there are few external requirements, such as head covering, for observant Christians to comply with, requirements which might otherwise conflict with secular practice.

If these theological understandings are brought into the debate over equality and religious attire, it becomes clear that so-called "neutral" rules, which prohibit the wearing of religious attire, are doubly non-neutral. First, it is more likely that adherents to minority faiths have rules of observance that are of such religious significance. Second, such rules can have a disparate impact upon adherents of minority faiths because the rules of those minority faiths are less likely to be compatible with mainstream social norms. This means that although rules which restrict religious attire can seem formally neutral, in practice they have a disparate impact on religious minorities.

The importance within religions of "right conduct" explains why some religiously observant individuals may appear to be what has been termed "obdurate believers,"[27] or those who will

[27] This phrase was coined by Anthony Bradney in his essay, *Faced by Faith*, *in* FAITH IN LAW: ESSAYS IN LEGAL THEORY 90, 91 (Peter Oliver et al.

not yield their religious beliefs or practices to other interests. For such individuals, a choice between removing religious attire and leaving the public space will not result in the removal of religious attire. Thus a seemingly neutral public space will be achieved at the expense of the religious believer, whose belief will remain hidden. In the context of religions based on orthodoxy, a split between private religious observance and public religious neutrality can be understood in terms of separating the personal and the public: what is God's is private, and can be kept private; what is public ("Caesar's") can remain in public.[28] The split remains a reasonably neat solution to the problem of reconciling personal religion with the neutral public space. However, applied to religions of orthopraxy, attempts to exclude personal belief from the public sphere results in the exclusion of the person altogether.

The importance of "orthopraxy" in some faiths explains the inequality that can arise when certain religious practices are restricted in public, and lessons from an equality perspective may be instructive in this context. For example, it has long been recognized that if women's participation at work is to be increased, then some accommodation of the family is needed. This can be through a workplace nursery provision, maternity leave, or other support for working mothers. If the argument were to be accepted that women's family responsibilities are private matters, best left in the private sphere, then there would be no need for such workplace provisions. Yet within Europe it has been accepted that such an approach does not lead women to work on equal terms with men.[29] If no accommodation of family life is offered, then many women will not leave their "personal matters" at home and head out to work; instead, they will stay at home. Many of the hard-won workplace rights, such as maternity leave, are predicated on the idea that such practical support is necessary if women are to be able to participate in the

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eds., 2000).

[28] *Matthew* 22:21.

[29] See, for example, the extensive workplace protection for gender equality within the European Union, going back to 1957 when the principle of equal pay for equal work became part of the founding Treaty of Rome.

workplace.[30] This lesson can be applied outside of the workplace, too: if we wish to include people in our societies, we need to provide some reasonable level of accommodation for their basic needs.

Applied to the ground of religion and belief, this equality-based reasoning suggests that outright bans on religious expression will lead to unequal results. Bans on religious expression will have a disparate impact on minority religious groups; they will lead to the removal of individuals holding these beliefs from the public sphere and will hamper attempts to include such individuals in mainstream society. Thus, it is clear that if inclusion of religious minorities is a society's aim, then some accommodation of religious practice is essential. If headscarves are banned at work, many Muslim women will not remove the headscarf and go to work; they will stay at home. If turbans cannot be worn by public sector workers, Sikh men will not cut their hair; they will just not work in the public sector. Arguments based on this reasoning apply to the public space as well: if face coverings are banned in the public sphere, those women who wear them will in effect be excluded from the public sphere.

These arguments, based on the perspective of equality law, demonstrate that what can look like simple neutrality may not, in practice, be experienced as neutral. The public sphere is not as neutral as might at first be supposed and the religions themselves are not equally placed in relation to the public space, meaning that similar treatment of religious individuals will not result in all of those individuals having the same experience. Religious groups are not alike, and equal treatment by way of the neutral public space will not result in "like" experiences. It is clear that policies which do not accommodate religious differences ensure there is no equal participation in public life; instead there is exclusion. Thus, if we exclude the personal from the public sphere, we exclude the person as well.

These equality-based perspectives suggest that an absolute ban on religious attire in the public space fails to give sufficient

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[30] *See* SANDRA FREDMAN, WOMEN AND THE LAW (1998).

recognition to the interests of religious individuals. They suggest that the better legal response is to ensure, instead, that there is consideration of the nuances and complexity involved in regulating religious practice. As has been argued above, responding to the plural religious landscape by creating a purely secular public space fails to recognize the deeply unequal way this would affect religious minorities. Instead, a more plural public space is required, with room for the religious and the secular to coexist, and even to engage in dialogue with one another.

To suggest a plural public space, however, is not to suggest that restrictions on religious freedom can never be imposed. Human rights protection for religion does not require absolute protection for religious practice. It does require, however, that any restrictions on religion have a legitimate aim, and that the restrictions on religious practice remain proportionate to that aim. Proportionality requires that no more be done to restrict the religious practice than is needed to achieve the legitimate aim.[31] The second part of this paper considers how and when restrictions on religious expression, through religious attire, may be justified, viewed through the equality context.

## III. WHEN WILL RESTRICTIONS ON RELIGIOUS ATTIRE BE JUSTIFIED?

The ECtHR has heard a number of human rights cases (some referred to above),[32] all involving challenges to the prohibition of religious dress at work. In these cases the prohibitions on religious dress at work have been upheld.[33] In *Dahlab v. Switzerland*, for example, the ECtHR held that the prohibition of the headscarf imposed on a Muslim teacher of young children

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[31] *See* Council Directive 2000/78, art. 2, §(2)(b), 2000 O.J. (L 303) 16, 18–19 (EC).

[32] Sahin v. Turkey, 2005-XI Eur. Ct. H.R. 175; Dahlab v. Switzerland, 2001-V Eur. Ct. H.R. 447; Eweida v. United Kingdom, 2013 Eur. Ct. H.R..

[33] *See* Sahin v. Turkey, 2005-XI Eur. Ct. H.R. 175; Dahlab v. Switzerland, 2001-V Eur. Ct. H.R. 447; Karaduman v. Turkey, App. No. 16278/90, 74 Eur. Comm'n H.R. Dec. & Rep. 93 (1993).

was proportionate because the teacher had influence on the intellectual and emotional development of children.[34] The court also took into account the fact that, as a public sector employee, the teacher was a "representative of the state."[35] The court also mentioned in its reasoning the fact that the headscarf is "hard to square with the principle of gender equality."[36] In *Sahin v. Turkey*[37] the court balanced the religious freedom of a student against the Turkish government's interest in the protection of state neutrality, in holding that the restriction on wearing a headscarf was justified. The court also noted the government's argument that the wearing of a headscarf may put other students under pressure to adopt more fundamentalist approaches to their faith.

However, viewed from an equality perspective, and drawing on the insights discussed above, it can be strongly argued that these decisions fail to respect the equality interests of religious minorities. Instead, a more sensitive approach to justification is needed; one that takes into consideration the wide range of factors involved in cases involving religious expression through attire and other symbols.

An example of a more sensitive consideration of the factors that can be relevant when considering restrictions on religious attire can be seen in the case of *Azmi v. Kirklees Metropolitan Borough Council*.[38] Azmi was a teaching assistant who wanted to wear the niqab[39] when in the presence of male colleagues.[40] She was dismissed for refusing the employer's request to remove the niqab when assisting in class.[41] Her initial claim to the court

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[34] *Dahlab*, 2001-V Eur. Ct. H.R. at 449–50.

[35] *Id.* at 462.

[36] *Id.* at 463.

[37] Sahin v. Turkey, 2005-XI Eur. Ct. H.R. 175, 204–05.

[38] Azmi v. Kirklees Met. Borough Council, [2007] I.C.R. 1154, *available at* 2007 WL 1058367.

[39] A niqab is a face-covering for women that veils the face and hair down to the shoulders, with a small opening for the eyes.

[40] *Azmi*, [2007] I.C.R. at 1157.

[41] *Id.* at 1161.

alleging direct and indirect discrimination was unsuccessful.[42] The court did accept that there was prima facie indirect discrimination since the refusal to allow Azmi to wear the niqab put her at a particular disadvantage when compared with others,[43] but the indirect discrimination was justified. The court held that the restriction on wearing the niqab was proportionate given the need to uphold the interests of the children in having the best possible education.[44] What is interesting about the case is that the court noted[45] that the school had performed a thorough investigation before reaching the conclusion that the restriction was necessary. For example, it undertook a review of Azmi's teaching to see if the quality of teaching was reduced when Azmi wore the face covering and came to the conclusion that it was; the school also investigated whether it was possible to rearrange Azmi's timetable to enable her to assist only in classes with a female teacher and found that this was not possible.[46] In relation to the question of justification, Azmi however argued that insufficient effort had been made to try to accommodate her religious requirements; for example, the school could have tried to assess alternative ways to improve her communication and performance when wearing the niqab.[47] The court, however, held that the school had sufficiently shown that the restriction on wearing the niqab was proportionate to the school's aim of providing effective education for the students.[48]

The *Azmi* case illustrates how a proportionate response to what might otherwise be indirectly discriminatory can require a careful review of the facts and circumstances of the case. This "fact-sensitive" approach can enable a full analysis to be undertaken to determine whether any accommodation of the

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[42] She also claimed victimization and was successful due to inadequacies on the part of the employer in dealing with her case. *See id.* at 1155.

[43] Under the U.K. Equality Act 2010 and the E.U. Equality Directive 2000/78 indirect discrimination occurs where a person is put at a particular disadvantage by an apparently neutral rule.

[44] *Azmi*, [2007] I.C.R. at 1169, 1172.

[45] *Id.* at 1172.

[46] *Id.* at 1169–70.

[47] *Id.* at 1160.

[48] *Id.* at 1169–70.

religious practice can be achieved without compromising the competing interests at stake. In *Azmi*, the court found that the competing interest in maximizing the children's educational experience could not be achieved if the required accommodation was given.[49] It is noteworthy that in *Azmi* the religious practice involved the covering of the face, which was found to impede communication in a context where non-verbal communication is essential. It is quite possible that in other cases, where the religious practice does not directly affect the purpose of employment, some accommodation of religious practice may be required in order to avoid the disparate impact that such restrictions can have on religious minorities.

A similar fact-sensitive approach can be seen in *R (on the application of Begum) v. Headteacher and Governors of Denbigh High School.*[50] The case involved a pupil's freedom of religious expression that was in conflict with the rights of others; here the right of the school to determine the dress code for the school. The school had a uniform which prohibited a female student from wearing the *jilbab*.[51] The reason for imposing the uniform was to promote harmony between the different races, religions, and cultures represented in the school, and to foster a sense of cohesion and community within the school. There had been some history of conflict between pupils in the past, with pupils defining themselves along racial lines, and the school viewed the uniform as necessary as a way to combat these problems and to prevent the development of sub-groups identified by dress.[52] In the case, the English House of Lords was asked to review a school's decision not to allow Begum to attend school wearing the *jilbab*. As with Azmi, the court upheld the decision of the school,[53] but only after a careful, fact-intensive review. The court recognized

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[49] *Id.* at 1172.

[50] R (on the application of Begum) v. Headteacher & Governors of Denbigh High Sch., [2006] UKHL 15, (appeal taken from Eng.), *available at* 2006 WL 690559.

[51] A loose fitting garment which hides the contours of the body, associated with Muslim women.

[52] *Id.* at [18].

[53] *Begum*, [2006] UKHL 15 at [40]–[41], [71], [91], [99].

that the school had undertaken detailed discussion in reaching its decision.[54] The school had consulted local religious leaders and had uniform requirements which met with common Islamic dress codes, in that it allowed for several uniform options, one of which was a salwar kameez[55] which could be worn with the school tie and school jumper.[56] The court recognized that the school's decision creating the uniform requirements had been discussed fairly carefully beforehand. The House of Lords also noted that there was evidence that the school had previously suffered the ill effects of groups of pupils defining themselves along racial lines, with consequent conflict between them.[57] Thus, based on the facts and due to the careful appraisal at the local level, the House of Lords upheld the restrictions on religious attire imposed by the school since the restriction struck a proportionate balance between the conflicting interests at stake in the case.[58]

Of course it will always be arguable that the court could have reached a different conclusion: it may be that Begum could have been accommodated without undue harm to others.[59] However, although one might disagree with the conclusion reached in the case, it is clear that the court's use of fact-based decision making allowed for a more contextual and sensitive decision. This type of decision making allows space in the legal framework for the complexity of the issue to be considered. This way the decision making process includes a full examination of religious freedom and equality concerns.

The benefit of submitting any prohibition on religious attire to the test of proportionality, assessed in light of a detailed factual examination, as was done in *Azmi* and *Begum*, is that a wide range of factors can be taken into account to decide the legality of

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[54] *Id.* at [33].

[55] A sleeveless smock-like dress with the loose trousers.

[56] *Begum*, [2006] UKHL 15at [34].

[57] *Id.* at [18].

[58] *Id.* at [68], [98].

[59] *See* Susanna Mancini, *The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence*, 30 CARDOZO L. REV. 2629, 2654 (2009).

a prohibition. This allows for a nuanced examination of the facts, which reflects the context of the prohibition, the rights of others such as pupils or colleagues, additional options that may be open to the individual, and the practical effect of any gender-based claims. For example, restrictions on headscarves on the basis that men impose them on women, or that headscarves create social pressure on others to conform, should be tested empirically. There is evidence that the courts' assumptions that headscarves are worn by Muslim women because their male relatives force them to do so is incorrect in many cases.[60] This is not to deny that in some instances this may happen, but, equally, legal policy should not be made on the assumption that this is usually the case. A model of legal protection based on a detailed review of the facts and circumstances surrounding each individual case enables courts and tribunals to reach reasoned decisions that are both flexible and responsive to the complexity of the issues involved.

While there are many benefits to a factually sensitive review as a model of protection for religious attire in the public sphere, such an approach does have some drawbacks. In particular, it can lead to uncertainty and inconsistency of approaches between different courts and different contexts. This can make it difficult to predict with certainty how any individual case will be resolved. For example, in *Begum*, the House of Lords stated:

> It is important to stress at the outset that this case concerns a particular pupil and a particular school in a particular place at a particular time. It must be resolved on facts which are now, for purposes of the appeal, agreed. The House is not, and could not be, invited to rule whether Islamic dress, or any feature of Islamic dress, should or should not be permitted in the schools of this country.[61]

The court is extremely clear that it is not setting precedent for

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[60] *See* Melanie Adrian, *France, the Veil and Religious Freedom*, 34 RELIGION, ST. & SOC'Y 345, 349 (2009); *see also* Eva Brems, *Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings*, 22 J.L. & POL'Y 517 (2014).

[61] *Begum*, [2006] UKHL 15 at [2].

how other schools should determine the issue of uniform and Islamic dress. Instead, the judgment focuses on the process by which the issue of religious attire should be determined: that the decision should be made with due acknowledgment of the impact any decision may have on religious freedom.

An additional concern with such a fact sensitive review is that the many and varied factors identified as relevant in the consideration of proportionality on any restriction of religious expression may create a false sense of objectivity, masking the fact that the judgment is ultimately personal and subjective. This potentially runs the danger of perpetuating precisely the disadvantage that the creation of legal protection for religious interests should prevent, namely the dominance of minority religious interests by the majority.

The concern over undue subjectivity is a powerful argument, but while fact-sensitive review may never be fully objective, neither is it fully subjective. The factors to determine the proper boundaries of religious expression when balanced against other concerns, are not drawn at random but are chosen as a result of careful consideration of the range of competing interests at stake. This includes the extent to which any claims are empirically valid, and the theoretical reasons for protecting the competing interests at all. Not every interest will be relevant. Thus, this fact-based proportionality approach relies on reasoned and principled analysis to determine which factors are relevant.

Moreover, this proportionality approach allows room for any decision relating to religious attire to be tested: any decisions reached must be open, and the factors which were relevant subject to review. Although ultimately courts may allow for some flexibility in the exercise of any discretion by decision makers such as schools or employers, this approach allows for challenges to be made if an important factor has been left out of the equation. Thus, a determination that an individual cannot wear religious attire at work or in school must be proportionate; it must take into account not only the needs of the business or school, but also the individual's interest in freedom of religious expression. Where the religious interests of the employee have not been taken into account, this may mean that a decision can be

challenged on the basis that it is disproportionate.

In sum, although there may be strong equality-based reasons to favor a plural public space, some restrictions on religious freedom will inevitably be necessary. Subjecting any proposed restriction on religion to a fact-sensitive proportionality review should mean that contextually sensitive decisions can be reached, with full account taken of relevant equality concerns.

## CONCLUSION

An approach to the question of when and to what extent a person should enjoy freedom of religious expression via their choice of attire can be considered both from a human rights perspective and from an equality perspective. Of course these two perspectives are inherently linked, but nonetheless are different. The consideration of equality concerns in this context serves to highlight the need for sensitive responses to calls to restrict religious attire in the public sphere. Without a clear understanding of the equality dimensions to the debate, questions about the role of religious attire may be resolved merely from the point of view of competing interests in religious freedom: the balance being between the right to freedom of religious expression and the rights of others to be free from religious symbols, particularly in the public sphere. Moreover, the use of the margin of appreciation in European human rights law means that the final standard of review on any restrictions of religious attire is weak: restrictions are effectively assessed against a "norm-reflecting" standard. This means that the case law under ECHR tends to accept current standards of protection for religion, even where standards are fairly low, rather than engaging in the setting of high standards of rights protection.

One of the reasons for weak protection for religious claims in the public space has been the competing interest in having a religiously neutral or secular public sphere. Yet while calls for a secular public space certainly have validity, when revisited in the light of the concerns that can be raised from an equality perspective, such claims lose some of their force. The recognition that secular or neutral public spaces lead to unequal outcomes for

different, and usually minority, religious groups means that additional factors need to be taken into account when balancing competing rights. I propose that, when assessing the proportionality of any restrictions on religious attire, the interest in equality needs to be added to the balance, and an approach allowing for the setting of standards needs to be used, rather than the norm-reflecting margin of appreciation. With the recognition that unequal results can arise from a reliance on neutrality in the public sphere, it becomes clear that outright bans on the wearing of religious attire in the public sphere are unsustainable. This is not to say that more limited restrictions will never be allowed: as the discussion of the cases of *Azmi* and *Begum* illustrate, there remains scope for religious attire to be restricted, but only after careful review of the facts of the case. This more fact-sensitive review allows for the complexity of the issues surrounding religious equality and religious expression to have its proper space in the legal discourse.