



Identity, Race and Ethnicity in Constitutional Law

Working Paper Series No. 2

MTA Law Working Papers

2023/4

Published by: Centre for Social Sciences,
Institute for Legal Studies
Headquarters: 1097 Budapest, Tóth
Kálmán utca 4.
Published by: Director General Zsolt Boda
Editor-in-chief: András L. Pap
Managing editor: Eszter Kovács Szitkay
Under the auspices of MTA Law Working
Papers
Editor-in-chief: Gábor Kecskés
Editorial board: Tamás Hoffmann, Kitti
Mezei, Emese Szilágyi
<https://jog.tk.mta.hu/en/mtalwp>
E-mail: mta.law-wp@tk.mta.hu
ISSN 2064-4515

ISSN 2064-4515

<http://jog.tk.mta.hu/mtalwp> Társadalomtudományi Kutatóközpont – MTA Kiválósági Kutatóhely
Eötvös Loránd Kutatási Hálózat Centre for Social Sciences – MTA Centre of Excellence Eötvös Loránd
Research Network

Katalin Szajbély

Religious Symbols and Clothing in Educational Institutions – Diverging Standards in the Practice of the UN Human Rights Committee and the European Court of Human Rights

In today's diverse Europe, the wearing of religious symbols is an increasingly current issue. In recent years, Judaeo-Christian symbols have been challenged at international human rights forums, as have symbols (including attires that cover the entire face or body) of the Muslim communities, which make up around 4% of Europe's population¹. The intersectionality of external manifestations of religious belief, and in particular the wearing of Muslim religious symbols cannot be overlooked. When a Muslim woman is discriminated against because of a headscarf (or other traditional head covering or dress), discrimination typically involves three elements: religion, gender and (real or perceived) national/ethnic origin, which are linked together to form a complex discrimination ground that can have a decisive influence not only on the social integration of the persons directly concerned, but also of entire generations.

The school is undoubtedly one of the most important venues and „training grounds” for social interaction, and this is particularly true in multicultural states with diverse populations. Undeniably, in addition to their primary function of imparting knowledge, education institutions are also centres of socialisation.

A state's approach to the wearing of religious symbols or clothing, which can be seen as an outward manifestation of religious freedom, may depend on a number of factors. It depends on the constitutional system of church-state relations, the concept of neutrality adopted by the state in question², and the historical role and importance of religion in the state. It is also related to the position of the state in question's aspirations on the scale of a diverse, pluralist or 'colourless' or even explicitly 'monochromatic' society, and on how it values the religious and cultural diversity that exists or that emerges with social movements.

The state's attitude towards the wearing of religious symbols inevitably determines the possibilities for social integration of minority groups, who can be identified not only by their religion but also on the basis of their skin colour, cultural traditions and possibly their mother

¹ Eweida and Others v. the United Kingdom (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) Judgment of 15 January 2013 FINAL 27/05/2013 (Eweida) <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-115881&filename=001-115881.pdf>. (2023.04.06.) ; Judgment of the Court (Grand Chamber) of 14 March 2017. Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62015CJ0157&from=EN> (2023.04.06.)
S.A.S. v. France (Application no. 43835/11) European Court of Human Rights Grand Chamber Judgment of 1 July 2014. <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-145466&filename=001-145466.pdf&TID=fuwrcbtui>. (2023.04.06.)

² János Tamás, Czigle: Az Európai Unió Bíróságának munkahelyi vallás szabadsággal kapcsolatos joggyakorlata. (Doktori értekezés) Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Kar Doktori Iskola, Budapest 2021
[https://jak.ppke.hu/uploads/articles/12332/file/Czigle%20J%C3%A1nos%20Tam%C3%A1s_dolgozatv\(1\).pdf](https://jak.ppke.hu/uploads/articles/12332/file/Czigle%20J%C3%A1nos%20Tam%C3%A1s_dolgozatv(1).pdf) (2023.04.06.)

tongue. Amongst them women are in an especially delicate situation. This is why it is of particular importance that public decisions on this issue are framed in terms of human rights, in particular the right to freedom of conscience and religion and the prohibition of discrimination. The decisions and resolutions of international human rights fora, including the European Court of Human Rights and the UN Human Rights Committee, play an important role in defining and standardising these frameworks.

The right to wear religious symbols

The wearing of religious clothing and symbols is generally seen as an outward manifestation of religious freedom.

According to Article 9. of the European Convention on Human Rights (ECHR) everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Freedom of conscience and religion thus includes both the fact of holding a religious or other belief (forum internum) and the right to publicly express one's religious beliefs (forum externum), as defined in the text of the Convention and in the case law of the European Court of Human Rights (ECtHR).³ It is important to note that the public display of religious symbols, is protected under the freedom of religion, regardless of whether the display of the symbol in question is required by the binding rules of a particular religion or not.⁴

However, the protection provided by the ECHR is not absolute: according to Article 9. (2) of the Convention, freedom to manifest one's religion or beliefs „shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.” This enumeration of legitimate aims is strictly exhaustive. This is no coincidence - the Convention considers pluralism of religious beliefs to be one of the foundations of democratic societies, in which the state has no right of interference, or only a very limited and controllable right.⁵

The Court also examines the necessity and inevitability of the restriction - mere justification or usefulness is not sufficient in this respect, the restriction must serve a „pressing social need”. Nevertheless, as will be seen below, the Court grants the States Parties to the Convention a certain margin of appreciation in assessing the necessity of a restriction, particularly in the case of educational institutions.

Article 18. of the United Nations Universal Declaration of Human Rights (UDHR) stipulates that everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

³ Eweida 80-82.

⁴ Eweida; Hamidovic v. Bosnia and Herzegovina (Application no. 57792/15) 5 December 2017 Final 05/03/2018. [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-179455%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-179455%22]}) (2023.03.31.)

⁵ European Court of Human Rights. Guide on Article 9 of the European Convention on Human Rights. Freedom of thought, conscience and religion. Updated on 31 August 2020, 34. https://www.echr.coe.int/documents/guide_art_9_eng.pdf (2023.03.31.)

The International Covenant on Civil and Political Rights (hereinafter: ICCPR), adopted pursuant to the legally not binding Declaration, clarifies and gives binding force to the human rights declarations set out by the latter. The UN Human Rights Committee (hereinafter „the Committee”) which also deals with individual complaints, plays an important role in the context of the ICCPR. Although its opinions (unlike those of the ECtHR) are not binding, they are undoubtedly relevant to determine whether a particular law or measure is in conformity with the principles laid down in the Covenant.

The ICCPR stipulates the right to freedom of religion and beliefs as follows. According to Article 18. (1), 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. As the Committee in their General Comment No. 22. sets out, the observance and practice of religion or belief may include not only ceremonial acts but also such customs as – among others – the wearing of distinctive clothing or headcoverings⁶.

According to Article 18 (2) of the ICCPR, no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. According to General Comment No. 22., not only threat of physical force or penal sanctions, but also policies or practices having the same intention or effect, such as for example those restricting access to education, medical care, employment are equally inconsistent with Article 18 (2).

The possible grounds for restricting the expression of religious belief are defined in the ICCPR in the same way as in the ECHR: „Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” (Article 18 (3)) The Committee observes in General Comment No. 22. that Article 18 (3) is to be strictly interpreted: „restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.”⁷

It is important to add that according to the Committee, even the fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the right to freedom of religion, nor in any discrimination against adherents of other religions or non-believers.⁸

⁶ Human Rights Committee General Comment No. 22 (48) (art. 18) 27 September 1993 CCPR/C/21/Rev.1/Add.4. https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.4&Lang=en (2023.03.30.)

⁷ Human Rights Committee General Comment No. 22. 8.

⁸ Human Rights Committee General Comment No. 22. 9.

Also of relevance to the wearing of religious symbols and clothing is General Comment No. 28.⁹, which addresses the issue of specific clothing requirements for women in the context of gender equality, bearing in mind the intersectionality of the issue. It stresses that such requirements may be in breach of further provisions of the ICCPR (e.g. non-discrimination or freedom of expression) as well. This Comment also states that States Parties should take measures to ensure that freedom of conscience and religion is guaranteed to women and men equally and without discrimination, both in law and in practice.

Wearing religious symbols in the practice of the ECtHR and the Committee

Taking into account that the ECHR and the ICCPR define freedom of conscience and religion with essentially the same content, and that both instruments specify the legitimate aim of the restriction in a narrower and more limited way than in the case of other fundamental rights, it is particularly interesting to see to what extent the Court of Justice's and the Committee's practice in relation to the display of symbols in educational institutions shows similarities and differences.

Display of religious symbols by students

The ECtHR has ruled on this issue in a number of cases, some of the most important of which - without claiming to be exhaustive - are the following.

In *Leyla Sahin v. Turkey*¹⁰, the Court held that a secular university could prohibit female students from wearing the hijab because of its effect on other students. The Court considered the prohibition necessary in order to protect the rights and freedoms of others and to maintain public order, because it considered that the sight of wearing the hijab could put pressure on other Muslim students and cause them to feel the need to conform. In this decision, the Court nevertheless took into account the wider socio-political context of the case, when it stressed that in Turkey certain extremist political forces aim to establish a religiously based social order and to impose the wearing of religious symbols on the population as a whole. A similar ruling was made¹¹ in the case of Turkish secondary school pupils who claimed, among other human rights, that their freedom of religion was violated because they were only allowed to wear their Islamic headscarves in religious studies classes.

The UN Human Rights Committee has taken the opposite view in the *Hudoyberganova case*¹². The complaint concerned the expulsion of a university student from Uzbekistan from her college, and subsequently from university, for wearing an Islamic headscarf in defiance of the general rule that students should not wear religious symbols.

⁹ Human Rights Committee General Comment No. 28 Article 3 (The equality of rights between men and women) (Replaces general comment No. 4) Adopted: 29 March 2000
https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_21_Rev-1_Add-10_6619_E.pdf (2023.03.30.)

¹⁰ *Leyla Sahin v. Turkey*, (Application no. 44774/93), 29 June 2004.
[https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-70956%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-70956%22]}) (2022.09.05.)

¹¹ *Köse and Others v. Turkey*, (Application no. 26625/02) 24 January 2006.

¹² *Raihon Hudoyberganova v. Uzbekistan*, Communication No. 931/2000, U.N. Doc. CCPR/C/82/D/931/2000 (2004). <http://hrlibrary.umn.edu/undocs/html/931-2000.html> (2021.01.12.)

The Committee pointed out, with reference to General Comment No. 22, that the prohibition of religious clothing could lead to a violation of Article 18(2) of the ICCPR. According to this provision, any measure or practice having an effect equivalent to coercion as regards the exercise of religion, including restrictions on access to education, is incompatible with the right to freedom of manifestation of religion. Restrictions on freedom of conscience and religion may be imposed only on the grounds and under the conditions laid down in Article 18 (3), which have not been justified in the case in point. The Committee thus found that the complainant's freedom of religion had been infringed.

In the light of the above, it is not surprising that the two human rights bodies do not share the same position on the French legislation banning the wearing of religious symbols in schools, which has since caused much controversy since its adoption. The 2004 amendment to the Public Education Act prohibits, among other things, the wearing in public schools of any symbol that ostentatiously expresses the religious affiliation of the pupil.¹³

The ECtHR received a number of complaints against France concerning the wearing of religious symbols in schools, where the petitioners wanted to wear both a keski (a small turban worn by young Sikh men¹⁴) and a cap to replace the headscarf, but were banned from doing so, which ultimately led to their exclusion from school.

In its decisions rejecting these applications¹⁵, the Court of Justice stressed that the restriction pursued legitimate aims, namely to protect the freedom of others and public order. Since the legislation in question fundamentally affects the system of relations between the State and the churches, in which there are significant differences in the legislation of the various States, the margin of appreciation of the State is particularly important in this respect. This is especially the case where the wearing of religious symbols in educational institutions is at issue.

The ECtHR, referring to its previous decisions¹⁶, stressed that national authorities have a duty to ensure that the expression of pupils' religious beliefs in school buildings is not ostentatious and does not lead to pressure or exclusion. It also stated that the prohibition imposed in order to enforce the principle of secularism is in line both with the previous practice of the ECtHR and with the fundamental values of the Convention. The Court therefore considered that neither the right to manifest religion nor the prohibition of discrimination had been infringed.

The UN Human Rights Committee however has taken a contrary position, both in general terms in its periodic reports on France¹⁷ and in a specific case four years after the entry into force of French legislation banning the wearing of religious symbols in schools. It had to take a stand in the case of a young Sikh man, *Bikramjit Singh*, who had been expelled from secondary school

¹³ Schanda, Balázs: Fejkendőviselet az iskolában. *Fundamentum* 2/2004. 115-120 ; Szajbély, Katalin: A vallási jelképek viseléséről szóló törvény Franciaországban. *Jogelméleti Szemle* 2004/4. <http://jesz.ajk.elte.hu/szajbely20.html> (2023.03.30.)

¹⁴ The keski is a small light piece of material of a dark colour, often used as a mini-turban, covering the long uncut hair considered sacred in the Sikh religion.

¹⁵ *Ranjit Singh v. France* (Application no. 27561/08), 30. June 2009; *Jasvir Singh v. France* (Application no. 25463/08), 30. June 2009; *Aktas v. France* (Application no. 43563/08), 30. June 2009.

¹⁶ *Dogru v. France* (Application no. 27058/05) 4. Décembre 2008; *Kervanici v. France* (Application no. 31645/04) 4 Décembre 2008

¹⁷ Concluding observations on the fourth periodic report of France. Human Rights Committee Geneva, 7-25 July 2008 CCPR/C/FRA/CO/4 23. https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fFRA%2fCO%2f4&Lang=en

for refusing to take off his keski.¹⁸ The petitioner claimed that his right to privacy and his right to practise his religion had been violated, and that he had suffered discrimination in connection with those rights.

The Committee pointed out that wearing the keski is a religious duty and is also tied in with a person's identity. It is undoubtedly a religiously motivated act, and its prohibition can therefore be considered a restriction on religious freedom. In considering the legality of the restriction, the Committee examined whether it was in accordance with the conditions laid down in Article 18 (3) of the ICCPR. The Committee accepted France's argument that the legislator was motivated by constitutional principle of secularism (*laïcité*) to protect the religious freedom and, in some cases, the physical safety of others. The legitimate aim of the legislation is therefore to protect the fundamental rights of others, public order and public security. However, in the specific case, the necessity and proportionality of the restriction could not be established: the State party has not furnished compelling evidence that, by wearing his keski, the specific complainant would have posed a threat to the rights and freedoms of other pupils or to order at the school. Moreover, the exclusion from school as a sanction was disproportionate and constituted a led to serious effects on the complainant's right to education. The exclusion of the complainant therefore did not meet the requirements for the restriction of rights under Article 18 (3) and the complainant's freedom of religion was therefore infringed.

Display of religious symbols by teachers

It is not possible to discern throughout Europe a uniform concept of the significance of religion in society, and therefore, the meaning or impact of the public expression of a religious belief will differ. In the practice of the ECtHR, in the public sector, and especially in schools, which have a significant impact on the personal development of young generations, the "symbol-free" appearance may be a legitimate expectation at the margin of appreciation of the state, with reference to the principle of neutrality of the state or of the public services¹⁹.

In the *Dahlab case*, the ECtHR pointed out that the prohibition of wearing the Islamic headscarf during instruction by persons teaching "young children" in the public education sector is, as a general rule, justified and proportionate to the aim of protecting the rights and freedoms of others and of public order and security; accordingly, it is "necessary in a democratic society". In reaching its decision, the ECtHR took into account the fact that teachers are representatives of both the education system and the State in the eyes of students, and that the symbols they wear may have a potentially proselytising effect on students. The ECtHR also emphasised the age of the pupils as a factor to be considered in this context, taking into account the greater potential for influence of younger children. In addition, the ECtHR did not see any justification for finding gender discrimination, referring to the fact that the prohibition of wearing religious

¹⁸ Bikramjit Singh v. France, Communication No 1852/2008 (UN Doc CCPR/C/106/D/1852/2008, 2013) Views adopted by the Committee at its 106th session (15 October–2 November 2012) <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6OkGld%2FPPrICAqhKb7yhsbttFNxTkgvXTPJWIZn3vk2zarw7Pb%2F8rlw1aoZFSdyEKjfy%2F33Bpx9xIGZqLwYcIPKrH%2BwEDsI3AXHeJ2C8C22ZqP XVlb79ONrT5JHTHOdbBzv%2F%2FjxjoO6SIcfqEtHO%3D%3D> (2023.03.30.)

¹⁹ European Court of Human Rights. Guide on Article 9 of the European Convention on Human Rights. Freedom of thought, conscience and religion. Updated on 31 August 2020, 94. https://www.echr.coe.int/documents/guide_art_9_eng.pdf (2023.03.29.)

symbols under the legislation in question also applies to men.²⁰ The ECtHR came to a similar decision in the *Kurtulumus case*²¹, where the issue was the wearing of a headscarf by a university lecturer, i.e. there were no minors or persons of influence involved.

Although the issue of the following cases did not concern the display of religious symbols by teachers, two further cases from the ECtHR's practice, the *Lautsi case* and the *Perovy case*, which both relate to the circumstances and content of education, are worth mentioning in this context.

In the *Lautsi case*²², the Court had to rule on the question of a crucifix on the walls of Italian school classrooms. At first glance, in the light of the above judgments, the decision in this case is somewhat surprising. The Court considered the crucifix to be acceptable because it was part of the country's tradition. It stressed that the mere fact that a religion is given a greater prominence in the school curriculum because of its major historical role does not in itself mean that the requirement of neutrality is violated. The crucifix on the wall is essentially a passive symbol, which cannot be equated, for example, with the obligation for all children to practise Christian religious rites. The Court also considered the fact that, in addition to the mere presence of the crucifix, there was no compulsory religious education in schools, Italian schools allowed other religious communities to celebrate their religious events, any religious education could be freely organised in schools and the wearing of any religious symbol in schools was also allowed. In this judgment, the Court therefore expressly authorised the display of a religious symbol on traditional grounds, provided that it was done in an open, religiously neutral environment and did not exclude other religions or their symbols and rituals.

In the *Perovy case*²³, the ECtHR however reached a surprising conclusion²⁴ compared to the above. In that case, the petitioners complained that their seven-year-old son, who was starting first grade, had been forced to participate in an Orthodox religious ceremony (the blessing of the classroom) at the beginning of the school year, in which, in addition to merely observing the ceremony, the boy of a different religion would practically have been forced to engage in active behaviour, if he had not explicitly refused to actively participate in the ceremony (kissing the crucifix) - but because he refused to do so, he was compelled to express his religious beliefs. The ceremony was decided by the parents' community, with the consent of the school, but on this occasion the parents of the child concerned were not present and they and other absent parents were not informed of the decision. After the ceremony, the complainant was abused by his schoolmates, causing him great stress and distress. The Court pointed out in the context of the case that, in addition to the fact that the national authorities had acted properly in the case,

²⁰ Dahlab v. Switzerland (Application no. 42393/98) 15 February 2001.
<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-22643%22%5D%7D> (2023.03.29.)

²¹ Kurtulumus v. Turkey (Application no. 65500/01) 24 January 2006.
<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-88325%22%5D%7D> (2023.03.29.)

²² Lautsi and Others v. Italy (Application no. 30814/06) Grand Chamber Judgement of 18 March 2011.
<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-104040%22%5D%7D> (2023.03.30.)

²³ Perovy v. Russia (Application no. 47429/09) 20 October 2020, Final 19/04/2021
<https://hudoc.echr.coe.int/fre#%7B%22languageisocode%22:%5B%22ENG%22%5D%2C%22appno%22:%5B%2247429/09%22%5D%2C%22documentcollectionid%22:%5B%22CHAMBER%22%5D%2C%22itemid%22:%5B%22001-205133%22%5D%7D> (2022.09.05.)

²⁴ Inez van Soolingen: The Case of Perovy v. Russia: Dealing with the right to freedom of religion in the educational sphere through picking the right fruits. <https://strasbourgobservers.com/2020/12/10/the-case-of-perovy-v-russia-dealing-with-the-right-to-freedom-of-religion-in-the-educational-sphere-through-picking-the-right-fruits/> (2023.03.30.)

the fact that the blessing ceremony was a separate event, limited in time and effect, was not negligible and did not involve indoctrination or coercion, in the view of the ECtHR. The Court also stressed that pluralism, tolerance and constructive dialogue are indispensable in a democratic state and do not entitle the adherents of any religion to be exempt from experiencing individual or collective manifestations of other religions. In this particular case, the child was not compelled to take an active part in the ceremony, apart from being present. The judges therefore concluded - by a far from unanimous 4:3 majority - that the pupil's right to freedom of religion had not been infringed. This decision, when compared with the relevant case law of the Court, would merit a more in-depth analysis beyond the scope of this paper. However, it is safe to say that the Court departed from the standard set in the Dahlab case, by not even taking into account the age of the child concerned and the extent to which he could be influenced, despite the fact that this was not merely a case of being exposed to the sight of a religious symbol, but one of taking part in an active ceremony.

The UN Human Rights Committee reached quite the opposite conclusion of the ECtHR's decisions on teachers and education staff in the *F.A. case*²⁵ in 2018. The case concerned the dismissal of an early childhood educator from a French private childcare center for refusing to remove her headscarf at work.

Referring to General Comment No 22., the Committee pointed out that for the Muslim complainant, the wearing of a headscarf constituted an expression of her religious belief, therefore the ban imposed on her wearing her headscarf in the workplace constitutes interference in the exercise of her right to freedom to manifest her religion. Consequently, the question arises whether the prohibition of wearing the headscarf is in conformity with the rules on restrictions on freedom of religion, i.e. necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, in which context both the necessity and the proportionality of the measure must be assessed. France has argued that the measure was intended to protect the rights and freedoms of children and their parents, and has relied on ECtHR case-law to argue that the Muslim headscarf is not a passive symbol but a powerful external symbol which can have an impact on impressionable children for whom the institution must provide social stability and a warm, welcoming environment.

However, the Committee did not find the above arguments convincing and did not see sufficient evidence from the State that the wearing of the headscarf would endanger social stability and a safe and inclusive environment, thereby infringing the rights of children and their parents. They indicated that it was not clear how a ban on the wearing of headscarves would contribute to the achievement of the institution's objectives or could ensure that the Muslim community would not be stigmatised, and stressed that wearing headscarves could not in itself be considered as a proselytising act. The Committee therefore found a violation of the applicant's freedom of religion.

In addition, the Committee found that the ban also resulted in multiple (intersectional) discrimination on grounds of sex and religion.

²⁵ Human Rights Committee. Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2662/2015 * (CCPR/C/123/D/2662/2015) 24 September 2018 <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6OkGld%2fPPRiCAqhKb7yhsjvfljqil84ZFd1DNPIs9EL3306EY%2bxPu%2bNzTLMSo8wPCz%2bK7DjJyF445dShmRAbqzqfJzg4ARLrMC369ufo%2b%2b0cvPdOHzwe6x00BFKh4PiCfnbytBTmCRzruPKrid3g%3d%3d> (2023.03.30.)

Conclusions

The approach of the Court and the Committee, although based on a text with essentially identical content and even wording, nevertheless leads to different results. Unsurprisingly, the divergence of approaches is not limited to the use of symbols in educational establishments, but also extends to other areas: the French legislation on the prohibition of the public wearing of full-face coverings, which has been the subject of much controversy, has not led to a shared position of the two bodies²⁶.

The picture that emerges from the decisions analysed in this paper is that the ECtHR usually interprets the Convention in the national context of a given state, recognising the diversity of states parties to the Convention, and thus, by placing particular emphasis on the margin of appreciation of the state concerned, therefore however, necessarily relativises the content of freedom of conscience and religion. It is in this relative human rights context that the panel weighs the fundamental rights of the individual, applying a quasi "sliding scale". In the context of the wearing of religious symbols, the Court's approach to discrimination is rather formalistic, essentially not conducive to a state approach that resonates meaningfully with the intersectionality of the issue. By comparison, the UN Human Rights Committee's consideration is much more focused on individual fundamental rights, and thus more constant and less sensitive to the diversity of states obliged to guarantee rights, while showing greater and more consistent sensitivity to the fundamental rights of applicants. The notion of substantive discrimination used by the Committee specifically resonates with the social complexity of the issue.

The question that remains unanswered is whether this significant divergence of the standards of legal protection will persist in the longer term and, if so, what impact it will have on the system of international (and national) legal protection; whether the consistent practice of the UN Human Rights Committee can elevate and adjust the standards of European legal protection in the field of displaying religious symbols.

²⁶ For diverging interpretations, see: *S.A.S. v. France* (Application no. 43835/11) Grand Chamber Judgement of 1 July 2014. [https://hudoc.echr.coe.int/eng/#{%22itemid%22:\[%22001-145466%22\]}](https://hudoc.echr.coe.int/eng/#{%22itemid%22:[%22001-145466%22]}) (2023.03.30.)

Human Rights Committee - Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2747/2016* (CCPR/C/123/D/2747/2016) 7 December 2018

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6OkG1d%2fPPRiCAqhKb7yhsjvfljqil84ZFd1DNPIs9EJKqYIhlmL6rhNwXcqOYJuUH9VE6Tyb9XTHWEHhF9nf4xnwrkTHOoRf0UGeTt71ldOVTOS8UARQkiHV6izalS45LLW1wZ11zTW1%2bfp4LoonZA%3d%3d> (2023. 03. 30)

Human Rights Committee - Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2807/2016 (CCPR/C/123/D/2807/2016) 17 October 2018

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/123/D/2807/2016&Lang=en (2023. 03. 30.)

© Katalin Szajbély

**Identity, Race and Ethnicity in Constitutional Law Working
Paper Series**

MTA Law Working Papers

Published by: Centre for Social Sciences, Institute for Legal Studies

Headquarters: 1097 Budapest, Tóth Kálmán utca 4.

Published by: Director General Zsolt Boda

Editor-in-chief: András L. Pap

Managing editor: Eszter Kovács Szitkay

Under the auspices of MTA Law Working Papers

Editor-in-chief: Gábor Kecskés

Editorial board: Tamás Hoffmann, Kitti Mezei, Emese Szilágyi

<https://jog.tk.mta.hu/en/mtalwp>

E-mail: mta.law-wp@tk.mta.hu

ISSN 2064-4515