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FREEDOM OF RELIGION AND THE HEADSCARF: A PERSPECTIVE FROM INTERNATIONAL AND COMPARATIVE CONSTITUTIONAL LAW

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Research dissertation presented for the approval of Senate in fulfilment of the requirements for the Master of Laws by dissertation.

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ABSTRACT

This thesis analyses whether a legislative ban on wearing a headscarf breaches the right to freedom of religion, as such right is universally understood. It describes the ambit of the right to freedom of religion by examining the theoretical justification and importance of the right and thereafter analysing how the right is recognised in international and regional treaties and domestic constitutions. It demonstrates that religious freedom comprises of the right to hold a religion and the right to manifest a religion in the form of worship, observance, practice and teaching. Religious freedom, however, is not absolute and the thesis explains in the light of international and comparative case-law that the right to freedom of religion may be limited by a law that pursues a legitimate state interest and is reasonable. In light of this theoretical framework the thesis examines the practice of Muslim women wearing a headscarf and argues that the practice constitutes a manifestation of Islamic belief protected by the right to freedom of religion. Thereafter this thesis examines French, Turkish and German prohibitions on wearing a headscarf, the effect of these laws on Muslim women and the justifications furnished for such laws. It is argued that the state interest of preserving secularism relied upon to justify a headscarf ban is not legitimate and does not justify a headscarf ban. Furthermore, even where the state has a legitimate interest in preventing the coercion of young girls, promoting the equality rights of women and maintaining safety and order, a headscarf ban does not constitute a reasonable limitation of religious freedom. Ultimately, this thesis argues that a headscarf ban exacerbates the problems it is meant to solve and constitutes an unjustifiable infringement of religious freedom.

TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION

1. INTRODUCTION

A headscarf, a simple piece of cloth that covers the head, is a controversial garment that carries various connotations and meanings. While a headscarf may be a fashion statement when worn by non-Muslim women, it is often viewed as a symbol of oppression and simultaneously aggression when worn by Muslim women. In recent years the simple piece of cloth has generated a complex debate over whether a headscarf is forced on to Muslim women, incompatible with gender equality, a symbol of terrorism and unacceptable in a modern world. The debate has grown with the increasing visibility of the Muslim population and their assertiveness of their Islamic identity and their human rights.[1]

However, unlike other disputes regarding the compatibility of religious practices with modern values, the debate has not been confined to the private sphere to be resolved between members of the religion. States are embroiled in the debate and France, Turkey and Germany have gone so far as to enact legislation prohibiting the wearing of a headscarf. These prohibitions may conflict with the rights of Muslim women to manifest their religion and this thesis examines whether a prohibition on the wearing of a headscarf constitutes an unjustifiable limitation of the right to freedom of religion.

2. OUTLINE OF PROBLEM AND LITERATURE REVIEW

There have been a number of legislative prohibitions on wearing a headscarf. In 1998, Turkey prohibited university students from wearing a headscarf when attending lectures. The Turkish

[1] Dominic McGoldrick *Human rights and religion: The Islamic headscarf debate* (2006) 1.

prohibition on the headscarf is noteworthy as it prohibits adults at tertiary institutions from wearing a headscarf. While the law is no longer enforced, it has not yet been repealed and has been upheld by the European Court of Human Rights ('ECtHR') in the case of *Leyla Sahin v Turkey*.[2] The ECtHR considered the prior case of *Dahlab v Switzerland* where the lawfulness of a state prohibiting a teacher from wearing a headscarf while teaching was challenged.[3] The ECtHR endorsed its previous decision and held that the headscarf was incompatible with the values of secularism, equality and was necessary to protect against religious extremism.[4]

In 2004 the French government prohibited the wearing of clothing manifesting a religious affiliation in public schools.[5] The law is couched in neutral terms and prohibits the wearing of larges crosses, veils or skullcaps[6] by students in public elementary, middle and high schools. However, the main effect of the law and commonly understood purpose was to ban Muslim girls from wearing a headscarf in public schools.[7] In *Dogru v France,* the ECtHR heard a challenge from a French student prohibited from wearing a headscarf during physical education classes and upheld the prohibition on the basis of protecting health and safety.[8]

In Germany a number of states have enacted laws prohibiting teachers from wearing headscarves while teaching. The German prohibitions on wearing a headscarf range from a complete ban on all religious symbols in classrooms to stating that the dress of teachers should not disturb the religious or philosophical sentiments of teachers and students.[9] More

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[2] *Leyla Sahin v Turkey* App No 44774/98 (2006) 45 ILM 436.
[3] *Dahlab v Switzerland* App No 42393/98, 15 February 2001.
[4] *Leyla Sahin v Turkey* (note 2) at 452-4 para 111 and 115-6.
[5] Timothy Welch 'The prohibition of the Muslim headscarf: Contrasting international approaches in policy and law' (2007) 19 *The Denning Law Journal* 181 at 201.
[6] Yael Barbibay 'Citizenship privilege or the right to religious freedom: The blackmailing of France's Islamic women' (2010) 18 *Cardozo Journal of International and Comparative Law* 159 at 177-8.
[7] Idem at 178.
[8] *Dogru v France* App No 27058/05 (2009) 49 EHRR 8.
[9] Tobias Lock 'Of crucifixes and headscarves: Religious symbols in German schools' in Myriam Hunter-Hennin (ed) *Law, religious freedoms and education in Europe* (2011) 347 at 361.

controversially, certain bans prohibit religious symbols but allow exceptions for Christian and Western symbols.[10]

Given the controversial nature of a ban on wearing a headscarf it is no surprise that a number of authors have examined the lawfulness of prohibitions on wearing a headscarf. The literature thus far focuses predominantly on particular prohibitions on wearing a headscarf and their legality in a national or regional context or certain controversial cases in which the legality of a headscarf ban has been challenged. In this regard, John Bowen examines the French ban on religious symbols in public schools by analysing the French history that culminated in the enactment, the justifications for the law, the reactions thereto and the effects of the law on Muslim girls.[11] Bowen explains the rationale for the French headscarf ban by examining the French history of separation between religion and state, the concern regarding the integration of minority groups into society and the fear of religious fundamentalism surrounding the headscarf.

Various authors have also critically analysed certain controversial decisions in which bans on the headscarf have been upheld. For example, Benjamin Bleiberg in his analysis of the ECtHR Chamber judgment of *Leyla Sahin v Turkey* argues that the ECtHR incorrectly upheld the Turkish ban on the headscarf.[12] Bleiberg argues that in light of Turkey's political history and the state's entanglement with religion, a headscarf ban is actually an attempt by the state to regulate the expression of religion which forces individuals to choose between their religious beliefs and obtaining an education.[13]

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[10] Ibid.
[11] John R Bowen *Why the French don't like headscarves: Islam, the state, and public space* (2007).
[12] Benjamin D Bleiberg 'Note unveiling the real issue: Evaluating the European Court of Human Rights' decision to enforce the Turkish headscarf ban in *Leyla Sahin v Turkey*' (2005-2006) 91 *Cornell Law Review* 129 at 149.
[13] Idem at 149,153,155-6 and 163.

The German legislative enactments regulating the wearing of headscarves by teachers were a response to the German Federal Constitutional Court's decision that a state could not ban the headscarf without a legislative basis.[14] Tobias Lock analyses the reasoning of the German Federal Constitutional Court and the German lower courts which were faced with deciding this issue.[15] Lock also provides an overview of the German legislation passed to prohibit teachers from wearing a headscarf.[16]

Other authors have analysed the headscarf ban in the broader European context due to the number of bans emanating from this region. Erica Howard examines European bans on the wearing of religious symbols in education and in particular, examines banning teachers and students from wearing a headscarf.[17] Howard examines arguments advocated for a headscarf ban such as protecting safety, promoting equality and preserving secularism and notes that in addition to the fact that these grounds can be countered, a headscarf ban may breach the right to freedom of religion, equality and freedom of discrimination.[18] Howard is critical of the fact that the ECtHR confers a wide measure of discretion on states in the regulation of religious symbols and notes that on existing precedent, the ECtHR is likely to find that a headscarf ban does not violate religious freedom.[19] Howard criticises the ECtHR for not scrutinising closely whether safety, equality and secularism are actually threatened when individuals wear headscarves, for failing to take into account the actual burden a headscarf ban imposes on individuals and argues that there may be less restrictive means of achieving the state's goals.[20]

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[14] Ruben Seth Fogel 'Headscarves in German public schools: Religious minorities are welcome in Germany, unless-God forbid-they are religious' (2006-2007) 51 *New York Law School Law Review* 619 at 622-3.
[15] Tobias Lock 'Of crucifixes and headscarves: Religious symbols in German schools' (note 9) 356-361.
[16] Idem 361-3.
[17] Erica Howard *Law and the wearing of religious symbols: European bans on the wearing of religious symbols in education* (2012).
[18] Idem 30-52.
[19] Idem 76.
[20] Idem 111.

Dominic McGoldrick has also examined headscarf bans in Europe by focussing on the headscarf debate in European states, and briefly considering how the issue has been dealt with in non-European states.[21] McGoldrick notes that the headscarf is often singled out from other religious dress for regulation because it is interpreted as a symbol of the oppression of women, religious extremism, terrorism and the failed integration of the Muslim population into society.[22] McGoldrick furthermore analyses how a headscarf ban has been and could be challenged in international human rights law such as in terms of the International Covenant on Civil and Political Rights ('the ICCPR')[23] and the European Convention on Human Rights ('ECHR').[24]

However, there is thus far no attempt to analyse whether a headscarf ban breaches the right to freedom of religion, as such right is universally understood. This may be due to the fact that the majority of laws banning the headscarf emanate from Europe and so it makes sense to test these prohibitions on wearing a headscarf against the multilateral, regional treaty meant to protect human rights, being the ECHR. However, the headscarf ban is a universal issue and Muslim women have been precluded from wearing a headscarf in non-European states as well such as South Africa[25] and the United States of America.[26] This thesis goes further than existing literature to examine whether there is a basic core or universally agreed upon notion of religious freedom which protects the right to wear a headscarf.

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[21] McGoldrick *Human rights and religion: The Islamic headscarf debate* (note 1).
[22] Idem 13-22.
[23] International Covenant on Civil and Political Rights, GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171.
[24] McGoldrick *Human rights and religion: The Islamic headscarf debate* (note 1) 237-287.
[25] See Patrick Lenta 'Muslim headscarves in the workplace and schools' (2007) 124 *South African Law Journal* 296 at 296. Lenta discusses the incidents where a social worker was dismissed from employment at a South African prison for wearing a headscarf and where a school girl was ordered to remove her headscarf as it breached the school's uniform requirements.
[26] See *Equal Opportunity Commission v The Geo Group, Inc* 616 F3d 265 and *Webb v City of Philadelphia* 562 F3d 256.

3. RESEARCH QUESTION

Is a prohibition on wearing a headscarf a justifiable infringement of the right to manifest a religion as such right is universally understood?

4. OBJECTIVES OF THESIS

In order to answer the above formulated research question, this thesis addresses the following objectives:

a) To identify and define the scope and ambit of the right to freedom of religion as found in domestic and international law;

b) To identify how states may justifiably limit the right to freedom of religion;

c) To determine whether wearing a headscarf constitutes a protectable manifestation of belief; and

d) To analyse whether a ban on wearing a headscarf constitutes a justifiable limitation of the right to freedom of religion.

5. OUTLINE OF THESIS

Chapter one is the introduction chapter which introduces the topic of this thesis, provides a brief review of existing literature, articulates the research question, sets out the objectives of the thesis and finally provides an outline of the thesis.

Chapter two examines the history, purpose and importance of the right to freedom of religion in order to explain the scope and ambit of religious freedom. The chapter analyses international and regional treaties and domestic constitutions and demonstrates that religious freedom is generally recognised as the right to hold a religion and the right to manifest a

religion. Thereafter chapter two explains the key manifestations of religion, being worship, observance, teaching and practice.

Chapter three analyses how the right to manifest a religion may be lawfully restricted, by explaining that the right to manifest a religion is not an absolute right and must be subject to limitations to protect basic human rights and ensure the orderly functioning of society. The chapter explains that while there is no fixed test for what constitutes an infringement of religious freedom, limitations that exert coercive pressure on the religious decision-making process or prevent an individual from engaging in a practice for several hours a day may constitute an infringement of religious freedom. The chapter thereafter examines international and domestic law in order to explain the requirements that a justifiable limitation of religious freedom must pursue a legitimate state interest and be reasonable.

Chapter four applies the legal principles discussed in chapters two and three to answer the research question of whether a ban on wearing a headscarf constitutes an justifiable limitation of the right to freedom of religion, as such right is universally understood. The chapter defines the headscarf and describes the practice of wearing a headscarf, its religious basis and significance in the Islamic religion. The chapter argues that wearing a headscarf constitutes a manifestation of religion, as understood from chapter two, which is protected by the right to freedom of religion.

Chapter four then analyses prominent headscarf bans and the effects thereof on Muslim women who wear the headscarf. Chapter four argues that a headscarf ban constitutes an infringement of the religious freedom of Muslim women which is required to be justified. The chapter thereafter analyses whether the state interests identified as necessitating a headscarf ban are sound and whether the limitation of religious freedom is a reasonable limitation of the right.

Chapter five is the conclusion chapter which summarises and reiterates the main conclusions of the thesis.

CHAPTER TWO

THE RIGHT TO FREEDOM OF RELIGION

1. INTRODUCTION

This chapter explains the scope and ambit of the right to freedom of religion which will be built on in chapter four to argue that religious freedom protects the practice of wearing a headscarf. This chapter first, briefly examines the history, purpose and importance of religious freedom in order to explain the meaning of the right and what it is meant to protect. Secondly, the chapter analyses international and regional treaties and domestic constitutions in order to identify how religious freedom is generally recognised and protected in these instruments and to ascertain and explain the key elements of the right.

2. RELIGIOUS FREEDOM

Religious freedom protects beliefs which are central to an individual's identity, religious pluralism in society, the rights of religious minorities and assists in the attainment and fulfilment of other human rights. This section briefly examines the history and purpose of religious freedom with the aim of demonstrating the fundamental importance of the right and identifying what the right is meant to protect.

The right to freedom of religion has historically developed to protect religious minorities from persecution by the limitation of state power and the separation of religion and state. Since as early as 380 AD when the emperor Theodosius made Christianity the Roman Empire's official religion and banned paganism, states have used their dominance and power to force religious beliefs on people.[1] The imposition of religious beliefs is often carried out under the guise that there is only one true religion and that peace and stability in society can

[1] Derek H Davis 'The evolution of religious freedom as a universal human right: Examining the role of the 1981 United Nations Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief' 2002 *Brigham Young University Law Review* 217 at 223.

only be attained when people practise the same religion.[2] This has resulted in religious wars, persecution and intolerance of the practices of religious minorities.[3] In 1689 John Locke, writing in response to state intolerance to religion in England and Europe, identified religious freedom, along with the right to life and property, as rights to be protected.[4] Locke suggested a re-orientation of the state's role in relation to religion, being that the state should be neutral in respect of religion and that religion was to be a private matter.[5] Locke believed that the religious freedom of minorities could be protected through a separation of state and religion and that the state should not promote religion but rather protect the right of citizens to choose and pursue their own religion.[6] Locke's idea of separation of religion and the state subsequently formed the basis of the American Declaration of Independence, one of the first acknowledgements of religious liberty, the English Bill of Rights and the French Declaration of Rights.[7]

In addition to protecting religious minorities from persecution, religious freedom protects beliefs which are often deeply personal and part of an individual's self-identity. David Conkle notes that while the content of religious beliefs may differ amongst individuals, the distinctive nature of these beliefs is that they define an individual and provide the framework through which individuals evaluate conduct.[8] This is because religious beliefs dictate in some instances almost every aspect of an individual's life, from their dress and diet to their purpose in life and what they consider acceptable behaviour. This is supported by jurisprudence from the European Court of Human Rights ('ECtHR'), the Supreme Court of Canada and the South African Constitutional Court which have held that religious freedom is central to the

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[2] Idem at 222.
[3] Ibid.
[4] Idem at 221.
[5] Idem at 222.
[6] Ibid.
[7] Idem at 221.
[8] Daniel O Conkle 'Toward a general theory of the establishment clause' (1987-1988) 82(4) *Northwestern University Law Review* 1113 at 1164; see also William P Marshall 'Truth and the religion clauses' (1993-1994) *DePaul Law Review* 243 at 247.

concept of life and identity of both believers and atheists.[9] Therefore, the right to freedom of religion may be considered a fundamental human right as it protects beliefs central to an individual's self-definition and identity.

However, while religious beliefs may be strong as they are bound up with an individual's identity and deeply embedded in a person's self, they are also personal and fragile.[10] This is important as Conkle notes that while curtailments of religious beliefs and practices are unlikely to change an individual's beliefs, they cannot simply be ignored and may cause an individual significant emotional distress.[11] This is because religious beliefs are interwoven with a person's identity and individuals are likely to perceive curtailments of their religious beliefs and practices as attacks on their identity.[12] The emotional distress caused by curtailing an individual's beliefs or practices should be borne in mind in evaluating whether an infringement of religious freedom is justifiable.

The right to freedom of religion is also important for the protection of autonomy which is central to several other important human rights such as freedom of expression, privacy and most importantly human dignity. The South African Constitutional Court in *Barkhuizen v Napier* has defined autonomy as 'the ability to regulate one's own affairs, even to one's own detriment'.[13] This suggests that autonomy is the notion that individuals are best placed to know what is best for themselves and, provided they do not infringe on the rights of others, should be free to choose their own beliefs and act in accordance with those beliefs. The ability of individuals to choose a way of life and to constantly re-define themselves in

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[9] In *Kokkinakis* v *Greece* App No 14307/88 (1994) 17 EHRR 397 at 418 the ECtHR held that religious freedom protects the religious freedom and concept of life of both believers and atheists; in *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 at para 42 the Supreme Court of Canada held religious freedom to be interwoven with an individual's self-definition and in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 CC at 779–780 para 36 the South African Constitutional Court held that religious belief may define individuals, their conduct and relationship with others.

[10] Conkle 'Toward a general theory of the establishment clause' (note 8) at 1165.

[11] Ibid.

[12] Ibid.

[13] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at 341 para 57.

relation to others and the world is argued by McDougal, Laswell and Chen to be what distinguishes human beings from other beings.[14] Autonomy is considered to be central to an individual's value as a human being, being an individual's human dignity.[15] Religious freedom protects autonomy by protecting the existence of different beliefs in society and allowing individuals to freely choose their religious beliefs without any influence.

Furthermore, religious freedom protects religious pluralism in society which forms the basis of democratic societies. Religious pluralism is the co-existence of various religions and beliefs in society and the notion that all religions have potential value and truth and therefore a right to exist. As the right to freedom of religion protects the existence of different religions and beliefs in society and affords individuals the opportunity to freely choose their own belief or religion, it ensures pluralism in society. Religious pluralism is important as it is considered the basis of a democracy.[16] Pluralistic and diverse societies force individuals to communicate and negotiate with each other for the common good of society which promotes democracy.[17] Durham also notes that minority groups are more likely to support and positively engage with a regime that tolerates and respects their beliefs which contributes to the stability of society.[18] Similarly, William Marshall argues that pluralism is a restriction on state power as the existence of various interest groups ensures that no single group exerts a dominating influence over the state and the state is therefore unlikely to advance the interest of one group at the expense of others.[19] Accordingly, the state should not simply ban contentious beliefs or

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[14] Myres S McDougal, Harold D Lasswell and Lung-chu Chen 'The right to religious freedom and world public order: The emerging norm of non-discrimination' (1976) 74(5) *Michigan Law Review* 865 at 873.

[15] This is supported by jurisprudence from the South African Constitutional Court which has repeatedly held autonomy to be an essential element of human dignity, see *NM and Others v Smith and Others* 2007 (5) SA 250 CC at 287 para 145; *Barkhuizen v Napier* (note 13) at 341 para 57 and *MEC for Education, KwaZulu Natal and Others v Pillay* 2008 (1) SA 474 (CC) at 492 para 64.

[16] W Cole Durham Jr 'Perspectives on religious liberty: A comparative framework' in Johan D Van der Vyver and John Witte, Jr (eds) *Religious human rights in global perspective* (1996) 1 at 8 and *Kokkinakis* v *Greece* (note 9) at 418.

[17] W Cole Durham Jr 'Perspectives on religious liberty: A comparative framework' (note 16) 8.

[18] Ibid.

[19] Marshall 'Truth and the religion clauses' (note 8) at 245.

practices with the aim of maintaining peace but should rather promote tolerance of these practices to maintain pluralism in society which is essential to democratic societies.[20]

As discussed earlier in this chapter, religious freedom evolved in response to the discrimination and persecution suffered by religious minorities. Accordingly, the right to freedom of religion protects religious minorities from being unfairly discriminated against and persecuted and may prevent conflict and wars. Discrimination may also be more subtle with dominant religious groups imposing their beliefs on religious minorities. Dominant religious groups may use their political power and strength to lobby the state to enact policies that hinder minorities from practising their beliefs or which force minorities to practise or acknowledge the beliefs of the majority. This may be in the form of laws which recognise the religious holidays, marriages or practices of the dominant religious group but not those of religious minorities. Minority groups, who because of their size may lack political influence, are vulnerable to such discrimination and require special protection from such 'illegitimate regulation'.[21] Accordingly, freedom of religion protects against discrimination which is crucial in the attainment of world peace and also enables religious minorities to hold and practise their beliefs without unlawful interference from the majority or the state.

The aforegoing discussion demonstrates that religious freedom may be considered a fundamental and important human right for a number of reasons. The right protects beliefs which define an individual and are central to an individual's identity and curtailment of such beliefs may arguably cause an individual significant emotional distress. Furthermore, the right protects the value of autonomy, central to the fundamental human right of human dignity. In addition, religious freedom protects the existence of different beliefs in society and allows individuals the freedom to choose freely between these beliefs. This maintains

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[20] *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) v Bulgaria* App No 412/03 (2010) 50 EHRR 3 at para 71

[21] Marshall 'Truth and the religion clauses' (note 8) at 246.

religious pluralism in society which has been shown to be important for democratic societies. Religious freedom also protects against discrimination of religious minorities and may therefore assist in the attainment of important social goals such as social cohesiveness and world peace. Religious freedom also enables religious minorities to hold and practise beliefs without illegitimate interference from the majority or the state. In light of this discussion, it is arguable that religious freedom is a fundamental human right, the infringement of which requires serious justification.

3. RECOGNITION OF THE RIGHT TO FREEDOM OF RELIGION

This chapter has thus far examined the theoretical importance of religious freedom and now examines how the right to freedom of religion is generally recognised in international treaties and domestic constitutions in order to identify the key components of religious freedom.

3.1. International and regional treaties

The right to freedom of religion is generally recognised in international and regional instruments though there may exist subtle differences in the formulation of the right. Article 18 of the Universal Declaration of Human Rights,[22] ('the UDHR') protects the right to freedom of thought, conscience and religion. It includes the right to change a religion alone or in community with others and, in public or private, the right to manifest a religion in teaching, practice, worship and observance. The UDHR, the first worldwide commitment to human rights, is a statement of standards to be pursued by states[23] and was not intended to be a legally binding document that would create legal obligations for states as part of

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[22] Universal Declaration of Human Rights, GA res 217A (III), UN Doc A/810 at 71 (1948). The United Nations General Assembly adopted the UDHR in 1948 in light of the atrocities of the Second World War with the aim of protecting the fundamental rights of all human beings.

[23] Hurst Hannum 'The status of the Universal Declaration of Human Rights in national and international law' (1995-1996) 25 *Georgia Journal of International and Comparative Law* 287 at 289.

international law.[24] However, there may be moral, political and today legal pressure for states to uphold the UDHR as argument is made that the UDHR is binding on states as part of customary international law.[25]

The International Covenant on Civil and Political Rights ('the ICCPR')[26] is a multilateral treaty that creates binding legal obligations for those states which are party to it.[27] Religious freedom is protected in article 18 of the ICCPR which states:

> 1. 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.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. 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.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.[28]

This formulation of the right to freedom of religion emulates article 18 of the UDHR and is mirrored in article 9 of the Convention for the Protection of Human Rights and Fundamental

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[24] John P Humphrey 'The International Bill of Rights: Scope and implementation' (1975-1976) 17 *William and Mary Law Review* 527 at 529.
[25] Ibid.
[26] International Covenant on Civil and Political Rights, GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171.
[27] According to Manfred Nowak in the *UN Covenant on Civil and Political Rights CCPR Commentary* 2nd revised edition (2005) xo the ICCPR is considered an authoritative expression of the universally accepted and minimum standard of human rights. Currently, 167 states are party to the ICCPR and 72 are signatories to the ICCPR.
[28] Article 18 of the ICCPR (note 26).

Freedoms better known as the European Convention on Human Rights ('ECHR') which protects the right to change a religion or belief and the freedom, either alone or in community with others and in public or private, to manifest a religion or belief, in worship, teaching, practice and observance.[29] Similarly, article 12 of the American Convention on Human Rights ('AmCHR') provides that religious freedom includes the freedom to maintain or change a belief and the freedom to profess or disseminate a belief, either individually or together with others, in public or in private.[30] Article 18 of the ICCPR is also duplicated in article 1 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief[31] which though not a binding document serves to clarify the rights contained in the ICCPR. Religious freedom is formulated differently in article 8 of the African Charter on Human and People's Rights[32] ('AfrCHR') which guarantees freedom of conscience, the profession and the free practice of religion and states that religious freedom may not, subject to law and order, be restricted.[33] While the right to

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[29] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, entered into force 3 September 1953. The full text of article 9(1) of the ECHR reads:
1. 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.
According to Carolyn Evans *Freedom of religion under the European Convention on Human Rights* (2001) 2 the ECHR is the most effective treaty for the protection of human rights and has been ratified by 47 member states see Convention for the protection of human rights and fundamental freedoms available at http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG [last accessed on 20/01/11].

[30] Article 12 of the American Convention on Human Rights, OAS Treaty Series No 36, 1144 UNTS 123, entered into force July 18, 1978, OEA/SerLV/II82 doc6 rev1 at 25 (1992) which states:
12. Freedom of Conscience and Religion
1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.

[31] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, GA Res 55, UN GAOR, 36th Sess, Supp No 51, UN Doc A/36/684 (1981).

[32] African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force 21 October 1986.

[33] Article 8 of the AfrCHR:
Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

manifest a religion is not expressly protected, the African Commission on Human and Peoples' Rights has held this to be implied in article 8 of the AfrCHR.[34]

Accordingly, it is clear that the right to freedom of religion is recognised as a fundamental right in all major international and regional treaties and is most commonly formulated as the freedom of thought, conscience and religion. Furthermore, the aforegoing analysis demonstrates that religious freedom at an international level has two distinct components, namely the right to hold a religion or belief and the right to manifest a religion or belief in worship, observance, practice and teaching.

3.2.Domestic constitutions

The right to freedom of religion or belief is generally protected in a domestic context, although the precise formulation of the right may differ between states. This section examines how religious freedom is protected in a domestic context.

As in international law, the right to freedom of religion in a domestic context is usually recognised to encompass the right to hold a religion or belief and the right to manifest a religion or belief. The protection of these components may be explicit or implicit. For example, the New Zealand Bill of Rights[35] mirrors international treaties and expressly provides that the right to freedom of religion includes the right to hold an opinion and the right to manifest a belief in worship, observance, practice or teaching. Other constitutions such as the Canadian Charter of Rights and Freedoms[36] ('the Canadian Charter of Rights and

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[34] *Prince v South Africa* Communication No 255/2002 (2004) AHRLR 105 (ACHPR 2004) at 112 para 41.

[35] ss 13 and 15 New Zealand Bill of Rights Act 1990 ('the New Zealand Bill of Rights'). s13 states that '[e]veryone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.'. s15 states that '[e]very person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.'.

[36] s 2(a) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 being Schedule B to the Canada Act, 1982 (UK) 1982, c11 states:
'2. [e]veryone has the following fundamental freedoms:
a. freedom of conscience and religion;'.

Freedoms'), the Malawian Constitution[37] and the Constitution of the Republic of South Africa, 1996[38] ('the South African Constitution') confer in general wording a right to freedom of religion and belief without clarification as to what the right entails. The Canadian Supreme Court and South African Constitutional Court have interpreted this general religious freedom as the right to hold a belief and the right to manifest a belief.[39] In other constitutions religious freedom is protected in a nuanced manner of prohibiting state interference with religion. This is exemplified by the constitutions of the United States of America[40] and Australia[41] which protect religious freedom by prohibiting the state from establishing a religion or prohibiting the free exercise thereof. While such clauses do not expressly refer to an individual's right to hold and manifest beliefs, the United States Supreme Court has held that religious freedom includes such rights. Similarly, the German Basic Law[42] which provides that the freedom to profess a religious belief is inviolable and guarantees the undisturbed practice of religion has also been interpreted to protect the right to hold and manifest a religion.[43] Religious freedom in the United Kingdom is given effect to by the Human Rights Act, 1998 which adopts article 9 of the ECHR as a right and fundamental

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[37] Republic of Malawi (Constitution) Act, 1994. s33 provides that '[e]very person has the right to freedom of conscience, religion, belief and thought, and to academic freedom.'.

[38] s15(1) of the South African Constitution states '[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion.'.

[39] *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 at para 94 and *Christian Education South Africa v Minister of Education* 2000 (note 9) at 770 para 19.

[40] First Amendment to the Constitution of the United States of America provides that '[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;…'.

[41] s116 of the Commonwealth of Australia Constitution Act, 1900 provides that '[t]he Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.'.

[42] Article 4 of the Basic Law for the Federal Republic of Germany, 23 May 1949 states:
(1) Freedom of faith, of conscience, and freedom of creed, religious or ideological [*weltanschaulich*], shall be inviolable.
(2) The undisturbed practice of religion is guaranteed.
English translation in Donald P Kommers *The constitutional jurisprudence of the Federal Republic of Germany* 2ed (1997) 443.

[43] *Blood Transfusion Case* (1971) 32 BVerfGE 98 English translation in Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (note 42) 450 where the German Federal Constitutional Court held that religious freedom includes the internal right to believe and the external right to manifest the belief.

freedom and ensures the enforceability of article 9 of the ECHR in courts in the United Kingdom.

Religious freedom is generally protected in domestic constitutions world-wide. While the formulation of the right differs from state to state and from international law, the right to freedom of religion is generally interpreted to encompass the right to hold and manifest a religion. Accordingly, the right to hold and manifest a religion may be considered the key components of religious freedom.

4. CONTENT OF THE RIGHT TO FREEDOM OF RELIGION

The right to freedom of religion is an important and universally recognised right and the key components of the right identified in the analysis of international instruments and domestic constitutions are the right to hold a religion and the right to manifest a religion. This section analyses the meaning and scope of these key components. The distinction between the right to hold a religion and the right to manifest a religion is considered important because the right to hold a religion is regarded as an inviolable right while restrictions may be placed on the right to manifest a religion. Distinguishing between these two components of the right, however, is problematic and may be practically difficult to maintain as manifestations of belief are inextricably linked to internal beliefs.[44] Carolyn Evans explains that when individuals are forced to act contrary to their beliefs they are in essence forced to recant on their beliefs and therefore restrictions on the right to manifest a religion may result in an infringement of the inviolable right to hold a religion.[45] Accordingly, while this chapter examines the right to hold a religion and the right to manifest a religion as two distinct components, it must be borne in mind that the rights may overlap and an infringement of the right to manifest a religion may lead to an infringement of the right to hold a religion.

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[44] *Kokkinakis* v *Greece* (note 9) at 418.
[45] Evans *Freedom of religion under the European Convention on Human Rights* (note 29) 77-78.

4.1. The right to hold a religion

The general right to hold a religion protects the private and internal beliefs of an individual and is a fundamental component of religious freedom. This section examines the meaning and importance of this component of religious freedom.

The general freedom to hold a religion is an inviolable freedom which protects the internal and private beliefs of an individual to hold or change a belief. The United Nations Human Rights Committee ('HRC') has interpreted this component as the freedom to choose, replace and retain one's religion or belief.[46] Manfred Nowak states that the right protects the right to develop one's own thoughts and beliefs without impermissible external influence.[47] Furthermore, article 18(2) of the ICCPR, article 12(2) of the AmCHR and section 13 of the New Zealand Bill of Rights, prohibits coercion, restriction or interference of this freedom. In this respect, the HRC and European Commission of Human Rights ('ECmHR') have stated that the right to adopt a religion or belief cannot be limited and that the freedom is protected unconditionally.[48] Accordingly, the right to hold a religion or belief may be interpreted as the inviolable right to develop and change internal beliefs.

The general freedom of an individual to hold a religion or belief, furthermore, protects against state coercion. Coercion may be pressure, directly or indirectly, to act contrary to religious beliefs or to adhere to religious beliefs. The HRC has interpreted the prohibition on coercion to include using the threat of physical force or penal sanctions and indirect policies that have the same intention or coercive effect.[49] In reality, coercion is more likely to be subtle and manifest itself in nuanced state policies than in physical force or sanctions.

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[46] Para 5 General Comment No 22 'The right to freedom of thought, conscience and religion (Art 18)' CCPR/C/21/Rev1/Add4 1993/07/30.
[47] Manfred Nowak *UN Covenant on Civil and Political Rights CCPR Commentary* (note 27) 412-413.
[48] Para 3 General Comment No 22 (note 46) and *Darby v Sweden* App No 11581/85 (1991) 13 EHRR 774 at ECmHR report at para 44.
[49] Para 5 General Comment No 22 (note 46).

Accordingly policies that restrict access to education, medical care or employment on the basis of religious beliefs may be regarded as unacceptable coercive policies.[50] An example of such a coercive policy arose in *Torcaso v Watkins* where the United States Supreme Court declared invalid a requirement that state officials take a religious oath before taking office on the basis that the state cannot force an individual to profess a belief or disbelief in any religion.[51] Similarly, in *Sherbert v Verner* the United States Supreme Court held that forcing individuals to choose between following their religious beliefs and forfeiting work or abandoning their beliefs in order to accept work is akin to penalising an individual for their beliefs and is unjustifiable.[52] The right to hold a religion or belief therefore confers on individuals the right to hold a belief without any, direct or indirect, coercion.

However, attempting to convert individuals to another opinion, and in particular religion, known as proselytism does not amount to coercion. First, Paul Taylor notes that nothing in General Comment No 22, the HRC's interpretation of article 18 of the ICCPR, equates proselytism with coercion.[53] Secondly, the freedom to adopt and change a religion or belief can only have any real meaning when individuals are exposed to different religions or beliefs.[54] This is because in order to make a meaningful choice of whether to adopt or change a belief, an individual needs to be aware of different beliefs and be afforded the opportunity to choose between beliefs. This is supported by the ECtHR which has held in *Kokkinakis* v *Greece* that the right to convince others of the correctness of one's beliefs is necessary to give effect to the freedom to hold a religion or belief.[55] In *Kokkinakis* v *Greece,* the applicant, a Jehovah's Witness, persuaded Mrs Kyrikaki to allow him to enter her home and encouraged

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[50] Ibid.
[51] *Torcaso v Watkins* 367 US 488 at 495.
[52] *Sherbert v Verner* 374 US 398 at 404 and 410.
[53] Paul M Taylor *Freedom of religion: UN and European human rights law and practice* (2005) 25.
[54] Ibid.
[55] *Kokkinakis* v *Greece* (note 9) at 418.

her to change her Orthodox Christian beliefs.[56] The ECtHR was faced with deciding whether restrictions on proselytism, which the applicant had been found guilty of contravening, breached the applicant's religious freedom. The ECtHR distinguished between simply trying to influence the beliefs of others and proselytism that uses 'deceitful, unworthy and immoral means, such as exploiting the destitution, low intellect and inexperience of one's fellow beings.'.[57] The ECtHR suggested that it would be lawful to prohibit 'improper proselytism' which may take the form of incentivising membership of religion, exerting pressure on people in distress, the use of violence or brainwashing or acting in a manner incompatible with the freedom of religion and conscience of others.[58]

The general right to hold a religion or belief encompasses the right to adopt, develop and change one's beliefs. This private dimension of the right is considered an inviolable right which cannot be limited. Furthermore, the right protects against coercion, direct or indirect, which may force individuals to recant on their beliefs or act contrary to their freely chosen beliefs. While the prohibition on coercion is comprehensive, it does not preclude trying to convince others of the correctness of your beliefs but protects against individuals placing improper pressure on individuals to change their beliefs.

4.2.The right to manifest a religion

Religious freedom also encompasses the essential right to manifest a religion or belief. This section examines the ambit of conduct protected by the right to manifest a religion or belief.

The most important manifestations of religion are worship or observance, practice and teaching. Certain instruments expressly protect these manifestations of religion,[59] while

[56] Idem at 400.
[57] Idem at 418.
[58] Idem at 422.
[59] Article 18 of the UDHR, article 18(1) of the ICCPR, article 9(1) of the ECHR and s15 of the New Zealand Bill of Rights.

others have been interpreted to confer such protection.[60] This section examines the meaning of 'worship or observance', 'practice' and 'teaching' being the main manifestations of religion protected by the right to freedom of religion.

4.2.1. Worship or observance

Worship encompasses the ceremonies, prayers or other religious forms by which religious adherents honour a religious deity, while observance is the act of complying with a religious law. As complying with religious rules is often a way of honouring a religious deity, worship and observance often overlap. Cornelis de Jong notes that the most common form of worship is prayer and meditation[61] and the HRC has explained that worship includes ritual and ceremonial acts which express a belief and incidental practices such as building places of worship, using ritual formulae and objects, displaying symbols and observing religious holidays.[62] Furthermore, the HRC has stated that the observance and practice of religion or belief includes observing dietary regulations, wearing distinctive clothing or head coverings, participating in rituals and using a particular group language.[63] Furthermore, article 6 of the Declaration on the Elimination of all Forms of Intolerance and Discrimination based on Religion and Belief provides examples of conduct protected by religious freedom and includes worship, establishing places of worship, using objects necessary for religious rituals and observing days of rest. The HRC's delineation of conduct protected by religious freedom is supported by the United States Supreme Court which has held that the exercise of religion includes assembling with others for worship and participating in the sacramental use of bread

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[60] *R v Big M Drug Mart Ltd* (note 39) at para 94; *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) at 1208 para 92; *Employment Division v Smith* 494 US 872 at 877; *Rumpelkammer Case* (1968) 24 BVerfGE 236 English translation in Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (note 42) 446.

[61] Cornelis D de Jong *The freedom of thought, conscience and religion or belief in the United Nations (1946-1992)* (2000) 104.

[62] Para 4 General Comment No 22 (note 46).

[63] Ibid.

and wine.[64] The ECtHR has also held that restrictions on the right to set up a place of worship have implications for the right to worship and observance.[65] Accordingly, worship and observance extend beyond the traditional acts of worship and meditation and include establishing places of worship, using religious objects, participating in rituals, observing religious holidays and dietary regulations and wearing distinctive clothing or head coverings.

4.2.2. Teaching

The right to manifest a religion also protects the right to convey, formally or informally, beliefs to others and practices central to the conveyance of these beliefs. The formal conveyance of religious beliefs includes religious teaching in schools while informal teaching is convincing others of the correctness of one's beliefs known as proselytism. As discussed earlier, the ECtHR in *Kokkinakis v Greece* held that religious freedom protects the right to proselytise to some degree.[66] In accordance with this, the United States Supreme Court has explained that the exercise of religion includes proselytism.[67] The ECtHR has, however, cautioned that religious freedom would not protect improper proselytism, which as discussed above was not defined but may constitute exerting improper pressure or incentivising individuals to change their beliefs. Furthermore, the HRC has explained that teaching, along with practice, includes the right to choose religious leaders, establish religious schools and prepare and distribute religious texts or publications.[68]

4.2.3. Practice

Practice is the widest form of manifestation of religion and is harder to define than other manifestations of religion such as worship, observance and teaching. The difficulty in defining practice may arise from it being regarded as a catch-all provision that encompasses

[64] *Employment Division v Smith* (note 60) at 877.
[65] *Manoussakis and others v Greece* App No 18748/91 (1997) 23 EHRR 387.
[66] *Kokkinakis* v *Greece* (note 9) at 436.
[67] *Employment Division v Smith* (note 60) at 877.
[68] Para 4 General Comment No 22 (note 46).

all other manifestations that do not constitute worship or observance.[69] The practice of a religion may also often overlap with other manifestations of religion such as observance and teaching as evidenced by General Comment No 22 where the HRC defined practice along with the manifestations of observance and teaching. General Comment No 22 does not, however, elaborate on what is meant by the manifestation of practice as it has done with other manifestations of religion. In this regard it is useful to have regard to article 6 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief which explains religious freedom to include the freedom to establish and maintain charitable institutions; write, issue and disseminate relevant publications; solicit and receive financial contributions and establish and maintain communications with individuals and communities in matters of belief at a national and international level. The HRC has, however, not developed a fixed test for determining when conduct constitutes a religious practice.

Similarly, article 9 of the ECHR does not define practice but the ECmHR has in *Arrowsmith v United Kingdom*[70] provided some indication of when conduct constitutes a practice. In this case, the applicant was a pacifist who had been arrested for distributing leaflets to soldiers encouraging them to refuse to serve in Northern Ireland.[71] The ECmHR accepted that pacifism was a belief protected by article 9(1) of the ECHR and had to decide whether the distribution of leaflets constituted a manifestation of belief protected by the applicant's religious freedom.[72] The ECmHR held that practice does not encompass every act motivated by a religion or belief and those actions that do not express a belief but are merely influenced

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[69] De Jong *The freedom of thought, conscience and religion or belief in the United Nations (1946-1992)* (note 61) 121.
[70] *Arrowsmith v United Kingdom* App No 7050/75 (1981) 3 EHRR 218.
[71] Idem at 219 para 2 and 10.
[72] Idem at 228 para 69.

by it are not protected.[73] The ECmHR noted that the contents of the leaflets did not categorically prohibit the use of force but only opposed British policy in Northern Ireland and was not directed at the public but only at soldiers who might serve in Northern Ireland.[74] Accordingly, the ECmHR held that the distribution of leaflets did not express and further pacifist views and was therefore not a manifestation of religion protected by the right to freedom of religion.[75]

The *Arrowsmith v United Kingdom* judgment attempts to distinguish between conduct that expresses a belief and constitutes a practice and conduct that is merely motivated or influenced by a belief and therefore not a practice. This distinction may, however, be artificial as it may be difficult to formulate a test that can identify and distinguish between conduct as an expression of a belief and conduct merely motivated by a belief. The ECmHR has found that the fact that conduct may be permitted by a religion does not necessarily mean that the conduct constitutes a manifestation of belief.[76] The ECmHR and ECtHR have, however, offered very little clarification beyond this on to how to determine whether a manifestation constitutes a practice. Carolyn Evans argues that the ECmHR has in fact adopted a necessity test in terms of which an applicant is required to prove that the manifestation is necessitated by a belief.[77] In support of this argument is the case of *X v the United Kingdom* in which the ECmHR held that the religious freedom of a Buddhist prisoner who had been prevented from publishing articles in a religious magazine was not infringed as he had failed to prove that publishing articles was necessary to his religion.[78] Similarly, in *X v Austria* the ECmHR dismissed the applicant's claim that the dissolution of two associations intended to provide the organisational framework for the Moon sect, a religious organisation,

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[73] Idem at 228-229 para 71.
[74] Idem at 229 para 72 and 74.
[75] Idem 229 para 74 and 75.
[76] *Khan v United Kingdom* App No 11579/85 (1986) 48 D&R 253.
[77] Evans *Freedom of religion under the European Convention on Human Rights* (note 29) 115.
[78] *X v the United Kingdom* App No 5442/72 (1974) 1 D&R 41.

violated his religious freedom.[79] The dismissal was on the basis that it had not been established that the legal structures of an association were necessary for the manifestation of religious beliefs.[80]

Furthermore, Evans suggests that issue of necessity is determined objectively without reference to the applicant's own beliefs.[81] In making this objective assessment, the ECmHR or ECtHR may rely on its own assessment of an applicant's obligations or the expert evidence of religious leaders.[82] However, Evans criticises this objective determination on the basis that individualistic beliefs or non-hierarchical religions will have no single religious authority or set of rules and it may therefore be difficult to obtain expert evidence which can authoritatively determine what conduct is required by a religion.[83] Furthermore, the necessity test may not protect the practices of individuals who believe that a religion imposes additional requirements than those generally accepted.[84] This is problematic as John Garvey explains that religious obligations are of a personal nature and individuals may perceive religious observances differently with a single observance being perceived as voluntary and obligatory by different individuals.[85] Therefore requiring judges to determine the objective requirements of a faith is problematic as it undermines personal beliefs and the ability of individuals to determine their religious obligations for themselves.

Taylor, however, argues that the necessity test applies in a prison or military context and is unlikely to apply outside thereof[86] but does not explain the ECmHR's judgment in *X v Austria* discussed above. Taylor suggests that the test is whether the conduct expresses a

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[79] *X v Austria* App No 8652/79 (1981) 26 D&R 89.
[80] Ibid.
[81] Evans *Freedom of religion under the European Convention on Human Rights* (note 29) 120.
[82] Idem 121.
[83] Idem 122.
[84] Ibid.
[85] John H Garvey 'Free exercise and the values of religious liberty' (1985-1986) 18 *Connecticut Law Review* 779 at 785.
[86] Taylor *Freedom of religion: UN and European human rights law and practice* (note 53) 211 and 212.

belief.[87] Evans herself notes that the ECmHR has on occasion not utilised the necessity test but rather examined whether the conduct expresses a belief.[88] In this regard the ECmHR has in the case of *X v the United Kingdom* stated that in finding no infringement of the Buddhist prisoner's religious freedom it took into account that the applicant was a prisoner and that questions of necessity would not normally arise in respect of persons at liberty.[89] The parties in *X v the United Kingdom* disputed whether the applicant's attendance at Friday mosque prayers was required by Islam and therefore a necessary part of his religious practice.[90] The ECmHR suggested that necessity is not a relevant consideration and did not decide whether attendance at Friday mosque prayers was a religious obligation.[91] Similarly, in *Knudsen v Norway* the ECmHR found that the refusal of a clergyman to perform administrative duties of his office in protest of a new abortion law was not protected by religious freedom as it did not express the applicant's religious beliefs.[92] The ECmHR examined whether the conduct expressed a religious belief as opposed to whether the conduct was required by the applicant's beliefs.

Accordingly, jurisprudence from the ECmHR and ECtHR suggests that not all conduct motivated or influenced by a religion constitutes a manifestation of belief in practice. While the conduct should express a belief and not simply be motivated by a belief, the test for when conduct expresses a belief is unclear. In certain circumstances, the applicant may be required to show that the conduct is objectively required by a belief. However, this necessity test is not consistently applied and it may be that even conduct that is not objectively required by a religion constitutes a practice.

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[87] Idem 211.
[88] Evans *Freedom of religion under the European Convention on Human Rights* (note 29) 123.
[89] *X v the United Kingdom* App No 8160/78 (1981) 22 D&R 27 at 34 para 7.
[90] Idem at 34 para 6.
[91] Idem at 35 para 10.
[92] *Knudsen v Norway* App No 11045/84 (1985) 42 D&R 247.

Religious freedom clauses in the United States of America, Canada, Germany and South Africa do not distinguish between different forms of manifestation of belief and protect practices based on sincerely held religious beliefs. In respect of when conduct is protected by religious freedom in the United States of America, Conkle suggests that the best interpretation of the United States Supreme Court's jurisprudence is that religious freedom protects conduct that is primarily or dominantly motivated by a religious belief.[93] Conkle observes that jurisprudence from the United States Supreme Court has not limited the protection of the First Amendment by defining the exercise of religion restrictively by requiring that the exercise of religion be central or mandated by the religion.[94] This means that it is not required that conduct be necessitated by a belief but only that it be primarily motivated by a religious belief. This is illustrated by the case of *Thomas v Review Board of the Indiana Employment Security Division* in which the United States Supreme Court had to decide whether there had been a violation of religious freedom when a Jehovah's Witness who had quit his job in belief that his religious beliefs precluded him from participating in the production of armaments was denied unemployment benefits.[95] The United States Supreme Court noted that the fact that another Jehovah's Witness did not object to the work was immaterial as it is not required that the belief be shared by all adherents and the court would not adjudicate on what was the correct interpretation of the requirements of a faith.[96] The United States Supreme Court held that it would only consider whether the applicant's conduct was based on an 'honest conviction' and certain conduct may be so bizarre and lacking in religious motivation that it would not be protected by religious freedom.[97] Accordingly, religious freedom in the United States of America arguably protects conduct

[93] Daniel O Conkle *Constitutional law: The religion clauses* (2003) at 84.
[94] Ibid.
[95] *Thomas v Review Board of the Indiana Employment Security Division* 45 US 707 at 709.
[96] Idem at 715-716.
[97] Ibid.

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[93] Daniel O Conkle *Constitutional law: The religion clauses* (2003) at 84.
[94] Ibid.
[95] *Thomas v Review Board of the Indiana Employment Security Division* 45 US 707 at 709.
[96] Idem at 715-716.
[97] Ibid.

that is based on an applicant's honest or sincere beliefs and it is not a requirement, as like in the necessity test, that the conduct be an objective requirement of the religion.

Similarly, religious freedom in Canada and South Africa protects conduct based on sincere beliefs. This was articulated in *Syndicat Northcrest v Amselem* where the Canadian Supreme Court was faced with deciding whether the refusal to allow the appellants to set up a *succah*[98] for nine days a year in accordance with their religious beliefs on their co-owned property violated their religious freedom.[99] In finding an infringement of religious freedom, the Canadian Supreme Court held that freedom of religion not only protects beliefs or conduct recognised by experts or other adherents as objective requirements of a religion[100] but rather practices connected to religion and based on an individual's sincere beliefs.[101] In explaining sincerity of belief, the Canadian Supreme Court held that this was merely 'an honesty of belief' and the court would only examine whether the appellants were in good faith and their belief was not pretence.[102] This may entail examining the credibility of the appellants' testimony, analysing the belief for consistency with other practices and hearing expert evidence confirming that the practice is consistent with the beliefs of other adherents, though this is not necessary or determinative.[103] Accordingly, the Canadian Supreme Court rejected the notion that the appellants were required to prove that setting up a *succah* was an objective requirement of their faith and focussed on whether the practice was connected to religion and the appellants had a sincere belief therein.

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[98] A *succah* is a small enclosed hut or booth, open to the heavens in which Jews are commanded to dwell temporarily during the *Succot* festival, *Syndicat Northcrest v Amselem* (note 9) para 5.
[99] Idem at para 2.
[100] Idem at para 43.
[101] Idem at para 46.
[102] Idem at para 51-52.
[103] Idem at para 53-54.

Similarly, the South African Constitutional Court has held that in order for a practice to be religious it must be based on a sincere belief.[104] In *MEC for Education, Kwazulu Natal, and others, v Pillay* the Constitutional Court was faced with the question of whether to grant a Hindu girl wearing a nose-stud an exemption from school regulations on the basis that the nose-stud expressed the pupil's Hindu faith and South Indian culture. The Constitutional Court found that the nose-stud was not a mandatory tenet of the Hindu religion[105] but stated that the status of a practice as mandatory or voluntary was not determinative of whether a practice is protected by religious freedom.[106] The Constitutional Court held that religious freedom protects voluntary religious practices as such protection is consistent with the spirit of the Constitution which not only permits diversity but promotes and celebrates it.[107]

The manifestation of practice is broad and it may therefore be difficult to identify conduct that constitutes a practice and therefore protected by religious freedom. The ECmHR and ECtHR have held that religious freedom protects conduct that actually expresses a belief, and in certain instances is actually required by a belief. However, jurisprudence from the United States of America, Canada, Germany[108] and South Africa suggests that religious freedom protects voluntary conduct based on sincerely held religious beliefs. This subjective approach may be favoured by courts reluctant to pronounce on the requirements of a religion. In light of the fact that judges may often lack the expertise to pronounce on such highly contested issues, especially in respect of minority religions, this approach may be preferable. Furthermore religion, in addition to setting out mandatory obligations for its adherents, also mandates a way of life for adherents to draw closer to God. Many religious adherents would

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[104] *MEC for Education, Kwazulu Natal, and others, v Pillay* (note 15) at 492 para 52.
[105] Idem at 495 para 60.
[106] Idem at 498 para 67.
[107] Idem at 497 para 65.
[108] See Axel Frhr Von Campenhausen 'The German headscarf debate'2004 *Brigham Young University Law Review* 665 at 678 which discusses the German Federal Constitutional Court's approach of determining whether a practice is protected by religious freedom by looking at the subjective beliefs of the claimant and not the general and universal requirements of the religion.

be deeply aggrieved if they were not able to follow such practices even if not mandatory. Therefore it makes more sense to take into account the status of the practice as a mandatory or non-mandatory obligation in evaluating the effect of the limitation and the justification of a breach of religious freedom rather than in excluding it from the protection of religious freedom. The limitations on obligatory practices which are central to an individual's identity may simply require greater justification[109] than ancillary practices.

The right to manifest a religion or belief generally protects the worship, observance, teaching and practice of a religion or belief. It is easier to explain and identify conduct that constitutes the worship, observance or teaching of a religion than it is to identify conduct that constitutes the practice of religion. The difficulty arises due to the fact that there are conflicting tests for determining whether conduct constitutes a manifestation of religion in practice. The necessity test requiring that the conduct be mandated by a belief is stricter than merely requiring the conduct to express a belief or be based on sincerely held beliefs.

5. CONCLUSION

Religious freedom is a fundamental human right that serves a number of functions. The right to freedom of religion protects personal beliefs which define an individual and are central to an individual's identity and also the value of autonomy, which is important for the attainment of several other human rights, such as human dignity, freedom of expression and privacy. In addition, religious freedom maintains religious pluralism in society, by protecting the existence of different beliefs in society and allowing individuals the freedom to choose between different beliefs. The right also protects religious minorities from discrimination and persecution and thereby assists in the attainment of social cohesiveness and world peace. Religious freedom, furthermore, ensures that minority religious groups are able to hold and practise beliefs without illegitimate interference from the majority or the state.

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[109] *MEC for Education, Kwazulu Natal, and others, v Pillay* (note 15) at 507 para 95.

The fundamental importance of the right to freedom of religion is re-iterated by the fact that it is recognised as a fundamental right in all major international and regional treaties and domestic constitutions. While the precise formulation of the right may differ, especially in the domestic constitutions of states, the two key components of religious freedom are the right to hold a religion or belief and the right to manifest a religion or belief.

The general right to hold a religion or belief, considered to be an inviolable right, protects the right to adopt, develop and change beliefs. It protects against coercion, direct and indirect, which may force individuals to recant on their beliefs or act contrary to their freely chosen beliefs. The prohibition on coercion is extensive and prevents restricting access to education or employment or other benefits on the basis of religious beliefs or placing improper pressure on individuals to change their beliefs.

The right to manifest a religion or belief generally protects the worship, observance, teaching and practice of a religion subject to certain necessary limitations. The manifestation of worship and observance protect conduct, and ancillary actions, by which religious adherents honour a religious deity or comply with a religious rule. The right to manifest a belief in teaching protects the right to convey, formally or informally, beliefs to others and related practices such as choosing religious leaders and establishing religious schools.

There are conflicting tests for determining whether conduct constitutes a manifestation of belief in practice. The necessity test requiring that the conduct be required by a belief is stricter than merely requiring the conduct to express a belief or to be based on sincerely held beliefs. This chapter argues that while the ECtHR has sometimes utilised a strict necessity test, religious freedom protects conduct that is based on sincerely held religious beliefs.

CHAPTER 3

LIMITATIONS ON THE MANIFESTATION OF RELIGION

1. INTRODUCTION

Religious freedom is a fundamental human right central to an individual's identity and important for the protection of several other human rights. Furthermore, religious freedom is recognised in all major international and regional treaties and domestic constitutions as the right to hold a religion and the right to manifest a religion in worship, observance, teaching and practice. The right to manifest a religion is not absolute and this chapter examines limitations on the manifestation of religion.

This chapter analyses how the right to manifest a religion may be lawfully restricted, by first providing a brief explanation as to why the right to manifest a religion cannot be considered an absolute right and must be subject to limitations. Secondly, as not all interferences with religious freedom constitute an infringement of religious freedom requiring justification, this chapter examines what is required in order to establish an infringement of religious freedom. Once an infringement of religious freedom has been established, the infringement must be shown to be justifiable in order to be upheld. Accordingly, this chapter examines international and domestic law in order to identify and explain the principles that govern the limitation of religious freedom.

2. RELIGIOUS FREEDOM IS A LIMITED RIGHT

In light of the fundamental nature and importance of religious freedom it is questionable why the manifestation of religion is subject to restrictions. This section explains that the manifestation of religion must be restricted in order to ensure the orderly functioning of society and to protect the rights and interests of others.

The rationale as to why the right to manifest a religion cannot be absolute and must be subject to limitations stems from the very nature of religious freedom itself. As some religions purport to regulate every aspect of an adherent's life, the right to manifest a religion has a wide ambit and may be invoked to protect a wide range of conduct and practices such as diet, dress and even the refusal to pay taxes,[1] carry photographic identification[2] and attend school.[3] If the right to manifest a religion was absolute, individuals would be entitled to practise their beliefs despite any conflict with societal laws and could avoid compliance with almost any civic obligation on the basis of religious beliefs. This would result in chaos in society with individuals becoming a law unto themselves based on their religious beliefs. Accordingly, limitations on the right to manifest a religion may be necessary to ensure that individuals comply with societal laws which are essential for the orderly functioning of society.

The limitation of religious freedom is also important in light of the fact that the manifestation of religious beliefs may easily harm or conflict with the rights of others. In this regard, religious freedom is frequently used as a justification for discrimination, prejudice and violence.[4] An apt example of this was the religious support demonstrated for the apartheid regime in South Africa. The apartheid regime, built by the Afrikaners,[5] discriminated against people on the basis of race and sought to establish the Afrikaner as the dominant and superior race in South Africa. The oppressive racial policies were supported and justified by the Dutch Reformed Church on the basis that race-separation was divinely commanded and formed part

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[1] *C v United Kingdom* App No 10358/83 (1983) 37 D&R 142.
[2] *Alberta v Hutterian Bretheren of Wilson Colony* 2009 SCC 37.
[3] *Wisconsin v Yoder* 406 US 205.
[4] Manfred Nowak and Tanja Vospernik 'Permissible restrictions on freedom of religion or belief' in Tore Lindholm, W Cole Durham Jr and Bahia G Tazib-Lie (eds) *Facilitating freedom of religion or belief: A deskbook* (2004) 147 at 147.
[5] An Afrikaans-speaking ethnic group in Southern Africa of Dutch and Huguenot descent.

of the religious beliefs of the Afrikaner people.[6] While such obviously oppressive and racist beliefs are not acceptable, the harm posed by religious beliefs may also be more subtle such as when parents, due to religious beliefs, refuse necessary medical treatment for a child. Here the religious beliefs of parents conflict with the rights of the child to life and healthcare. In such circumstances where the manifestation of belief may endanger the life of others, limitations on religious freedom are necessary to reconcile conflicting rights and ensure the peaceful co-existence of individuals in society.[7]

Accordingly, while religious freedom is a fundamental human right, the right to manifest a religion is not an absolute right and may be subject to necessary limitations. Pluralistic societies may require the limitation of religious freedom to protect basic human rights and ensure the orderly functioning of society.

3. INFRINGEMENT OF RELIGIOUS FREEDOM

As with any right, not all interferences with religious freedom will constitute an infringement of religious freedom requiring justification. Generally, there will only be a violation of a right requiring justification when there has been a substantial and non-trivial interference with the right. This section examines what is necessary in order to establish a *substantial and non-trivial interference* with religious freedom.

The requirement that a claimant prove a substantial and non-trivial interference with the right to freedom of religion in order to establish a violation of religious freedom is prevalent in the United States of America. This is because religious freedom is entrenched in the First

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[6] Susan Rennie Ritner 'The Dutch Reformed Church and apartheid' (1967) 2(4) *Journal of Contemporary History* 17 at 24.

[7] *Kokkinakis* v *Greece* App No 14307/88 (1994) 17 EHRR 397 at 419; *Leyla Sahin v Turke*y App No 44774/98 (2006) 45 ILM 436 at 452 para 108 where it was held that democracy is a balancing of fundamental rights and requires that the rights of individuals and groups be restricted in certain circumstances.

Amendment to the Constitution of the United States of America[8] and there is no limitation provision attached to the right itself nor does the American Constitution contain a general limitation of rights clause. In order to narrow the scope of religious freedom and limit when an individual may rely on this right, the United States Supreme Court requires the state to impose a 'substantial burden' on the exercise of a religious belief or practice to trigger the protection of religious freedom.[9] The United States Supreme Court has, however, not identified precisely what constitutes a substantial burden.[10]

David Conkle suggests that a substantial burden on religious freedom is one that interferes with the ability of an individual to make religious choices or places coercive pressure on an individual to forgo a religious practice.[11] Conkle notes that the interference with the religious decision-making process or the pressure to forgo a religious practice may be clear and direct or subtle and indirect.[12] The United States Supreme Court case of *Wisconsin v Yoder* is an example of the state's clear and direct interference with the religious decision-making process of individuals. In *Wisconsin v Yoder* a state law forced Amish parents, with the threat of criminal sanctions, to send their children to school until the age of 16 in conflict with their religious beliefs.[13] The Amish objected to formal schooling education beyond the eighth grade on the basis that the values of individual accomplishment, worldly success and social life taught during this period conflicted with their religious beliefs.[14] The United States Supreme Court examined the Amish way of life and noted that compulsory secondary schooling was often carried out in distant areas with practices and values unfamiliar to the

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[8] First Amendment to the Constitution of the United States of America [provides that '[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;…'.
[9] *Hernandez v Commissioner of Internal Revenue* 490 US 680 at 699.
[10] Daniel O Conkle *Constitutional law: The religion clauses* (2003) 84.
[11] Idem at 87.
[12] Ibid.
[13] *Wisconsin v Yoder* (note 3) at 218.
[14] Idem at 210-211.

Amish.[15] Amish children would therefore be removed from their communities during their formative years in which they should be learning the skills necessary to fulfil their adult roles in the Amish community and this may threaten the very existence of the Amish community.[16] Accordingly, the law forced Amish parents to make the difficult choice of educating their children in accordance with their religious beliefs or abiding by the law and abandoning their religious beliefs. The United States Supreme Court held this to be a substantial interference with the religious development of Amish children and the religious beliefs of their parents which therefore breached the religious tenets of the Amish faith.[17]

The burden placed on the exercise of religious freedom, however, may not always be as direct as the threat of criminal sanctions and may be more subtle in the form of withholding benefits in order to pressurise individuals to forgo their religious beliefs. For example, the United States Supreme Court held in *Sherbert v Verner* that the denial of unemployment benefits to a claimant who had been discharged from employment as she had refused to work on a Saturday in accordance with her religious beliefs placed a substantial burden on the claimant's religious freedom.[18] The United States Supreme Court noted that the claimant was excluded from receiving the benefits on the basis of the exercise of her religious beliefs and this constituted pressure on the claimant to forsake her religious beliefs.[19] The United States Supreme Court reasoned that the denial of benefits forced the claimant to choose between following her religious beliefs and forfeiting benefits or abandoning her beliefs in order to accept employment and therefore imposed a substantial burden on the claimant's religious freedom.[20]

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[15] Idem at 217.
[16] Idem at 211-212.
[17] Ibid.
[18] *Sherbert v Verner* 374 US 398 at 403.
[19] Idem at 404.
[20] Ibid.

Similarly, in Canada claimants must show that there has been a significant and non-trivial interference with the exercise of their religious beliefs in order to establish an infringement of the right to freedom of religion. Canadian jurisprudence has not defined what constitutes a significant and non-trivial interference with the exercise of religious freedom and this is decided on a case by case basis. The Supreme Court of Canada held in *Multani v Commission scolaire Marguerite-Bourgeoys* that forcing individuals to choose between abiding by their religious beliefs or attending a public school is a substantial interference with religious freedom.[21] In *Multani v Commission scolaire Marguerite-Bourgeoys* there was an absolute prohibition on wearing a *kirpan,* a religious object made of metal resembling a dagger which Orthodox Sikhs believe they are required to wear at all times, to school.[22] As a result of the prohibition, the applicant's son left the public school system and attended a private school in order to abide by his religious beliefs of wearing the *kirpan.* The Supreme Court of Canada held that the deprivation of the right to attend a public school was a significant infringement of religious freedom.[23]

The loss of time or money associated with the practice of religious beliefs, however, does not automatically constitute a substantial and non-trivial interference with religious beliefs. In support of this argument is the Canadian Supreme Court case of *R v Edwards Books and Art Ltd* which examined the constitutionality of legislation prohibiting the sale of retail goods on a Sunday.[24] The Supreme Court of Canada examined whether the prohibition resulted in coercion[25] on the basis that it was more expensive for retailers who observed a day of rest other than Sunday to practise their religious beliefs[26] as such retailers would be closed, and lose out on trading, for two days a week. The Supreme Court of Canada held that religious

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[21] *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256 at para 40.
[22] Idem at para 1 and 3.
[23] Idem at para 40-1.
[24] *R v Edwards Books and Art Ltd* [1986] 2 SCR 713.
[25] Idem at para 95.
[26] Ibid.

freedom does not protect against every increased cost associated with the practice of a religion if the burden is insubstantial or trivial.[27] The Supreme Court of Canada held that religious freedom only protects against a reasonable or actual threat to religious conduct or practices which are based on deeply personal beliefs which govern an individual's perception of themselves, human kind, nature or a higher being.[28] Religious adherents may be expected to bear a certain amount of loss of time and money associated with the practise of their religious beliefs, provided they can still adhere and hold on to those beliefs which govern their way of life.

In determining whether there has been a substantial interference with a claimant's freedom of religion, the South African Constitutional Court is sensitive to the views of the claimant and the importance and value the claimant attaches to the practice. For example, the South African Constitutional Court in *MEC for Education, Kwazulu Natal, and others, v Pillay* held that regulations prohibiting a student from wearing a nose-stud to school discriminated against the student on the basis of religion and culture,[29] even though the nose-stud was not a mandatory tenet of the student's religion or culture[30] and the student could wear the nose-stud outside of school.[31] The majority noted that preventing the student from wearing the nose-stud for several hours in a school day would severely undermine the practice and significantly infringe the student's cultural and religious identity.[32] The majority, furthermore, dismissed the argument that the student, if unhappy with the school dress code, could attend another school where she was allowed to wear a nose-stud on the basis that this would marginalise religion and culture and was inconsistent with the values of the South African Constitution.[33]

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[27] Idem at at para 97.
[28] Ibid.
[29] *MEC for Education, Kwazulu Natal, and others, v Pillay* 2008 (1) SA 474 (CC) at 498 para 68.
[30] Idem at 495 para 60.
[31] Idem at 504 para 85.
[32] Ibid.
[33] Idem at 506 para 92.

The examination as to whether a law substantially burdens religious freedom is a threshold enquiry necessary to establish whether there has been an infringement of religious freedom requiring justification. There is no fixed test for what constitutes a substantial burden on religious freedom and this is determined on a case by case basis by examining the effect of the law on an individual. Limitations that interfere with a religious belief or practice, exert coercive pressure on the religious decision-making process, exclude an individual from the public school system or prevent an individual from engaging in a practice for several hours a day may constitute a substantial burden on religious freedom. In determining whether a law substantially burdens religious freedom, a court should adopt a generous and sensitive approach which accords due regard to the importance and value the claimant attaches to the practice. This is because a law that infringes religious freedom will not necessarily be struck down and may be upheld if the infringement is justifiable. A generous approach to the threshold enquiry allows conflicting rights to be balanced and reconciled in terms of the justifiability enquiry and ensures that religious freedom is only limited when there is real justification therefor.

4. JUSTIFIABLE LIMITATIONS ON RELIGIOUS FREEDOM

Law or conduct that infringes religious freedom may nonetheless be upheld if the infringement of the right is justifiable. This section analyses international and regional treaties, domestic constitutions and relevant case-law in order to identify and explain the principles that govern and justify limiting the right to freedom of religion.

Religious freedom may be limited by a specific limitation provision attached to the right itself, a general limitation of rights clause or in accordance with the principles articulated in case-law. An example of a limitation provision attached to the right to freedom of religion is

article 18(3) of the International Covenant on Civil and Political Rights ('the ICCPR')[34] which provides that the freedom to manifest a religion is subject to limitations prescribed by law necessary to protect public safety, order, health, or morals or the fundamental rights of others.[35] Similarly, the religious freedom clauses in the European Convention on Human Rights ('ECHR')[36] and the American Convention on Human Rights ('AmCHR')[37] subject the manifestation of religion to limitations prescribed by law necessary to protect public safety, order, health, or morals, or the rights of others.

A general limitation clause is a separate and independent clause in a treaty or constitution that specifies the criteria to be satisfied in order to justifiably limit rights contained in the treaty or constitution. These general limitation clauses typically require that the limitation be prescribed by law, pursue a lawful aim and be reasonable. For example, article 29(2) of the Universal Declaration of Human Rights[38] ('UDHR') provides that the exercise of rights is subject to limitations determined by law necessary to ensure the respect for the rights of others and to satisfy the requirements of morality, public order and general welfare.[39] Similarly, section 1 of the Canadian Charter of Rights and Freedoms,[40] ('the Canadian

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[34] International Covenant on Civil and Political Rights, GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171.

[35] The full text of article 18(3) of the ICCPR reads:
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.

[36] Article 9(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, entered into force 3 September 1953 provides:
(2) 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 the protection of the rights and freedoms of others.

[37] Article 12(3) of the American Convention on Human Rights, OAS Treaty Series No 36, 1144 UNTS 123, entered into force July 18, 1978, OEA/SerLV/II82 doc6 rev1 at 25 (1992), provides:
(3) Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.

[38] Universal Declaration of Human Rights, GA res 217A (III), UN Doc A/810 at 71 (1948).

[39] Article 29(2) of the UDHR provides:
In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

[40] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 being Schedule B to the Canada Act, 1982 (UK) 1982, c11.

Charter of Rights and Freedoms') states that the exercise of rights is subject to reasonable limitations prescribed by law as can be demonstrably justified in a free and democratic society.[41] Section 5 of the New Zealand Bill of Rights[42] provides that the exercise of rights is subject to reasonable limitations, prescribed by law that are justifiable in a free and democratic society. The general limitation clause in the South African Constitution states that a limitation of rights must be reasonable and justifiable and details the factors to be taken into account in determining the reasonability of a limitation.[43] Accordingly, the limitation of rights in accordance with a general or specific limitation provision is not entirely dissimilar and requires consideration of the same principles such as whether the limitation is prescribed by law, pursues a lawful aim and is necessary or reasonable.

In certain domestic constitutions religious freedom is an entrenched right which is not subject to a specific limitation provision nor do the constitutions contain a general limitation of rights clause. This is exemplified by the First Amendment to the Constitution of the United States of America which simply provides that '[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...' and article 4 of the Basic Law of the Federal Republic of Germany which provides that religious freedom is inviolable and that the undisturbed practice of religion is guaranteed.[44] Despite the impression that religious freedom is guaranteed absolutely in these constitutions, the respective case-law from these countries have held that the right may be limited.

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[41] s1 of the Canadian Charter of Rights and Freedoms provides:
The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[42] s5 of the New Zealand Bill of Rights Act 1990 ('New Zealand Bill of Rights') states that '[s]ubject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

[43] s36 of the Constitution of the Republic of South Africa, 1996 ('the South African Constitution').

[44] Article 4 of the Basic Law of the Federal Republic of Germany, 23 May 1949 states:
(1) Freedom of faith, of conscience, and freedom of creed, religious or ideological [*weltanschaulich*], shall be inviolable.
(2) The undisturbed practice of religion is guaranteed.
English translation in Donald P Kommers *The constitutional jurisprudence of the Federal Republic of Germany* 2ed (1997) 443.

Initially, the exercise of religion in the United States of America could only be limited by demonstrating that the limitation pursued a compelling state interest and that the state had used the least restrictive means of achieving the interest. The test, known as the compelling interest test, did not allow the state to rely on broad state goals and required the state to clearly identify the interest in need of protection. Accordingly, in *Wisconsin v Yoder* discussed earlier in this chapter, the United States Supreme Court did not simply accept the state's argument that it had a compelling interest in a system of compulsory education which superseded the religious beliefs of the Amish.[45] The United States Supreme Court held that where there is a claim for the fundamental right to religious freedom, sweeping claims of an interest in compulsory education are too general and will not suffice as a compelling state interest.[46] The state was required to clearly articulate its objective in requiring compulsory education until the age of 16 and to state how these objectives would be impeded if it recognised an exemption for the Amish.[47]

Furthermore, the compelling interest test required the state to show that the measures used constituted the least restrictive measures capable of protecting the state interest. This is best explained by the case of *Church of the Lukumi Babalu Inc v City of Hileah*,[48] in which the United States Supreme Court had to determine the validity of ordinances prohibiting animal sacrifice. The United States Supreme Court examined the text of the ordinance and the effect thereof and noted that while the state may have a legitimate interest in protecting public health and preventing cruelty to animals, the interest could be protected by less restrictive means than an absolute prohibition on animal sacrifice.[49] The United States Supreme Court held that the state's interests could be adequately protected by the regulation of the rituals,

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[45] *Wisconsin v Yoder* (note 3) at 221.
[46] Ibid.
[47] Ibid.
[48] *Church of the Lukumi Babalu Inc v City of Hileah* 508 US 520.
[49] Idem at 538.

treatment and disposal of the sacrificed animals and a complete prohibition was therefore held to be overbroad.[50] Accordingly, even if a law pursues a clearly compelling state interest, the state is still required to demonstrate that it has used the least restrictive means available of protecting this interest in order for an infringement of religious freedom to be justified.

The United States Supreme Court decision of *Employment Division v Smith*[51] signified a departure and a relaxation of the compelling interest test. In *Employment Division v Smith* the respondents had been dismissed from their jobs for ingesting peyote, an illegal drug, for sacramental purposes and had been denied unemployment benefits on the basis that they had been dismissed for work-related misconduct.[52] The United States Supreme Court examined whether the prohibition on the use of the drug violated the respondents religious freedom by indirectly preventing their religious use of peyote or whether the respondents could claim an exemption from the prohibition based on the compelling interest test.[53] The United States Supreme Court held that where an otherwise valid law which applies equally to all people has the incidental effect of limiting the free exercise of religion, known as a generally applicable prohibition, the free exercise clause will not be infringed.[54] Furthermore, the compelling interest test was held not to apply in evaluating claims for exemptions from generally applicable prohibitions.[55] This effectively resulted in a relaxation of the compelling interest test and meant that generally applicable laws which did not target religious beliefs could lawfully limit religious freedom without any further requirements.[56]

The United States Congress responded to the *Employment Division v Smith* case by passing the Religious Freedom Restoration Act of 1993 ('RFRA') which restored the compelling

[50] Idem at 538-539.
[51] *Employment Division v Smith* 494 US 872.
[52] Idem at 874.
[53] Idem at 882-883.
[54] Idem at 878.
[55] Idem at 884- 885.
[56] For a full discussion of the case see Michael W McConnell 'Free Exercise Revisionism and the Smith Decision' (1990) 57(4) *The University of Chicago Law Review* 1109.

interest test.[57] In terms of RFRA, the state was required to justify any substantial burden on religious freedom, even if resulting from a generally applicable law, by showing the burden imposed was in pursuit of a compelling interest and that the least restrictive means were employed to achieve the interest.[58] However, the United States Supreme Court declared RFRA invalid in its application to state and local laws and governmental practices on the basis that it exceeded Congress's powers.[59] RFRA still applies to federal laws and some states have enacted statutes similar to RFRA[60] and there is therefore still scope for the compelling interest test in respect of generally applicable laws.

Accordingly, it is evident that there is some uncertainty as to how the exercise of religion may be limited in the United States of America. While the *Employment Division v Smith* case has ruled that the compelling interest test does not apply to generally applicable and neutral laws, the compelling interest test has been restored by the enactment of the RFRA in respect of federal laws and in states which have enacted similar laws. Where the compelling interest test applies, the limitation of religious freedom may only be justified by demonstrating that the limitation pursues a clearly identifiable state interest and is the least restrictive means of achieving the state interest.

Furthermore, religious freedom in Germany is not absolute and may be limited even though the right is guaranteed unreservedly and there is no general limitation clause in the German Basic Law. The German Federal Constitutional Court ('FCC') has explained that the German Basic Law itself imposes formal limits even on rights which are guaranteed unreservedly,[61] including religious freedom. The limitations on religious freedom are therefore determined by

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[57] Conkle *Constitutional law: The religion clauses* (note 10) 103.
[58] Ibid.
[59] Ibid.
[60] Idem 104-105.
[61] *Blood Transfusion Case* (1971) 32 BVerfGE 98 English translation in Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (note 44) 450.

the rights and values contained in the German Basic Law itself.[62] Accordingly, any conflict with religious freedom must be resolved by considering the Basic Law and its values as a whole[63] and religious freedom may only be limited by other rights and values in the German Basic Law.

The aforegoing discussion demonstrates that the right to freedom of religion is not absolute and may be limited in both international and domestic law. Religious freedom may be limited in accordance with a specific limitation provision attached to the right itself, a general limitation clause or according to the principles found in case-law. A limitation of religious freedom may be justified if it is prescribed by law, pursues a legitimate state interest and is necessary or reasonable. A limitation will be prescribed by law if the law limiting the right is a law of general application, being a law that is 'sufficiently clear, accessible and precise that those who are affected by it can ascertain the extent of their rights and obligations'.[64] As the requirement that a limitation be prescribed by law is typically satisfied, this chapter examines what is meant by the requirements that the limitation pursue a legitimate state interest and is necessary or reasonable.

4.1.A legitimate state interest

In order for an infringement of religious freedom to be justifiable the limitation of the right must pursue a legitimate state aim. As mentioned earlier in this chapter, the UDHR, ICCPR, ECHR and AmCHR expressly articulate the protection of state aims which may justify a limitation of religious freedom. The aims common to these instruments, and most frequently relied upon by states to justify a limitation of religious freedom, are the protection of public safety, order, health, or the rights and freedoms of others, which are examined in detail below.

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[62] Ibid.
[63] Ibid.
[64] Iain Currie and Johan de Waal *The bill of rights handbook* 5ed (2005) 168-9.

4.1.1. Public safety

Public safety is a broad and often not well-defined state aim and it is therefore unclear what a state relying on this ground would have to prove in order to justify a limitation of religious freedom. The uncertainty may be attributed to the fact that public safety is often defined with reference to vague concepts such as protecting public peace or social harmony.[65] The Siracusa Principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights[66] ('the Siracusa Principles') which guide the interpretation of the limitation and restriction clauses in the ICCPR define public safety with reference to itself and is therefore of limited use. The Siracusa Principles define public safety as protecting against danger to the safety of persons, their life, physical integrity or serious damage to their property[67] without further clarification.

Public safety at the very least may be relied upon to limit religious freedom when a religious gathering incites violence or actually threatens the public well-being[68] or when the manifestation of a religion endangers the safety of others. A religious gathering may endanger public safety when there are confrontations between hostile religious groups or when religious customs are used for political purposes and in such cases the state may limit religious freedom by dissolving or prohibiting the religious gathering.[69] The aforementioned Canadian Supreme Court case of *Multani v Commission scolaire Marguerite-Bourgeoys* is an apt example of a limitation on the manifestation of religion in the pursuit of safety. In *Multani v Commission scolaire Marguerite-Bourgeoys* the issue was whether an absolute prohibition on wearing a *kirpan* to school was a justifiable infringement of religious

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[65] Cornelis D de Jong *The freedom of thought, conscience and religion or belief in the United Nations (1946-1992)* (2000) 95.
[66] Siracusa Principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights E/CN4/1985/4 1984/09/28.
[67] Idem principle 33.
[68] Carolyn Evans *Freedom of religion under the European Convention on Human Rights* (2001) 150 and Manfred Nowak *UN Covenant on Civil and Political Rights CCPR Commentary* 2nd revised edition (2005) 427.
[69] Nowak and Vospernik 'Permissible restrictions on freedom of religion or belief' (note 4) 151.

freedom.[70] The Supreme Court of Canada held, in light of the fact that the *kirpan* had characteristics of a bladed weapon and could be used to harm other individuals,[71] that the goal of achieving safety at schools would justify a prohibition on wearing a *kirpan* and a limitation on the manifestation of religious freedom.[72]

The ground of public safety may furthermore be interpreted to protect an individual's safety. Manfred Nowak and Tanja Vospernik argue that the protection of the public safety has been relied upon to protect individual safety and cite the European Commission of Human Rights ('ECmHR') decision of *X v the United Kingdom,*[73] and the United Nations Human Rights Committee ('HRC') decision of *Karnel Singh Bhinder v Canada*[74] in support of this argument.[75] In *X v the United Kingdom*, a Sikh motorist who had repeatedly been fined for failing to wear a motorcycle helmet, complained that the requirement to wear a motorcycle helmet interfered with his freedom of religion as it necessitated that he remove his turban.[76] The ECmHR in a brief decision on the admissibility of the application held that the law was a necessary safety measure and found that any interference with religious freedom was justified on the basis of the protection of health.[77] While the interference was justified on the basis of the protection of health, the decision suggests by referring to 'necessary safety measure' that the notion of safety takes into account an individual's safety and not only public safety concerns. Similarly, in the HRC decision of *Karnel Singh Bhinder v Canada*, a Sikh applicant claimed that safety regulations which required him to remove his turban in order to wear safety headgear during work infringed his religious freedom and that the limitation was not

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[70] *Multani v Commission scolaire Marguerite-Bourgeoys* (note 21) at para 1.
[71] Idem at para 37.
[72] Idem at para 45.
[73] *X v the United Kingdom* App No 7992/77 (1978) 14 D&R 234 at 235.
[74] *Karnel Singh Bhinder v Canada* Communication No 208/1986 UN Doc CCPR/C/37/D/208/1986 (1989).
[75] Nowak and Vospernik 'Permissible restrictions on freedom of religion or belief' (note 4) 151.
[76] *X v the United Kingdom* (note 73) at 235.
[77] Ibid.

necessary to protect public safety as the safety risk was limited to himself.[78] The HRC held that an infringement of religious freedom would be justifiable on the grounds set out in article 18(3) of the ICCPR without specifying a particular ground.[79] Presumably, the HRC had in mind the ground of safety but it does not clearly articulate this or explain how the notion of public safety may be used to limit religious freedom when the risk is limited to an individual and not to the public at large. These two decisions strongly suggest that protecting the public safety extends to protecting an individual's safety even when there is no risk to the public at large.

4.1.2. Public order

Religious freedom may also be limited to protect public order, which like public safety is not a clear and well-defined concept. Nowak and Vospernik note that the notion of order in article 18(3) of the ICCPR, article 12(3) of the AmCHR and article 9(2) of the ECHR is not qualified by the term '*ordre public*' which qualifying term is used in comparable provisions of these treaties.[80] Evans explains that *ordre public* is a broad term that may protect a variety of public interests[81] and this is supported by the Siracusa Principles which defines public order (*ordre public*) as the rules which ensure the functioning of society or the fundamental principles on which society is based.[82] Evans and Nowak note that the French text of the provision in the ICCPR and the ECHR use the term '*la protection de l'ordre*'[83] and omit the broad qualifying term *ordre public* and therefore argue that the notion of public order should be interpreted more restrictively.[84] Nowak and Vospernik suggest that public order should be restricted to mean 'the prevention of public disorder', which although not entirely clear,

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[78] *Karnel Singh Bhinder v Canada* (note 74) at para 3.
[79] Idem at para 6.2.
[80] Nowak and Vospernik 'Permissible restrictions on freedom of religion or belief' (note 4) 152.
[81] Evans *Freedom of religion under the European Convention on Human Rights* (note 68) 150.
[82] Principle 22 of the Siracusa Principles (note 66).
[83] Evans *Freedom of religion under the European Convention on Human Rights* (note 68) 150.
[84] Nowak and Vospernik 'Permissible restrictions on freedom of religion or belief' (note 4) 152; Evans *Freedom of religion under the European Convention on Human Rights* (note 68) 150.

appears to refer to something narrower than preventing a disturbance of the general public policies of a society.[85] It therefore appears that religious freedom should only be limited when it is necessary and essential to maintain public order and protecting against mere interferences with public policies will not suffice to justify a limitation of religious freedom.

It should, however, be noted that case-law does not entirely accord with the restrictive definition of public order as suggested by some authors. In the HRC decision of *Coriel and Aurik v the Netherlands* the applicants wanted to study to become Hindu priests in India and requested to change their surnames to Hindu names as required for the study and practise of the religion.[86] The HRC had to decide whether the authorities' refusal to allow the change of surnames violated the applicants' religious freedom.[87] The HRC found the claim of an infringement of religious freedom to be inadmissible but stated that regulating the changing of surnames was a matter of public order and restrictions were therefore allowed in terms of article 18(3) of the ICCPR.[88] However, the regulation of the changing of surnames does not appear essential to maintain public order but rather a matter of public policy, which is much wider than the definition of public order proposed by the authors above.

From the aforegoing discussion it is apparent that the concept of the protection of order is not clearly defined. While it is argued that the aim of protecting the public order should be interpreted narrowly to only prevent public disorder, the protection of order is sometimes relied upon to protect broad public interests. Accordingly, it appears that protecting the broad public interest may in certain instances suffice to justify a limitation of religious freedom.

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[85] Nowak and Vospernik 'Permissible restrictions on freedom of religion or belief' (note 4) 152.
[86] *Coeriel et al v The Netherlands* Communication No 453/1991 UN Doc CCPR/C/52/D/453/1991 (1994).
[87] Idem at para 3.
[88] Idem at para 6.1.

4.1.3. Public health

Manifestations of religion may furthermore be limited protect the public health. This may entail restricting religious practices which may be harmful and injurious to individuals or to society generally. As with the aim of public safety, religious freedom may be limited when the risk is restricted to the individual and the protection conflicts with the individual's wishes. As mentioned briefly in the discussion on public safety above, the ECmHR has held that a law which required a Sikh motorist to remove his turban and wear a motorcycle helmet was in conflict with his religious beliefs but was a necessary safety measure, justified on the basis of the protection of health.

The protection of the public health encompasses the protection of the health and well-being of third parties and of society generally. In this regard, the state has a duty to protect third parties from any mental and physical harm arising from individuals manifesting their beliefs and to ensure the general health of society. The South African Constitutional Court acknowledged this duty of the state in *Christian Education South Africa v Minister of Education* when it upheld a prohibition on corporal punishment, which the parents claimed formed part of their religious beliefs, on the basis of protecting children from potentially abusive practices.[89] The right to manifest religious beliefs had to yield to the state's interest in protecting people, especially children from maltreatment, violence, abuse and degradation.[90]

Similarly, the state has a non-controversial duty to protect the general public health and Nowak and Vospernik in fact note that averting the spread of diseases in society is the primary aim of limiting religious freedom in the interests of public health.[91] Accordingly, they argue that the implementation of mandatory health measures, such as vaccinations or the regulation of animal sacrifice, which may conflict with individual religious beliefs, may

[89] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).
[90] Idem at 780 para 40.
[91] Nowak and Vospernik 'Permissible restrictions on freedom of religion or belief' (note 4) 157.

nonetheless be justified if the measures are necessary to protect the public health.[92] This was acknowledged by the United States Supreme Court in the previously discussed case of *Church of the Lukumi Babalu Inc v City of Hileah* when it held that the absolute prohibition on animal sacrifice could be justified by the legitimate state interest of protecting the public health.

4.1.4. Rights and freedoms of others

As the manifestation of belief may sometimes harm and endanger the lives and interests of others, it is important that religious freedom may be limited when the manifestation of belief conflicts with the rights and freedoms of others. The wearing of a headscarf is sometimes argued to interfere with the rights of individuals to be free from religious influence and accordingly this section examines the potential conflict between the positive right to manifest a religion and the negative right to be free from religious beliefs.

This issue was raised in the German FCC *Classroom Crucifix Case* in which it was claimed that the display of the crucifix in classrooms infringed the religious freedom of students to be free from religious influence.[93] The FCC distinguished the display of crosses which individuals could not avoid in the classroom from the religious symbols encountered by individuals in their daily lives as such encounters were limited, not forced by the state and merely a result of diverse beliefs in society.[94] The FCC held that while an individual has no right to claim an exemption from exposure to quaint religious manifestations or symbols, it is different where the state exposes a child to the influence of a faith without the opportunity to avoid such influence.[95] The FCC acknowledged that while the display of the cross in classrooms does not force children to act in a certain way, to identify with the cross or

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[92] Ibid.
[93] *Classroom Crucifix II Case* (1995) 93 BVerfGE 1 English translation in Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (note 44) 472.
[94] Idem at 474-5.
[95] Idem 473.

influence the manner in which subjects are taught, it may nonetheless exert an influence on children.[96] The display of the cross to children, who are impressionable and developing, may suggest to them that Christianity is the endorsed religion which should be followed.[97] Students who do not believe in Christianity are unable to avoid the presence of the cross or the message it conveys.[98] The FCC held that in light of the strong religious symbolism, the display of the cross at public schools conflicted with minority's negative right to decide for themselves which religious symbols to accept or reject[99] and was not protected by the positive right to freedom of religion.

By contrast, the ECtHR found that the display of the crucifix in state classrooms did not infringe religious freedom in the case of *Lautsi v Italy*.[100] While the ECtHR held that the decision of whether a crucifix may be displayed in classrooms fell within the prerogative of the state, it suggested that not every positive manifestation of belief will constitute coercion which infringes on the rights of individuals. The ECtHR acknowledged that the crucifix was a religious symbol but found that the lack of evidence on the effect of the display of the crucifix on young children precluded any assertions being made in respect thereof.[101] Furthermore, the crucifix was regarded as a passive symbol which did not have the comparable influence of speech or participation in activities.[102] The display of the crucifix was not to be equated with compulsory religious teaching and religious freedom is respected by the display of other religious symbols and allowing the celebration of other religious practices at school.[103] It was also never asserted that the display of the crucifix resulted in

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[96] Idem 475.
[97] Idem 476.
[98] Idem 478.
[99] Ibid; however after much criticism of the judgment the FCC stated that its judgment did not require the removal of all crucifixes from classrooms but only when it was objected to on religious grounds see Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (note 44) 484.
[100] *Lautsi and others v Italy* App No 30814/06 (2012) 54 EHRR 3.
[101] Idem at para 66.
[102] Idem at para 68-72.
[103] Idem at para 72

proselytism in teaching or interfered with the rights of parents to raise their children in accordance with their religious beliefs.[104]

The conflicting results of the *Lautsi v Italy* and *Classroom Crucifix II* cases are hard to reconcile but may be understood if it is borne in mind that the ECtHR is a supranational court adjudicating matters of various states. The ECtHR affords states a margin of discretion in their decision-making, called the margin of appreciation, with the view that states are best suited to determine which measures best meet their needs in light of their own history and customs. Accordingly, the *Lautsi v Italy* decision may be understood as the ECtHR affording a national state a wide margin of appreciation. The *Lautsi v Italy* decision nonetheless highlights the need for real evidence of the effect of religious symbols on students before these symbols may be banned. This is because religious liberty does not require the state to prohibit all forms of religious expression but rather to carefully balance the right to express beliefs against the right to be free from coercion. Every expression of religious beliefs cannot be treated as a coercion of another individual to be prohibited as it would make nonsense of the right to freedom of religion. Religious liberty does not translate into an absolute ban on religious expression but rather requires a tolerance and reconciliation of conflicting views of religious freedom.[105] On the other hand, the display of the religious symbol of the dominantly practised religion in schools may be problematic as individuals cannot escape the symbol, which may exert coercive pressure on young impressionable children, without making a disproportionate sacrifice. Courts must guard against any state endorsement of religion but a certain degree of tolerance must be expected from individuals. Accordingly, religious

[104] Idem at para 74-75.
[105] *Classroom Crucifix II Case* (note 93) 481.

freedom requires a real balancing of rights and not a ban on all public manifestations of belief which favours the negative right to be free from religious influences.[106]

In international and domestic law an infringement of religious freedom is justified if the limitation is prescribed by law, pursues a legitimate state interest and is necessary or reasonable. This section examined and explained the interests most frequently relied upon by states in limiting religious freedom namely the protection of public safety, order, health or the rights and freedoms of others. The pursuit of a legitimate state interest is only one leg of the justifiability enquiry and a court may sometimes accept or even assume that a limitation pursues a legitimate state interest but find that the limitation is not reasonable or necessary and therefore not justifiable.

4.2. Reasonable or necessary limitation

A limitation of a right, in addition to being prescribed by law and pursuing a legitimate state interest, must be reasonable or necessary in order to be justifiable. The question of reasonableness or necessity is a proportionality enquiry which examines the importance of the objective of the limitation, the connection between the limitation and objective, whether there are less restrictive means of achieving the objective and the proportionality of the effects of the limitation in relation to the importance of the objective.[107] The importance of the objective of the limitation examines whether the limitation pursues an important state

[106] *Interdenominational School Case* (1975) 41 BVerfGE 29 English translation in Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (note 44) 469.

[107] Para 8 General Comment No 22 'The right to freedom of thought, conscience and religion (Art 18)' CCPR/C/21/Rev1/Add4 1993/07/30 where the HRC has stated that limitations of religious freedom must be directly related and proportionate to the purpose of the limitation. While the ECtHR has not provided clear guidelines on administering the proportionality enquiry, Jeremy Gunn suggests that the enquiry is whether the measures have the capacity to achieve the purpose, whether there are less restrictive means available and whether the burden imposed is proportional to the objective of the limitation, see T Jeremy Gunn 'Deconstructing proportionality in limitation analysis' (2005) 19 *Emory International Law Review* 465 at 467-8. The compelling interest test adopted by the United States Supreme Court also examines whether there are less restrictive means of achieving the government interest. The Canadian Supreme Court case of *R v Oakes* [1986] 1 SCR 103 at para 69-70 and s 36(1) of the South African Constitution expressly lists the factors that determine the reasonability of a limitation as the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and whether there are less restrictive means of achieving the purpose.

interest which has been discussed in the aforegoing section. Accordingly, this section examines the notion that the limitation is connected to the objective, constitutes the least restrictive means of achieving the objective and the proportionality of the effects of the limitation in relation to the importance of the objective.

A causal connection between the limitation and the objective of the limitation requires that the law actually be designed to achieve the purpose of the limitation. According to the Canadian Supreme Court this means that it must be reasonable to believe that the limitation will achieve its intended purpose which protects against the arbitrary and unfair infringement of rights[108] based on irrelevant considerations.[109] The South African Constitutional Court considered this causal connection in *MEC for Education, Kwazulu Natal, and others, v Pillay* in deciding whether the refusal to grant a religious and cultural exemption to allow a student to wear a nose-stud to school amounted to unfair discrimination.[110] The refusal to grant an exemption was advocated on the basis that it would undermine discipline at school and the quality of education provided and evidence was presented about the importance of uniforms in contributing to discipline and respect for authority.[111] The Constitutional Court acknowledged that discipline and education were important state goals but noted that the issue was the granting of an exemption to uniforms and not the wearing of uniforms generally.[112] The Constitutional Court held that there was no evidence that granting a cultural or religious exemption would undermine the purposes served by uniforms generally and that accordingly the refusal to grant an exemption did not achieve its intended purpose.[113] This case illustrates that the limitation must be clearly identified in order to determine whether the limitation achieves the intended purpose. Furthermore, even if the objective of a limitation is

[108] *Alberta v Hutterian Bretheren of Wilson Colony* (note 2) at para 48.
[109] *R v Oakes* (note 107) at para 70.
[110] *MEC for Education, Kwazulu Natal, and others, v Pillay* 2008 (note 29).
[111] Idem at 507-8 para 96 and 99.
[112] Idem at 507 para 98.
[113] Idem 508 para 101-2.

recognised as being an important state goal, real evidence is required, and not merely speculative arguments, that the limitation of the right will actually achieve this goal. The connection between the limitation and the objective of the limitation must be clearly established to justify a limitation of a right.

The limitation should, furthermore, constitute the least restrictive means of achieving the objective. This consideration is often incorporated into the examination of the effects of the limitation in relation to the importance of the objective. The existence of less restrictive means to achieve the purpose may often suggest that the effects of the limitation are not proportional to the purpose of the limitation. It is therefore important that the limitation of the right should be as minimal as possible and the measures employed should not infringe the right more than is necessary.[114] The court will, however, afford a measure of deference to the legislature who is better suited to choose between alternative solutions[115] and a state may choose between a range of acceptable solutions and does not have to adopt the least intrusive solution.[116]

The requirement of a minimal impairment of rights was the deciding factor in the previously discussed United States Supreme Court case of *Church of the Lukumi Babalu Inc v City of Hileah.* The United States Supreme Court struck down the absolute prohibition on animal sacrifice as there were less restrictive measures capable of protecting the state interest, such as the regulation of the rituals, treatment and disposal of the sacrificed animals. Similarly, the Canadian Supreme Court in the case of *Multani v Commission scolaire Marguerite-Bourgeoyst* considered whether the goal of reasonable safety in schools could be achieved by less restrictive means than an absolute prohibition on wearing the *kirpan* to school, such as by

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[114] *R v Oakes* (note 107) at para 70; *Alberta v Hutterian Bretheren of Wilson Colony* (note 2) at para 54.
[115] *Alberta v Hutterian Bretheren of Wilson Colony* (note 2) at para 53.
[116] *Multani v Commission scolaire Marguerite-Bourgeoys* (note 21) at para 50.

imposing conditions on the way the *kirpan* was worn.[117] The Canadian Supreme Court held that it was highly unlikely that the student would use the *kirpan* for violent purposes or that another student would be able to take away the *kirpan* if worn under conditions, such as being worn under clothing in a sheath and there was therefore no real risk to safety.[118] The Canadian Supreme Court found that as the goal of safety at schools could be achieved by imposing conditions on the way the *kirpan* was worn, the absolute prohibition on wearing a *kirpan* infringed religious freedom more than was necessary and was therefore not reasonable.[119]

A limitation of religious freedom must be reasonable in order to be justifiable. In assessing the reasonability of a limitation, the court will consider the importance of the objective of the limitation, the connection between the objective and limitation, whether there are less restrictive means available for achieving the objective and the proportionality of the effects of the limitation in relation to the importance of the objective. This reasonability enquiry is a robust and flexible enquiry and certain factors may be accorded more weight depending on the facts of the case.

5. CONCLUSION

While the right to freedom of religion is a fundamental human right, the manifestation of religion is not an absolute right and may be subject to necessary limitations. Limitations on the right to manifest a religion maintain the orderly functioning of society by ensuring that

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[117] Idem at para 51 and 54.
[118] Idem at para 57 and 58.
[119] Idem at para 77. See also *Prince v President, Cape Law Society and Others* 2002 (2) SA 794 (CC) where it was accepted that the prohibition on the use of cannabis pursued the legitimate government interest of preventing drug abuse but the South African Constitutional Court was divided on whether the interest could be achieved by less restrictive means than a prohibition which did not provide an exception for the religious use of cannabis by Rastafarians. The majority found the lack of an exemption justifiable by focussing on the practical difficulties in enforcing an exemption, such as distinguishing between the religious use of the drug and illicit trade, and the lack of formal structures in the Rastafarian religion which could monitor the use of the drug. The minority, however, held that it was not shown that an exemption for religious use would undermine the purpose of the prohibition as there was no evidence that alternative uses of cannabis or smoking cannabis in small amounts, as practised by Rastafarians, were dangerous.

individuals do not avoid compliance with basic civic obligations on the basis of religious beliefs. Furthermore, as religious freedom is frequently used to justify violence and may infringe on the rights of others, limitations on religious freedom are necessary to reconcile conflicting rights and ensure the peaceful co-existence of individuals in society.

However, not all interferences with the right to freedom of religion will constitute an infringement of the right requiring justification. A law must substantially burden religious freedom in order to establish an infringement of religious freedom requiring justification. While there is no fixed test for what constitutes a substantial burden on religious freedom, limitations that interfere with a religious belief or practice, exert coercive pressure on the religious decision-making process, exclude an individual from the public school system or prevent an individual from engaging in a practice for several hours a day may constitute a substantial burden on religious freedom. An infringement of religious freedom may nonetheless be upheld if the infringement is justifiable.

The principles determining whether an infringement of religious freedom is justifiable may be found in a specific limitation provision attached to the right itself, a general limitation of rights clause or in accordance with the principles articulated in case-law. Generally, this requires an examination of whether the limitation is prescribed by law, pursues a lawful aim and is necessary or reasonable. This chapter examined international instruments and domestic jurisprudence and identified that the aims most frequently relied upon by states to justify a limitation of religious freedom are the protection of public safety, order, health, or the rights and freedoms of others. The question of reasonableness is a proportionality enquiry which examines the importance of the objective of the limitation, the connection between the limitation and objective, whether there are less restrictive means of achieving the objective

and the proportionality of the effects of the limitation in relation to the importance of the objective.

CHAPTER 4

BANNING THE HEADSCARF AND THE RIGHT TO FREEDOM OF RELIGION

1. INTRODUCTION

As discussed in chapter two, religious freedom is a fundamental human right which protects strongly-held beliefs central to an individual's identity. Through the protection of the rights of vulnerable religious minorities, religious freedom contributes to the attainment of other social goals such as social justice and world peace. The right to freedom of religion is furthermore universally recognised and protected in international, regional and national instruments as the right to hold a religion and the right to manifest a religion. Chapter three analysed how the right to manifest a religion may be limited in order to understand the most pertinent factors to be considered in determining whether an infringement of religious freedom is justifiable.

This chapter examines whether a prohibition on wearing a headscarf constitutes a justifiable limitation of the right to freedom of religion. In order to achieve this, this chapter defines the headscarf and describes the practice of wearing a headscarf, its religious basis and significance in the Islamic religion. Thereafter this chapter examines whether the wearing of a headscarf constitutes a manifestation of religion, as understood from chapter two, which is protected by the right to freedom of religion.

This chapter then analyses certain controversial laws banning the headscarf and the effect of these laws on Muslim women who wear a headscarf. The understanding of the effects of a headscarf ban will shape the determination of whether banning the headscarf imposes a

substantial burden on the religious freedom of Muslim women and constitutes an infringement of religious freedom which is required to be justified.

As discussed in chapter three, an infringement of a right may nonetheless be upheld if the infringement is justified, meaning the infringement pursues a legitimate aim and is reasonable. Accordingly, this chapter critically analyses whether the reasons advocated by states and authors for a headscarf ban are sound and support banning the headscarf. Assuming that there is a legitimate purpose for banning the headscarf, this chapter examines whether a headscarf ban is a reasonable limitation of religious freedom or whether there are less restrictive means of protecting the state's interests.

2. THE HEADSCARF AND ISLAM

In order to determine the justifiability of a headscarf ban, it is important to first define the term 'headscarf' and describe the practice of wearing a headscarf in the Islamic religion. This will shed light on who wears a headscarf, when and how it is worn, its religious basis, significance and meaning to Muslim women.

The term headscarf refers to the head covering worn by Muslim women in accordance with their religious beliefs. While there is no single way in which a headscarf is worn, it is generally worn to completely conceal a woman's hair, neck and ears, whilst leaving the face exposed, as illustrated in figure 1 below.

Figure 1: An illustration of the headscarf which leaves the face exposed.

There is, however, no uniformity in the way in which a headscarf is worn, and a headscarf may be worn in an assortment of styles. Some Muslim women may wear a *bandana*, a large handkerchief that may be found in conventional retail stores, to cover only their hair and ears. Other women may adopt the more traditional headscarf but may only partially cover their hair, leaving parts of their head, neck or ears exposed. Furthermore, some women may only wear black or dull coloured headscarves while others may wear colourful and decorated headscarves which attract attention. The way in which a headscarf is tied may also vary according to cultural and societal practices. A headscarf may be tied tightly under the chin, at the back of the head, draped over the body or using decorative and shiny pins.

The religious basis for Muslim women wearing a headscarf is derived from the following *Qur'anic* verses and *hadiths.*[1] The *Qur'an* states:

> And say to the believing women that they should lower their gaze and *guard their modesty*, that they *should not display their beauty and ornaments except that what must ordinarily appear thereof*; that they should *draw their veils over their bosoms* and that they should not display their beauty except to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers or their brothers' sons, or their sisters' sons, or their women or the slaves whom their right hands possess, or male servants free of physical needs, or small children who have no sense of the shame of sex and that they should not stroke their feet in order to draw attention to their hidden ornaments.[2] [Emphasis added]

> O Prophet! Tell thy wives and daughters, and the believing women, that they should *cast their outer garments over their persons (when abroad)*. That is most convenient, that they should be known, (As such) and not molested.[3] [Emphasis added]

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[1] These are recorded sayings or actions of the Prophet Muhammad (may peace be upon him). It is Islamic practice to confer peace and salutations on the Prophet Muhammad whenever his name is mentioned and this is why I have used the words 'may peace be upon him'.
[2] Surah 24, Verse 31, reproduced in Abdullah Yusuf Ali *The meaning of the holy Qur'an* (1996) 873-4.
[3] Surah 33, Verse 59, reproduced in Ali *The meaning of the holy Qur'an* (note 2) 1077.

Before discussing how Islamic jurists have interpreted the aforementioned *Qur'anic* verses, it should be noted that the verses do not explicitly command women to wear a headscarf. The *Qur'anic* verses enjoin women to guard their modesty, not to display their beauty except that which ordinarily appears thereof, to draw their veils over themselves and to cast their outer garments over their persons. The verses do not stipulate how women should guard their modesty or explain which part of their beauty may be considered to ordinarily appear thereof. There is, furthermore, no express mention that women should wear a headscarf or cover their heads. The *Qura'nic* verses do provide some reasons for the dress requirements in Islam, being to guard a woman's modesty, conceal a woman's beauty, identify her as a Muslim and protect her from unwanted interferences from males.

The *hadiths* of the Prophet Muhammad (may peace be upon him) are a primary source of law in the Islamic religion and are viewed as an interpretation of the *Qur'an.* Accordingly, the aforementioned *Qur'anic* verses must be read in conjunction with the *hadith* in which it is reported that the Prophet Muhammad (may peace be upon him) said that '[w]hen a woman reaches puberty, it is not proper that any portion of her body should be seen by a man except these parts' and he pointed towards his hands and face.[4] This is supported by the separate narration in which it is reported that the Prophet Muhammad (may peace be upon him) has said that when a girl comes of age, it is unlawful for her to display any part of her body except her face and two hands.[5]

The above quoted *Qur'anic* verses and *hadiths* are generally interpreted to require women to cover all parts of their body, except their face and hands when in public. In this regard the four main schools of Islamic jurisprudence,[6] which represent the dominant mainstream

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[4] Syed Mutawalli ad-Darsh *Muslim women's dress hijāb or niqāb* (1997) 7.
[5] Idem at 8.
[6] The four schools, being *Shafi'i, Hanafi, Maliki* and *Hanbali,* represent different schools of thought on the interpretation of religious material and are named after the Muslim jurists who founded the school of thought.

understanding of Islamic law, are of the view that females upon reaching puberty are required to cover their heads in public.[7] The Islamic dress requirements are a fundamental part of the Islamic faith, which must be observed at all times and during all activities in public. Accordingly, Muslim women who wear a headscarf may do so in order to comply with a perceived religious obligation. A headscarf therefore functions to fulfil a fundamental religious obligation for Muslim women and cannot be equated to a mere religious symbol such as the wearing of the cross by some Christians.

The fact that not all Muslim women wear a headscarf does not detract from the centrality of the practice of wearing a headscarf in Islam. Muslim women may not wear a headscarf but nonetheless regard it as a requirement of their faith. These women may consider not wearing a headscarf as conduct for which they may repent and be forgiven. Other Muslim women may adopt the view that a headscarf is not a mandatory requirement of the Islamic religion. The different viewpoints stem from the ambiguity in the aforementioned *Qur'anic* verses, differing interpretations of *hadiths* and attempting to re-interpret traditional Islamic law in line with contemporary times. However, the opinion that a headscarf is not a mandatory requirement of the Islamic faith is a minority view that should not be used to detract from the centrality of the practice of wearing a headscarf in the Islamic religion.

A headscarf is also importantly distinguishable from the veil with which it is often conflated. The full face veil worn by some Muslim women conceals the face and leaves only the eyes exposed, as illustrated by the figure below, and therefore differs significantly from a headscarf in appearance.

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[7] Ad-Darsh *Muslim women's dress hijāb or niqāb* (note 4) 8.

Figure 2: An illustration of the veil which conceals the face and leaves the eyes exposed.

According to the orthodox Muslim scholar, Muhammad bin Saleh Al-Uthaimeen, the requirement of modesty in the *Qu'ran* requires women to cover their face.[8] The difference in opinion is due to a rejection of certain *hadith* on the basis that they are not authentic or occurred prior to the revelation which made veiling mandatory and greater weight being accorded to analogy and reason.[9] Covering the face was, furthermore, obligatory for the wives of the Prophet Muhammad (may peace be upon him) who were in certain instances subject to additional rules, not imposed on other women, because of their status as wives of the Prophet Muhammad (may peace be upon him). Accordingly, some Muslim women may wear the veil as they view a headscarf as only fulfilling the minimum requirements of dress. Women may view the veil as a highly recommended act through which they may emulate the wives of the Prophet Muhammad (may peace be upon him), surpass the minimum requirements of dress and thereby draw closer to God.

A headscarf and veil are accordingly two very distinct practices with different practical implications. However, despite the differences between the headscarf and the veil, Timothy Welch notes that discussions on the justifiability of bans on wearing a headscarf are often conflated with discussions on the justifiability of bans on wearing a veil.[10] This is problematic because the headscarf, unlike the veil, does not conceal the face and therefore

[8] Muhammad bin Saleh Al-Uthaimeen *A treatise on hijab and a compilation of questions pertaining to family matters* (2011).
[9] Ibid.
[10] Timothy Welch 'The prohibition of the Muslim headscarf: Contrasting international approaches in policy and law' (2007) 19 *The Denning Law Journal* 181 at 185.

does not impede communication or the ability to assess facial expressions and allows for easy recognition of individuals. Therefore caution should be exercised in applying arguments against the practice of veiling to the practice of wearing a headscarf.

Muslim women are required to wear a headscarf, a covering that conceals the head, neck and ears, upon reaching puberty when in public regardless of whether they are engaged in sporting activities, work or schooling. While the manner in which a headscarf is worn may differ between individuals, a headscarf should not be confused with the veil which is a distinguishable practice with significantly different implications. A headscarf is generally regarded as a fundamental and mandatory requirement of the Islamic faith and accordingly any ban on a headscarf must take into account the status and importance of this practice.

3. THE HEADSCARF AS A MANIFESTATION OF RELIGION

As discussed in chapter two, not all conduct motivated by religion is protected by the right to freedom of religion. This section briefly examines whether wearing a headscarf is a manifestation of religion protected by the right to freedom of religion.

Religious freedom comprises of the right to hold a religion and the right to manifest a religion in worship, observance, practice and teaching.[11] The observance and practice of a religion have been interpreted to include the wearing of distinctive clothing or head coverings[12] and accordingly the wearing of a headscarf is arguably an observance of the requirements of the Islamic faith and therefore a protectable manifestation of religion.

Furthermore, chapter two examined the subjective and objective tests for determining whether conduct constitutes the practice of a religion and therefore a protectable

[11] Chapter two *The right to freedom of religion* 23.
[12] Idem 23-24.

manifestation of religion.[13] The subjective test adopted in the United States of America, Canada, Germany and South Africa protects conduct based on sincerely held religious beliefs. It is not required that the conduct be necessitated by a belief but only that it be primarily motivated by a religious belief. Accordingly, the examination of whether a claimant holds a sincere belief in the practice of wearing a headscarf is a limited enquiry, dealt with as a question of fact to assess whether the claimant is acting in good faith and that the belief is not an artifice. Given the subjective nature of the assessment, in the absence of real evidence that the claimant is acting fraudulently, the wearing of a headscarf would be considered a practice protected by the right to manifest a religion.

The European Commission of Human Rights ('ECmHR'), however, has adopted a more objective, necessity test in terms of which a claimant is required to prove that the conduct is necessitated by a religion or belief. This entails relying on the court's own interpretation of the religious requirements of a religion or on the expert evidence of religious leaders in order to objectively determine whether a religion requires a practice. The wearing of a headscarf is protected by the right to manifest a religion even on this more stringent objective test. This is because, as previously discussed, a headscarf is generally considered to be a fundamental requirement of the Islamic faith and satisfies the requirements of the objective necessity test. This conclusion accords with the jurisprudence of the European Court of Human Rights ('ECtHR') which has moved away from the initial assessment of the ECmHR in *Karaduman v Turkey* that the requirement to submit a photograph without a headscarf in order to obtain a university certificate did not interfere with the right to manifest a religion.[14] The ECtHR has subsequently in *Dahlab v Switzerland*[15] and *Sahin v Turkey*[16] assumed that wearing a

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[13] Idem 25-32.
[14] *Karaduman v Turkey* App No 16278/90 (1993) 74 D&R 93 at 109.
[15] *Dahlab v Switzerland* App No 42393/98, 15 February 2001.
[16] *Leyla Sahin v Turkey* App No 44774/98 (2006) 45 ILM 436.

headscarf was a religious practice and decided both cases on the basis of whether the interference with religious freedom was justifiable.

Accordingly, the practice of wearing a headscarf is a manifestation of religion, in the form of observance and practice, protected by the right to freedom of religion.

4. PROHIBITIONS ON WEARING A HEADSCARF

This section examines the two main areas of concern with a ban on wearing a headscarf, namely a ban on students wearing a headscarf and a ban on public officials wearing a headscarf.

4.1. Educational institutions

Prohibitions on the wearing of religious attire, including headscarves, in educational institutions are not new and have stirred controversy worldwide. This section examines the most controversial and noteworthy of these prohibitions being the headscarf ban in France and Turkey and the effect of these laws on Muslim women.

4.1.1. France

In France, the debate regarding the banning of the headscarf began as early as 1989 when a principal of a predominantly Muslim school suspended three Muslim girls for wearing a headscarf to school.[17] The debate reached its pinnacle in 2004 with the enactment of a law prohibiting the wearing of clothing manifesting a religious affiliation in public schools[18] (hereinafter referred to as 'the French Headscarf Ban'). The French Headscarf Ban states:

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[17] Elisa T Beller 'The headscarf affair: The Conseild'Ètat on the role of religion and culture in French society' (2003-2004) 39 *Texas International Law Journal* 581 at 582-583.

[18] Welch 'The prohibition of the Muslim headscarf: Contrasting international approaches in policy and law' (note 10) at 201.

> In public elementary, middle and high schools, *the wearing of signs or clothing which conspicuously manifest students' religious affiliations is prohibited.* Disciplinary procedures to implement this rule will be preceded by a discussion with the student.[19] [Emphasis added]

The French Headscarf Ban distinguishes between conspicuous and discrete religious symbols and effectively prohibits the wearing of large crosses, veils or skullcaps[20] by students in public elementary, middle and high schools.

The French Headscarf Ban was based on recommendations made by the Stasi Commission which had been tasked with reporting on issues associated with *laïcité*.[21] *Laïcité* is the French constitutional principle that religion and all manifestations thereof are to remain in the private sphere and the public sphere is to remain neutral.[22] In 2003, as a precursor to the French Headscarf Ban, the then French Prime Minister Jean-Pierre Raffarin proposed a ban on wearing headscarves in public schools on the basis of protecting *laïcité*.[23] After the enactment of the French Headscarf Ban, the French President Jacques Chirac explained the law on the basis of maintaining the secular nature of state schools.[24] Patrick Weil, a member of the Stasi Commission, furthermore explained that the recommendation to ban the headscarf was motivated by a desire to protect young Muslim girls who were being pressurised by their families and communities into wearing a headscarf and threatened and assaulted for failing to do so.[25] Weil states that the Stasi Commission received testimonies from educators unable to handle the situation and parents who were forced to remove their daughters from public

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[19] Yael Barbibay 'Citizenship privilege or the right to religious freedom: The blackmailing of France's Islamic women' (2010) 18 *Cardozo Journal of International and Comparative Law* 159 at 177.
[20] Idem at 177-178.
[21] John R Bowen *Why the French don't like headscarves: Islam, the state, and public space* (2007) 112-113.
[22] Sarah Bienkowski 'Has France taken assimilation too far? Muslim beliefs, French national values, and the June 27, 2008 Conseil D'Ètat decision on Mme M' (2010) 11 *Rutgers Journal Law and Religion* 437 at 439; for a detailed discussion on the meaning of *laïcité* see Mohammad Mazher Idriss '*Laïcité* and the banning of the 'hijab' in France' *Legal Studies* 260 at 260-263.
[23] Kathryn Boustead 'The French headscarf law before the European Court of Human Rights' (2007) 16(2) *Journal of Transnational Law and Policy* 167 at 189.
[24] Ibid.
[25] NM Thomas 'On headscarves and heterogeneity: Reflection on the French foulard affair' (2005) 29 *Dialectical Anthropology* 373 at 382-383; See also Idriss '*Laïcité* and the banning of the 'hijab' in France' (note 22) at 277.

schools to avoid the pressure to wear a headscarf.[26] According to Weil, the majority of Muslim girls who did not wear a headscarf requested the headscarf ban to protect against such pressure.[27] Mohammad Mazher Idriss furthermore notes that the law was motivated by concern that Islam was an oppressive religion and that as the headscarf was a symbol of 'extremist Muslims' the ban was necessary to suppress radical Islam and maintain public order.[28]

A headscarf ban in schools may furthermore be justified on the basis of protecting the health and safety of students wearing a headscarf. This argument was canvassed in the ECtHR case of *Dogru v France* in which the applicant, an eleven year old Muslim girl enrolled in her first year at a state secondary school in France, was prohibited from wearing a headscarf during physical education classes.[29] Dogru attended 'physical education and sports classes' while wearing a headscarf[30] and had refused to remove the headscarf despite being told that the headscarf was incompatible with physical education classes.[31] The state averred that the duty to wear clothes compatible with the proper conduct of classes was necessary for safety and health reasons[32] and suggested that the headscarf was banned because it was a potential choking hazard. Dogru was expelled from school for failing to participate actively in physical education and sports classes and the expulsion was upheld on the basis that by attending

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[26] Patrick Weil 'Symposium: Constitutionalism and secularism in an age of religious revival: The challenge of global and local fundamentalisms religious symbols in the public space' (2009) 30 *Cardozo Law Review* 2699 at 2707.
[27] Ibid.
[28] Idriss '*Laïcité* and the banning of the 'hijab' in France' (note 22) at 276.
[29] *Dogru v France* App No 27058/05 (2009) 49 EHRR 8.
[30] The judgment does not describe what is meant by the term 'headscarf' or how the headscarf was worn by the applicant and it has been assumed that the term 'headscarf' is as defined in this thesis and leaves the face exposed.
[31] *Dogru v France* (note 29) at para 7. The judgment does not specify the type of sport class or sporting activity involved or explain how wearing a headscarf impeded the applicant's participation therein.
[32] Idem at para 36.

physical education and sports classes while wearing a headscarf, the applicant was not able to participate in the class and had failed in the duty to attend classes regularly.[33]

A further reason for a headscarf ban in schools may be to eliminate religious differences between pupils and reduce conflict at schools. Sebastian Poulter notes that schools may prohibit the wearing of a headscarf and enforce a dress code with the aim of instilling discipline in students, regulating attire, fostering loyalty to the institution and minimising differences in wealth and competition over fashion.[34]

The effect of the French Headscarf Ban is that Muslim girls who have reached puberty, upon whom the headscarf is incumbent, are prevented from wearing a headscarf while at school. Despite the neutral wording of the French Headscarf Ban, its main effect, and commonly understood purpose, was to ban Muslim girls from wearing a headscarf in public schools.[35] The law disproportionately affected Muslim girls, with 45 of the 48 students expelled from school following the implementation of the ban being Muslim girls.[36] Weil acknowledged that the ban excluded Muslim girls from society and may result in many Muslim girls leaving the public school system.[37] While some of these girls may pursue alternative avenues of education, such as private schools or correspondence courses,[38] others may simply forgo their schooling. Accordingly, the French Headscarf Ban results in students who choose to wear a headscarf, and even those who are forced to do so, being deprived of their right to public

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[33] Idem at para 8 and 13.
[34] Sebastian Poulter 'Muslim headscarves in school: Contrasting legal approaches in England and France' (1997) 17 *Oxford Journal of Legal Studies* 43 at 68.
[35] Barbibay 'Citizenship privilege or the right to religious freedom: The blackmailing of France's Islamic women' (note 19) at 178.
[36] Nusrat Choudhury 'From the Stasi Commission to the European Court of Human Rights: L'Affaire du Foulard and the challenge of protecting the rights of Muslim girls' (2007) 16 *Columbia Journal of Gender and Law* 199 at 200.
[37] Thomas 'On headscarves and heterogeneity: Reflection on the French foulard affair' (note 25) at 384.
[38] Ibid.

education and, in the absence of viable alternatives, being left uneducated.[39] This barrier to education may have a knock-on effect of limiting the employment opportunities of girls and perpetuating gender inequality.

4.1.2. Turkey

Like France, Turkey has a long history of regulating religious attire[40] which culminated in the issuing of the controversial regulations which prohibit university students from wearing a headscarf during classes. On 23 February 1998, the Istanbul University issued a circular stating that:

> By virtue of the Constitution, the law and regulations, and in accordance with the case law of the Supreme Administrative Court and the European Commission of Human Rights and the resolutions adopted by the university administrative boards, *students whose 'heads are covered' (who wear the Islamic headscarf)* and students (including overseas students) with beards *must not be admitted to lectures, courses or tutorials*. Consequently, the name and number of any student with a beard or wearing the Islamic headscarf must not be added to the lists of registered students. However, students who insist on attending tutorial and entering lecture theatres, although their names and numbers are not on the lists must be advised of the position and, should they refuse to leave, their names and numbers must be taken and they must be informed that they are not entitled to attend lectures. If they refuse to leave the lecture theatre, the teacher shall record the incident in a report explaining why it was not possible to give the lecture and shall bring the incident to the attention of the university authorities as a matter of urgency so that disciplinary measures can be taken.[41] [Emphasis added]

While the regulation explicitly targets and prohibits the wearing of the Islamic headscarf and beard, further resolutions were adopted by Istanbul University prohibiting students from

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[39] Benjamin D Bleiberg 'Note unveiling the real issue: Evaluating the European Court of Human Rights' decision to enforce the Turkish headscarf ban in *Leyla Sahin v Turkey*' (2005-2006) 91 *Cornell Law Review* 129 at 163-164.
[40] *Leyla Sahin v Turkey* (note 16) at 441-3 para 33-41.
[41] Idem at 438 para 16.

wearing any clothing or symbols manifesting a religion on university premises.[42] The headscarf ban at universities was subsequently adopted throughout Turkey but has since about September 2010 been informally lifted when the state issued a statement that it would support any student disciplined or expelled for covering her head.[43] The ban remains of interest because it has not yet been repealed and has been upheld by the ECtHR, though it is not currently enforced.

The ban on the headscarf at tertiary institutions was challenged by Leyla Sahin in the ECtHR. Leyla Sahin, a fifth year medical student who claimed to have been wearing a headscarf for the duration of her studies, was refused access to examinations and lectures on her enrolment at Istanbul University on the basis that she wore a headscarf in contravention of the regulations.[44] Turkey justified the headscarf ban on the basis of protecting the values of secularism and equality. The ECtHR held that the principle of secularism was the paramount consideration underlying the headscarf ban and stated:

> In such a context, where the values of pluralism, respect for the rights of others, and in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, as in the present case, the Islamic headscarf, to be worn.[45]

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[42] Idem at 444 para 47.
[43] Jonathan Head 'Quiet end to Turkey's college headscarf ban', 31 December 2010, available at http://www.bbc.co.uk/news/world-europe-11880622 [last accessed on 16/01/12].
[44] *Leyla Sahin v Turkey* (note 16) at 438 para 17.
[45] Idem at 454 para 116.

The ECtHR also suggested that the Islamic requirement that women wear a headscarf and the headscarf itself was contrary to the value of equality. The ECtHR endorsed the findings of the *Dahlab v Swizerland* case and held that:

> [the headscarf] appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality. It also noted that wearing the Islamic headscarf could not easily be reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.[46]

The ECtHR furthermore alluded to the fact that the headscarf had extremist connotations which necessitated a ban on wearing the headscarf. The ECtHR noted that the headscarf had political significance and that there were 'extremist political movements in Turkey who wished to impose on society as a whole their religious symbols and conception of a society founded on religious precepts'.[47] The ECtHR appears to have associated fundamentalism, extremism and unwillingness to integrate with the mere wearing of a headscarf and assumed that a headscarf ban could curb extremism and prevent the violence associated with religious extremism.

The ECtHR did not examine or take into account the effect of the Turkish regulations on Sahin. The ECtHR noted as a matter of fact that Sahin subsequently left Turkey to complete her studies at Vienna University[48] but with no real discussion as to the effect of the law on Sahin or on Muslim students in general. As with the French Headscarf Ban, the Turkish regulations force students to choose between abandoning their religious beliefs in order to obtain a tertiary degree or to wear a headscarf and forsake their education. As Sahin was prevented from completing her studies at any Turkish university and was forced to leave the

[46] Idem at 452-3 para 111.
[47] Idem at 453 para 115.
[48] Idem at 439 para 28.

country in order to abide by her religious beliefs and obtain her degree, it is arguable that the regulations place a heavy burden on the religious freedom of Muslim women.

Furthermore, Benjamin Bleiberg questions whether Turkey's headscarf ban also infringes on the right to hold a religion.[49] As discussed in chapter two, the right to hold a religion is an inviolable right which confers on individuals the right to develop and hold their own thoughts and beliefs free from external coercion. Individuals should not be penalised for holding beliefs and states are prohibited from dictating or even influencing an individual's choice to adopt a religion by direct or indirect coercion. This prohibits policies which restrict access to education, medical care or employment on the basis of religious beliefs and have the same intention or effect as coercing an individual's choice to adopt a religion or belief.[50]

Accordingly, Bleiberg questions whether the Turkish headscarf ban coerces Muslim women to adopt the state sanctioned version of Islam, which does not require a headscarf to be worn and thereby infringes the right to hold a religion. The Turkish state heavily regulates religion in Turkey by regulating Islamic education, mosques and the sermons delivered at Friday prayers and Bleiberg questions whether the headscarf ban is yet another way for the Turkish government to control the practise of Islam in Turkey.[51] Bleiberg argues that the ban forces women to choose between two versions of Islam, a traditional version which requires a headscarf to be worn and the state version which views a headscarf to be contrary to the value of secularism.[52] The effect of the Turkish headscarf ban is that women who adhere to the traditional version of Islam are precluded from accessing tertiary education. The ban penalises individuals who genuinely believe that they are required by their religion to wear a

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[49] Bleiberg 'Note unveiling the real issue: Evaluating the European Court of Human Rights' decision to enforce the Turkish headscarf ban in *Leyla Sahin v Turkey*' (note 39) at 155.
[50] Chapter two *The right to freedom of religion* 20-1.
[51] Bleiberg 'Note unveiling the real issue: Evaluating the European Court of Human Rights' decision to enforce the Turkish headscarf ban in *Leyla Sahin v Turkey*' (note 39) at 154-5.
[52] Idem at 155-156.

headscarf by withholding education from them. This undoubtedly influences an individual's choice to wear a headscarf and is at the very least an indirect coercive policy which pressurises individuals to recant on their religious beliefs. Accordingly, it is arguable that bans on wearing a headscarf at educational institutions infringe on the inviolable right to hold a religion and cannot be justified.

4.2.State sector

The other significant headscarf ban is when the state prohibits public officials from wearing a headscarf during service. This section examines a few noteworthy cases where banning the headscarf has been challenged for infringing on the right to freedom of religion.

State employees, such as teachers, are often prohibited from wearing religious attire, including a headscarf, in carrying out their duties. Such a prohibition was challenged in the ECtHR case of *Dahlab v Switzerland* when Lucia Dahlab, a primary school teacher of pupils aged between four and eight, was prohibited from wearing a headscarf while teaching.[53] The legal basis for the prohibition was the Public Education Act, which provides that:

> The public education system shall ensure that the political and religious beliefs of pupils and parents are respected.[54]
>
> Civil servants must be lay persons; derogations from this provision shall be permitted only in respect of university teaching staff.[55]

The aforegoing statutory provisions are neutral and do not explicitly prohibit teachers from wearing a headscarf at school. The provisions were interpreted to provide a general indication of the values to which civil servants should adhere which could later be translated into

[53] *Dahlab v Switzerland* (note 15).
[54] s6 Canton of Geneva Public Education Act of 6 November 1940 as cited in *Dahlab v Switzerland* (note 15) at 4.
[55] s120(2) Canton of Geneva Public Education Act of 6 November 1940 as cited in *Dahlab v Switzerland* (note 15) at 5.

specific orders or individual decisions.[56] When Dahlab challenged the prohibition on her wearing a headscarf while teaching in the ECtHR, the state argued that the prohibition was meant to protect the principle of denominational neutrality in schools and promote religious harmony.[57] According to the state, Dahlab as a civil servant was a representative of the state and her conduct should not suggest that the state endorsed a particular religion.[58] The ECtHR noted that the prohibition reflected the desire on the part of the state to protect secularism and the separation between the church and the state.[59] The ECtHR furthermore suggested that the prohibition may be necessary to prevent the coercion of young children and protect gender equality. The headscarf was regarded as having a proselytising effect and as being incompatible with the principle of gender equality as it is imposed on women by the Koran.[60] The ECtHR held that:

> It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.[61]

In analysing the justifiability of the prohibition the ECtHR noted that while the prohibition presented Dahlab with the difficult choice of teaching or wearing a headscarf, she would have to tolerate restrictions on her freedom of religion in order to ensure that pupils were taught in denominational neutrality.[62] The ECtHR ignored that the prohibition effectively restricted employment in public elementary schools on the basis of religious beliefs which is a real and substantial burden on religious freedom.

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[56] *Dahlab v Switzerland* (note 15) at 4.
[57] Idem at 11.
[58] Idem at 12.
[59] Idem at 5.
[60] Idem at 15.
[61] Ibid.
[62] Ibid.

Similarly, in Germany Fereshta Ludin was refused a teaching position in the Baden-Wűrttemberg school system on the basis that the Islamic headscarf she wore in the classroom was incompatible with the principle of separation of church and state in the German Basic Law.[63] While there were no legal provisions prohibiting teachers from wearing a headscarf, the German Federal Administrative Court ('FAC') upheld the school authorities' decision on the basis that the state had a duty to be neutral in respect of religious matters which extended to teachers as representatives of the state.[64] According to Tobias Lock, the decision is striking for failing to take into account the effect of a prohibition on Ludin.[65] Lock notes that as the state had a quasi-monopoly on primary schools and there were hardly any Muslim primary schools, Ludin would effectively never work as teacher, which is particularly harsh in light of Ludin's years of studying and training.[66]

When Ludin challenged the refusal in the German Federal Constitutional Court ('FCC') in the *Headscarf Case*, the matter was decided on the technical basis that the interference with rights could not be upheld in the absence of an authorising statutory provision.[67] As a result several German states passed legislation banning teachers from wearing religious symbols in classrooms.[68] Some of these states argued that a ban on teachers wearing a headscarf would promote the integration of Muslims into society and prevent discrimination,[69] presumably by eliminating the visible differences between Muslims and non-Muslims and ensuring that Muslims were not instantly recognisable to be targeted for discrimination.

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[63] Cindy Skach 'Religious freedom-state neutrality-public order-role of international standards in interpreting and implementing constitutionally guaranteed rights' (2006) 100 *American Journal of International Law* 186 at 188.
[64] Tobias Lock 'Of crucifixes and headscarves: Religious symbols in German schools' in Myriam Hunter-Hennin (ed) *Law, religious freedoms and education in Europe* (2011) 347 at 357.
[65] Ibid.
[66] Ibid.
[67] Idem 358.
[68] Idem 361.
[69] Ruben Seth Fogel 'Headscarves in German public schools: Religious minorities are welcome in Germany, unless-God forbid-they are religious' (2006-2007) 51 *New York Law School Law Review* 619 at 622-3.

The bans ranged from a complete ban on all religious symbols in classrooms to stating that the dress of teachers should not disturb the religious or philosophical sentiments of teachers and students.[70] More controversially, however, certain bans prohibited religious symbols but allowed exceptions for Christian and Western symbols.[71] For example, the Baden-Wűrttemberg enacted the following law:

> Teachers at public schools ... must not make political, religious, philosophical or similar avowals, which are capable of endangering or disturbing the Land's neutrality *vis-á-vis* pupils and parents or a politically, religiously or philosophically peaceful school environment .... The realization of the education mission in accordance with [the] constitution of the Baden-Wűrttemberg and the accordant portrayal of Christian and Western cultural and educational values does not contradict the conduct required of teachers [described above].[72]

The aforegoing law prohibits the wearing of a headscarf but allows Christian dress and symbols such as a nun's habit.[73] Accordingly, on remand to the FAC, Ludin's case was dismissed as the prohibition on wearing a headscarf now had a statutory basis.[74]

The bans on religious symbols which allow exceptions for Christian dress are arguably a blatant breach of the rights to freedom of religion and equality. The FAC acknowledged that laws should treat different religions equally and that exceptions for certain religious clothing were not permissible but nonetheless upheld the exception for the Christian faith.[75] The reference to the Christian faith was held to refer to values which though originated from Christianity, were no longer religious in meaning, informed the values of the German Basic

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[70] Lock 'Of crucifixes and headscarves: Religious symbols in German schools' (note 64) 361.
[71] Ibid.
[72] s38 Schulgesetz für Baden-Wűrttemberg translated into English in Lock 'Of crucifixes and headscarves: Religious symbols in German schools' (note 64) 361.
[73] Lock 'Of crucifixes and headscarves: Religious symbols in German schools' (note 64) 361.
[74] Fogel 'Headscarves in German public schools: Religious minorities are welcome in Germany, unless-God forbid-they are religious' (note 69) at 638-639.
[75] Idem at 639.

Law and to which public officials could adhere to regardless of their religion.[76] However, the laws effectively prevent Muslim school teachers from wearing a headscarf while Christian school teachers may wear the habit. As only Muslim teachers are forced to choose between their careers and their religious beliefs, the law arguably breaches the rights to equality and freedom of religion of Muslim school teachers.[77]

An employment dress code that prohibits headgear and does not allow exceptions for religious reasons has the same effect as that of a targeted ban on wearing a headscarf. For example, in the United States of America Geo Group Inc, a private company operating a prison facility, adopted the following dress code:

> No hats or caps will be permitted to be worn in the facility unless issued with the uniform. The Uniform described below is not to be altered, modified, or embellished upon. Only items approved by the Warden will be authorized.[78]

The neutral dress code which does not explicitly mention a headscarf was interpreted to prohibit the wearing of the *kihimar,* a headscarf designed to cover the hair, forehead, sides of the neck, shoulders, and chest, worn by some Muslim employees.[79] The prison warden's refusal to authorise an exception to allow Muslim women to wear a *kihimar* resulted in one Muslim employee being fired and two Muslim employees ceasing to wear the *khimar* to work.[80] The dress code, which appears religiously neutral, bars Muslim women who wear a headscarf from employment.[81]

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[76] Idem at 640.
[77] Idem at 642.
[78] *Equal Opportunity Commission v The Geo Group, Inc* 616 F3d 265 at 268.
[79] Idem at 267-8.
[80] Idem at 269.
[81] See also *Webb v City of Philadelphia* 562 F3d 256 where a Muslim police officer was denied permission to wear a headscarf while in uniform and on duty on the basis that that dress code did not authorise religious symbols or garb as part of the uniform.

A headscarf ban, regardless of its form, imposes a substantial and non-trivial burden on religious freedom. In addition to the effects discussed above, a headscarf ban may cause significant emotional distress and humiliation to those who are prevented from wearing it. Muslim women may consider a headscarf to be part of their identity and not simply a manifestation of religion they can forgo for a period of time such as during school or work. Accordingly, a ban on wearing a headscarf for any period of time may be perceived as an attack on an individual's identity rather than as merely the regulation of a religious practice. Furthermore, the interference with the ability to act autonomously in accordance with freely held beliefs infringes on human dignity and may be interpreted as a judgment that certain beliefs are not acceptable and worthy of protection. This may be interpreted as anti-Muslim and may alienate and exclude even moderate Muslims from mainstream society.[82] The alienation and exclusion of Muslim women from society entrenches a division between Muslim women and the West and leaves these women more susceptible to the influence of religious extremists.[83]

While targeted bans that specifically prohibit the wearing of a headscarf are generally more controversial and problematic because of their discriminatory nature, neutral laws which have the effect of prohibiting the wearing of a headscarf impose as great a burden on the religious freedom of individuals. There is no fixed test for determining what constitutes a substantial interference with religious freedom but excluding an individual from the public school system, influencing the religious decision-making process or preventing an individual from engaging in the practice for several hours a day may constitute a substantial burden on religious freedom.[84] A headscarf ban during school or employment forces individuals to make the painful choice of abiding by their religious beliefs or attending school or being

[82] Dominic McGoldrick *Human rights and religion: The Islamic headscarf debate* (2006) 97 and 101.
[83] Maria Zhurnalova *Religion in the public sphere: Public schools and religious symbolism-a comparative analysis* (unpublished PhD Thesis, Central European University, 2007) 169-170.
[84] Chapter three *Limitations on the manifestation of religion* 41.

employed. It pressurises individuals to forsake the headscarf, for at least several hours a day, in order to attend school or continue with their employment or risk being excluded from the school system and employment. Accordingly, bans on wearing a headscarf during school or employment, regardless of whether resulting from a neutral or targeted law, clearly constitute a substantial and non-trivial interference with religious freedom which require justification.

5. JUSTIFIABILITY OF BANNING THE HEADSCARF

As discussed in chapter three, an infringement of religious freedom may be justifiable if the limitation pursues a legitimate state purpose and is reasonable. This section examines the main justifications furnished by states and authors in justifying a ban on wearing a headscarf, namely, preserving secularism, preventing coercion, promoting equality and ensuring safety. For the sake of clarity and structure of this thesis, these goals are discussed separately even though the policy considerations underlying these goals frequently overlap and the goals are often raised in conjunction with one another. This section will also briefly examine certain peripheral state interests sometimes raised to justify a headscarf ban such as protecting health, safety and order.

5.1.Secularism

As evident from the discussion above, states often justify a headscarf ban on the basis of protecting secularism. Secularism is generally understood to be the separation of religion and state and that the state should be neutral in respect of religion. However, there are divergent opinions on what is required in order for the state to achieve neutrality towards religion and this section examines the liberal and strict conception of secularism and whether either notion justifies a headscarf ban.

At the very least, secularism requires the state to be neutral and indifferent with respect to religion and not to promote a religious, or irreligious, point of view. In *Leyla Sahin v Turkey*, the ECtHR held that the state's role is that of a neutral and impartial organiser of the exercise of religion and such role is incompatible with the power to assess the legitimacy of religious beliefs or the way in which it is expressed.[85] The ECtHR endorsed the findings of the Turkish Constitutional Court that secularism precludes a state from preferring a particular religion and provides protection against arbitrary interference from the state and pressure from extremist movements.[86] The Turkish Constitutional Court explained that the neutrality of the state maintains a distinction between religion and politics by preventing a state from legislating on the basis of religious beliefs in order to allow individuals to choose and change their religious beliefs without state interference,[87] which is a basic component of the right to freedom of religion. As discussed in chapter two, the separation of religion and state and the curtailment of the state's influence in the private domain of religion was the starting point of the right to freedom of religion. However, it is not clear that in order to achieve neutrality and secularism the state is required to prohibit all public manifestations of religion.

Liberal secularism allows manifestations of religion in the public sphere and accordingly, would not justify a headscarf ban. Liberal secularism supports the idea that religion is a matter of personal choice and the state should not impose on citizens religious beliefs or practices or discriminate against individuals on the basis of religious beliefs or practices.[88] While liberal secularism requires a separation between religion and the state, it allows public manifestations of religion, even in public institutions.[89] This is passive neutrality where the

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[85] *Leyla Sahin v Turkey* (note 16) at 107 para 450.
[86] Idem at 453 at 113-4.
[87] Idem at 442 para 39.
[88] Ingvill Thorson Plesner 'The European Court on Human Rights between fundamentalist and liberal secularism' (2005) Norwegian Centre for Human Rights, Paper for seminar on *The Islamic head scarf controversy and the future of freedom of religion or belief* Strasbourg, France at 2.
[89] Ibid.

state does not support any religion but refrains from passing laws that inhibit the practice of religion. The German FCC in the *Headscarf Case* referred to this as inclusive neutrality where all religious symbols would be permitted in public institutions, including schools, and tolerance of different beliefs is promoted.[90] The neutrality of the state is that it neither prescribes nor prohibits the manifestation of religion but merely allows the expression of religious beliefs without any assessment as to the legitimacy of the beliefs. The manifestation of belief in public may of course nonetheless be restricted in accordance with the general requirements of limiting rights, such as by a law that reasonably pursues a legitimate aim.

The notion of liberal secularism is supported by the definition of the right to freedom of religion which in fact provides for the right to manifest a religion in private and in public. Furthermore, liberal secularism is also less limiting of religious freedom in that it does not absolutely prohibit the public manifestation of religion but respects the religious freedom of individuals to manifest their beliefs, such as by wearing a headscarf, in the public sphere.[91] Liberal secularism does not require a ban on wearing a headscarf as such understanding of secularism does not prohibit the manifestation of religion in the public sphere. Therefore any reference by states to protecting secularism in justifying a ban on a headscarf must be understood as reference to a stricter and different understanding of secularism.

The strict conception of secularism, or irreligious neutrality, goes beyond the separation of religion and state and relegates religion and all manifestations thereof to the private sphere. It is the idea that secularism requires the public sphere to remain absolutely neutral which necessitates a complete prohibition on the manifestation of religion by public officials or by citizens in public institutions.[92] The state is entitled to actively protect secularism by

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[90] Niraj Nathwani 'Islamic headscarves and human rights: A critical analysis of the relevant case law of the European Court of Human Rights' (2007) 25(2) *Netherlands Quarterly of Human Rights* 221 at 228.
[91] Idem at 229.
[92] Plesner 'The European Court on Human Rights between fundamentalist and liberal secularism' (note 88) at 3.

legislating against public manifestations of religion. This strict notion of secularism accords with the French principle of *laïcité.*

The French concept of *laïcité* pursues noble aims. The rationale behind the strict separation of state and religion is the desire to eliminate ethnic differences between citizens and to create a single national identity into which all citizens assimilate.[93] The creation of a single national identity and relegating differences to the private sphere aims to eliminate differences between people promoting greater social cohesion in society[94] and avoiding conflict. The absence of any manifestation of religion is also meant to protect individuals against pressure from religious groups and proselytism and the state may take positive steps, such as prohibiting religious dress, to achieve this goal.[95]

Despite the noble aims of *laïcité*, it is questionable whether *laïcité* is a sound state goal which supports a headscarf ban. First, *laïcité* pursues the goal of neutrality in the public sphere when neutrality may not exist in reality. No dress is neutral and individuals may convey cultural and religious beliefs in what they wear and in what they choose not to wear. Accordingly, the ECtHR's description of the headscarf as a 'powerful external symbol'[96] overlooks the fact that the act of not wearing a headscarf is just as powerful an action which indicates a disbelief in the Islamic faith and an adherence to an atheistic or other religious belief. Accordingly, *laïcité* may in fact favour religions which do not require public manifestations of religion.

Secondly, it is questionable whether the requirement of state neutrality can be imposed on public officials. Maria Zhurnalova notes that neutrality is a requirement of the state and is not

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[93] Bienkowski 'Has France taken assimilation too far? Muslim beliefs, French national values, and the June 27, 2008 Conseil D'Ètat decision on Mme M' (note 22) at 437.
[94] Poulter 'Muslim headscarves in school: Contrasting legal approaches in England and France' (note 34) at 47.
[95] McGoldrick *Human rights and religion: The Islamic headscarf debate* (note 82) 13.
[96] *Dahlab v Switzerland* (note 15) at 15.

an obligation imposed on individuals, such as public officials.[97] The neutrality requirement cannot be extended to individuals simply because they are employed by the state nor should the conduct of state employees be automatically attributed to the state.[98] It is even more difficult to impose the requirement of neutrality onto students who do not represent the state but merely use state provided education. The state cannot be said to be endorsing or supporting a religion simply because it allows individuals, either employees or users of their services, to wear religious symbols.[99] Patrick Lenta argues that such allowances merely permit individuals to engage in what they consider to be a religiously mandated practice,[100] but in no way requires or encourages the practice. Allowing a headscarf to be worn does not require additional state resources[101] or any other positive conduct from the state and is therefore distinguishable from where the state involves itself in religion by formulating policies that require religious symbols to be displayed at schools. Allowing individuals to act in accordance with their religious convictions is arguably more in keeping with the notion of secularism than dictating whether or not individuals may wear a religious symbol which actually entails state involvement with religion.[102] State policies that prohibit, or mandate, the

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[97] Zhurnalova *Religion in the public sphere: Public schools and religious symbolism-a comparative analysis* (note 83) 334-335.

[98] The German Federal Constitutional Court has in deciding whether a school teacher was entitled to wear a headscarf in the classroom held that if the state did not order or require the dress, the religious dress cannot be attributed to the state, see Manisuli Ssenyonjo 'The Islamic veil and freedom of religion, the rights to education and work: A survey of recent international and national cases' (2007) 6 *Chinese Journal International Law* 653 at 706.

[99] Patrick Lenta 'Muslim headscarves in the workplace and schools' (2007) 124 *South African Law Journal* 296 at 310.

[100] Ibid.

[101] Memorandum to the Turkish government on Human Rights Watch's concerns with regard to academic freedom in higher education, and access to higher education for women who wear the headscarf, Human Rights Watch Briefing Paper, June 29 2004, at 24 available at http://www.hrw.org/sites/default/files/related_material/headscarf_memo.pdf [last accessed on 16/01/12].

[102] This is supported by Bleiberg 'Note unveiling the real issue: Evaluating the European Court of Human Rights' decision to enforce the Turkish headscarf ban in *Leyla Sahin v Turkey*' (note 39) at 154.

wearing of a headscarf are in reality more coercive policies,[103] which threaten the value of secularism.

Furthermore, it must be noted that in some instances a headscarf ban advocated to protect secularism is in reality a state attempt to regulate the expression of religious beliefs. This is highlighted in the Turkish context, where though Turkey refers to itself as a secular state the state is heavily involved with religion. The right to freedom of religion in Turkey provides that religious instruction is provided under the control and supervision of the state.[104] The Turkish state appoints religious leaders, controls the construction of mosques and the content of sermons delivered at Friday prayers. A headscarf ban may therefore be interpreted as the state controlling the expression of religion in accordance with its own views of the Islamic religion rather than an attempt to preserve secularism which requires a separation of religion and state.

Liberal secularism permits the public manifestation of religion and therefore does not require a headscarf ban. The strict concept of secularism favours religions which do not require public manifestations of religion, extends the requirement of neutrality beyond the state to individuals and is often used by states as a pretext to control the expression of religious beliefs. Accordingly, neither the strict or liberal value of secularism justifies a headscarf ban.

5.2.Coercion

This section examines direct, indirect and systemic coercion in order to explain coercion and examines whether banning a headscarf may be justified on the basis of protecting against coercion.

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[103] Memorandum to the Turkish government on Human Rights Watch's concerns with regard to academic freedom in higher education, and access to higher education for women who wear the headscarf (note 101) at 24.

[104] Article 24 of the Constitution of the Republic of Turkey as cited in *Leyla Sahin v Turkey* (note 16) at 440 para 29.

5.2.1. Direct coercion

Direct coercion refers to the pressure exerted on young girls by their families and communities to wear a headscarf. According to Weil, in French public schools the pressure manifested itself as violence and insults with girls who did not wear a headscarf being called 'whores' or 'bad Muslims'.[105] It is clear that where girls are coerced with verbal and physical abuse to wear a headscarf the state is entitled to intervene to prevent such coercion.

It is, however, questionable whether the problem of verbal and physical coercion is so wide-spread to warrant state intervention. While Weil maintains that the primary motivation behind the French Headscarf Ban was to protect against the coercion of girls, there is little evidence in support thereof. The Stasi Commission conducted its interviews in private, did not hear from groups opposing the headscarf ban and only heard from two students wearing a headscarf when the report had almost been drafted.[106] Accordingly, there is no real evidence or data as to the extent and seriousness of the coercion[107] and it is questionable whether reports of coercion are isolated incidents and a headscarf ban an overreaction to such reports. There is in fact contrary evidence that many girls voluntarily choose to wear a headscarf. There were various protests against the French Headscarf Ban and demonstrators, who wore headscarves, held signs and chanted slogans such as '[r]eservedness is a right, the headscarf is my honour' and '[n]either fear, nor husband, the headscarf is my choice'.[108] Girls explained that they wore the headscarf out of choice, had mothers who in fact did not wear

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[105] Weil 'Symposium: Constitutionalism and secularism in an age of religious revival: The challenge of global and local fundamentalisms religious symbols in the public space' (note 26) at 2707; see also Zhurnalova *Religion in the public sphere: Public schools and religious symbolism-a comparative analysis* (note 83) 160.

[106] Zhurnalova *Religion in the public sphere: Public schools and religious symbolism-a comparative analysis* (note 83) 151.

[107] Susanna Mancini 'The power of symbols and symbols as power: Secularism and religion as guarantors of cultural convergence' (2008-2009) 30 *Cardozo Law Review* 2629 at 2648.

[108] Adrien Katherine Wing and Monica Nigh Smith 'Critical race feminism lifts the veil?: Muslim women, France and the headscarf ban' (2005-2006) 39 *University of California, Davis Law Review* 743 at 764.

the headscarf, which indicated a lack of family pressure to do so and sometimes wore the headscarf in spite of family encouragement not to do so.[109]

The coercion to wear a headscarf is more likely to be parental or societal pressure on girls to wear a headscarf as opposed to being real physical and verbal intimidation to do so. Such pressure, however, does not justify a legislative ban on wearing a headscarf. First, parents make decisions on behalf of their children all the time and have the right to raise their children in accordance with their religious beliefs, which would encompass the right to determine the religious attire of their children. In the absence of violence and abuse, it is questionable why parental direction that children should wear a headscarf would warrant a legislative interference when parental pressure on children to participate in sporting activities or excel in academia would not do so.

Secondly, it is generally acknowledged that children, like adults, are subject to pressure to dress and act in a certain way.[110] For example, in many societies it would be unacceptable for men to wear dresses or skirts and men may wear trousers to conform to society's expectations of acceptable dress. While such pressure may be disliked and even criticised, it has never warranted legislative intervention and been regarded as a reason to limit fundamental rights.[111] There is no reason why societal pressure to wear a headscarf, save when it amounts to real verbal and physical abuse of which there is no real supporting evidence, should be treated any differently.

It is undisputed that young girls should not be intimidated, either verbally or physically, into wearing a headscarf. It is, however, unclear whether the problem of such aggressive coercion

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[109] Idem at 762; see also Welch 'The prohibition of the Muslim headscarf: Contrasting international approaches in policy and law' (note 10) at 202 where Welch notes that women veil for a variety of reasons and there is no evidence to support the proposition that women only wear the headscarf due to pressure to do so nor is there evidence to suggest that this is the reason in the majority of cases.

[110] Mancini 'The power of symbols and symbols as power: Secularism and religion as guarantors of cultural convergence' (note 107) at 2652.

[111] Ibid.

is so wide-spread so as to justify a ban on the headscarf as there is no real evidence indicating the proportion of girls forced into wearing a headscarf. States should, furthermore, be cautious of relying on societal pressure to wear a headscarf as justification for a headscarf ban as usually such pressure is tolerated.

5.2.2. Indirect coercion

Coercion may also be indirect and it is suggested that a headscarf ban may be necessary to protect against the coercive impact a headscarf may have on those who do not wear it. This argument is often raised, and is perhaps most persuasive, in a school context where a teacher wears a headscarf while teaching.[112] This section examines whether the wearing of a headscarf by a teacher has an impact on the religious beliefs of students which justifies a headscarf ban.

It is the mere wearing of a headscarf by a teacher which is thought to have a coercive effect on students and it is irrelevant whether the teacher actually says anything to promote a religious belief or influence students. In *Dahlab v Switzerland*, the ECtHR suggested that the wearing of a headscarf by a teacher who occupies a position of authority and acts as a role model for students is sufficient to influence students.[113] Sylvie Langlaude regards the situation as a 'captive audience' scenario as students cannot escape the manifestation of religion without some difficulty, such as changing class or schools.[114] The ECtHR held that the age of the students is important as young students may be vulnerable to the views of a

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[112] This argument was also raised in *Leyla Sahin v Turkey* (note 16) where the ECtHR held that the wearing of the headscarf by Sahin may have a proselytising effect and exert pressure on non-Muslims. Not only is it questionable whether Sahin, a university student herself, would be able to exert pressure on fellow university students but the finding conflicts with the ECtHR's finding in *Kokkinakis* v *Greece* App No 14307/88 (1994) 17 EHRR 397 that proselytism is protected by the right to manifest a religion.

[113] *Dahlab v Switzerland* (note 15) at 14-5.

[114] Sylvie Langlaude 'Indoctrination, secularism, religious liberty and the ECHR' (2006) 55 *International and Comparative Law Quarterly* 929 at 930.

teacher and more likely to emulate a teacher's behaviour.[115] The young age of the children means that they are more impressionable than older children and susceptible to being influenced.

The judgment of the ECtHR is problematic for a number of reasons. The ECtHR labelled the headscarf as a 'powerful external symbol' but did not explain why this was so or what the headscarf symbolised. The ECtHR found the mere act of Dahlab wearing a headscarf to have a proselytising effect which may influence young impressionable children to forsake their religious beliefs.[116] While the ECtHR did not explain proselytising, it may be understood as attempting to convert others to another religion.[117] Proselytism, which is not regarded as coercion and is generally protected by the right to freedom of religion, may be unacceptable when there are young students who are easily influenced and cannot avoid the views of a teacher without changing schools or class. The ECtHR judgment suggests that overt manifestations of religion, such as wearing a headscarf, amount to proselytism and are to be prohibited. However, it is wrong to equate the mere wearing of a headscarf with proselytism. First, such an approach penalises religions which require public manifestations of belief. Secondly, the wearing of a headscarf by a teacher pits a teacher's positive right to manifest her religious beliefs against the negative right of students to be free from religious beliefs. While students cannot avoid the teacher's headscarf, chapter three demonstrated that it is important to identify the effect and influence a religious symbol may have on children.[118] The absence of real evidence as to the effect a headscarf may have on students precludes assertions that a headscarf interferes with religious freedom of students.[119] There is no evidence in *Dahlab v Switzerland* or any other case of the effect wearing a headscarf has on

[115] *Dahlab v Switzerland* (note 15) at 15.
[116] Ibid.
[117] Chapter two *The right to freedom of religion* 21-2.
[118] Chapter three *Limitations on the manifestation of religion* 54-5.
[119] Ibid.

young children. There is nothing to suggest that a headscarf in itself or being able to identify the religious faith of a teacher induces students to imitate a teacher's religious beliefs. The wearing of a headscarf is, furthermore, distinguishable from where the state displays a religious symbol at schools as a teacher's personal choice to wear a headscarf does not suggest that Islam is the state endorsed or school mandated religion. Accordingly, the mere wearing of a headscarf should not be regarded as having an unacceptable coercive effect on young children.

While the religious beliefs of students and their parents may conflict with the wearing of a headscarf, this conflict does not constitute an interference with religious beliefs. A teacher wearing a headscarf does not impede students or their parents from holding and acting on their religious beliefs and may in fact teach students respect and tolerance for different beliefs. The potential for coercion which states must guard against is when teachers exploit their position of authority, as a representative of the school to influence the religious beliefs of young, impressionable students.

5.2.3. Systemic coercion

This section examines the argument that a headscarf ban is necessary to protect females against systemic coercion, namely being conditioned by society into believing that they are required to wear a headscarf.

Elisabeth Badinter argues that females can never voluntarily choose to wear a headscarf, even when they claim to do so, as a headscarf is based on values contrary to personal autonomy such as female restraint, modesty and seclusion.[120] Individuals who claim to choose to wear a headscarf must be uneducated or brainwashed by their families and religion into thinking it is

[120] Monica Mookherjee 'Affective citizenship: Feminism, postcolonialism and the politics of recognition' (March 2005) 8(1) *Critical Review of International, Social and Political Philosophy* 31 at 33.

required.[121] This argument assesses the autonomy of individuals not only on how they make choices but on the type of choices they make.[122]

The assessment of autonomy based on the content of an individual's choice is problematic as it entails a state assessment as to the legitimacy of a religious practice. The judgment that a headscarf is an oppressive garment which a female can never voluntarily choose is a value-laden judgment which conflicts with the state's role as impartial organiser of religion who does not assess the legitimacy of religious beliefs. It is a paternalistic approach that conflicts with the state's duty to respect an individual's religious freedom and undermines an individual's autonomy. As discussed in chapter two, autonomy is the idea that individuals are best placed to know what is best for them and should be free to pursue what they consider best without interference from the state. Furthermore, the state lacks the expertise to assess the legitimacy of religious practices and in so doing, it risks protecting the religious practices of the majority at the expense of the minority's religious practices with which it may be unfamiliar.

Furthermore, almost all choices in life are shaped and conditioned by surrounding circumstances and yet are still regarded as autonomous choices. Zhurnalova rightfully notes that an individual's choice to practise or participate in religious activities is frequently motivated by a desire to please an authoritative figure or to abide by prevailing societal norms.[123] Choices are motivated by a complex matrix of factors and no choice is entirely free from social influences. These choices are nonetheless respected and are not simply categorised as coerced and disregarded. The choice to wear a headscarf should not be

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[121] Bleiberg 'Note unveiling the real issue: Evaluating the European Court of Human Rights' decision to enforce the Turkish headscarf ban in *Leyla Sahin v Turkey*' (note 39) at 161 and McGoldrick *Human rights and religion: The Islamic headscarf debate* (note 82) 14.

[122] Mookherjee 'Affective citizenship: feminism, postcolonialism and the politics of recognition' (note 120) at 33.

[123] Zhurnalova *Religion in the public sphere: Public schools and religious symbolism-a comparative analysis* (note 83) 153.

accorded any less respect simply because a headscarf is a foreign practice, often misunderstood and regarded as a practice imposed on women rather than voluntarily undertaken.

5.3.Equality

This section examines one of the most popular justifications for a headscarf ban, being that a headscarf ban is necessary to protect the equality rights of women.

The ECtHR has been prominent in supporting the argument that a headscarf is incompatible with the value of equality and that a ban is necessary to protect the rights of women. The ECtHR, however, does not clearly explain why a headscarf is incompatible with gender equality or how the ban achieves sexual equality. The ECtHR appears to view the requirement that women, and not men, are required to cover themselves as a sexist practice. Furthermore, a headscarf may result in a woman's religiosity being judged according to whether or not she wears a headscarf while a Muslim man's religiosity cannot be judged by dress.[124]

However, most religions treat men and women differently, imposing different religious obligations on men and women, and such differential treatment has never justified legislative interference. For example, the Catholic Church does not allow women to be ordained as priests and in terms of Jewish law only a husband may initiate a divorce. While these are clearly sexist practices, religious adherents may nonetheless voluntarily abide by them in accordance with their religious convictions. Neither the state nor the court should be able to prohibit practices voluntarily undertaken in accordance with religious beliefs in order to impose equality on religions.

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[124] Wing and Smith 'Critical race feminism lifts the veil?: Muslim women, France and the headscarf ban'(note 108) at 771.

A headscarf, however, is often treated differently to other religious practices as it is viewed as a symbol of Islam's oppression of women which should be abolished. While Muslim women may wear a headscarf to comply with their religious obligations, a headscarf is often interpreted very differently by non-Muslims. Poulter notes that a headscarf is sometimes interpreted to mean that women should be inconspicuous, confined to domestic roles and completely segregated from men.[125] Furthermore, as the *Qur'anic* verses suggests that a headscarf is a means of protecting women from unwanted interferences Wing and Smith note that some feminists question why men cannot control themselves so that women can dress as they please.[126] A headscarf is seen as isolating women and controlling the sexuality of women[127] because of the inability of men to control themselves.

However, the validity of the abovementioned interpretation of a headscarf is questionable. Muslim women are only obliged to wear a headscarf in public. Accordingly, Muslim women are not required to stay at home restricted to domestic roles but may actively participate and engage in society provided they wear a headscarf. It is without a headscarf that Muslim women are confined to their homes and excluded from society. Therefore a ban on a headscarf may actually have the perverse effect of excluding Muslim women from society and perpetuating gender inequality. This is because a ban on a headscarf has the effect of excluding females who voluntarily choose to wear a headscarf from education or employment simply because of their religious beliefs.

The idea that a headscarf may be a means of achieving equality is in fact supported by the facts of the cases before the ECtHR. Manisuli Ssenyonjo notes that in *Dahlab v Switzerland* there was no evidence that Dahlab was oppressed or wore a headscarf as part of her

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[125] Poulter 'Muslim headscarves in school: Contrasting legal approaches in England and France' (note 34) at 71.
[126] Wing and Smith 'Critical race feminism lifts the veil?: Muslim women, France and the headscarf ban' (note 108) at 768-769.
[127] Idem at 768; see also McGoldrick *Human rights and religion: The Islamic headscarf debate* (note 82) 13.

subordination to a man.[128] Dahlab appeared as an intelligent and educated woman who chose to wear a headscarf to comply with her religious obligations in the face of state pressure not to do so.[129] Similarly, in *Sahin v Turkey* the dissenting judgment of Judge Tulkens notes that Sahin claimed she wore a headscarf out of her own free will and that allowing a woman to follow a freely adopted practice cannot be said to be contrary to the principle of equality.[130] Nusrat Choudhury argues that the headscarf in reality enabled Sahin to participate in public spaces, such as pursuing her medical degree at a university and fighting for her rights in court, while maintaining her religious convictions.[131] Choudhury argues that it is hard to reconcile the picture of an adult woman pursuing her medical degree, fighting for her right to wear a headscarf up to the ECtHR and finally leaving her home to continue her studies with the notion of an oppressed female.[132]

Therefore, while the ECtHR has interpreted the headscarf to be a symbol of gender inequality, it has in both the *Dahlab v Switzerlamd* and *Turkey v Sahin* cases ignored the applicants' interpretation of the headscarf and the facts of the case. The refusal to acknowledge a claimant's own interpretation of a religious practice is a paternalistic approach that involves judges interpreting and evaluating the appropriateness of a religious practice. The dissenting judgment of Judge Tulkens in the *Sahin* case cautions against this paternalistic approach and notes that it is inappropriate for courts, which lack the necessary expertise, to undertake such evaluations[133] as they will often protect that which is familiar and not that which they do not understand. Judge Tulkens notes that this undermines the religious

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[128] Ssenyonjo 'The Islamic veil and freedom of religion, the rights to education and work: A survey of recent international and national cases' (note 98) at 702.
[129] Ibid.
[130] *Leyla Sahin v Turkey* (note 16) at para 12 of the dissenting judgment of Judge Tulkens.
[131] Choudhury 'From the Stasi Commission to the European Court of Human Rights: L'Affaire du foulard and the challenge of protecting the rights of Muslim girls' (note 36) at 287.
[132] Ibid.
[133] *Leyla Sahin v Turkey* (note 16) at para12 of the dissenting judgment of Judge Tulkens.

autonomy of the applicant[134] which as discussed in chapter two is what religious freedom is meant to protect.

Furthermore, a state's interpretation of the practice of wearing a headscarf may also have implications for the requirement that the state is to remain neutral and impartial with respect to religion. Weil emphatically states that the Stasi Commission did not ban the headscarf because the headscarf was interpreted as a sign of the domination of women and states that such interpretation could not justify banning the headscarf.[135] Weil acknowledges that the headscarf may have different meanings, such as expression of belief and identity,[136] and banning the headscarf because it symbolises the domination of women would constitute 'an intrusive interpretation of a religious symbol'.[137] Therefore, while a headscarf may be viewed as oppressive of women, Muslim women may also view wearing a headscarf as an autonomous choice made in accordance with their religious convictions. The state should not interpret religious practices and ban a headscarf based on its own interpretation of the practice of wearing a headscarf as this violates the principle of state neutrality.

5.4.Safety

After the attacks on September 11 on the World Trade Center thought to be carried out by the Muslim organisation *Al-Qaeda*, a headscarf has also become a symbol of religious extremism which is seen to foster Islamic fundamentalism. Accordingly, a headscarf ban is argued to be necessary to protect the public safety. This emotive argument has been raised in a number of judgments and this section analyses the strength of this justification.

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[134] Ibid.

[135] Weil 'Symposium: Constitutionalism and secularism in an age of religious revival: The challenge of global and local fundamentalisms religious symbols in the public space' (note 26) at 2705-2706.

[136] For different interpretations of the headscarf see also Zhurnalova *Religion in the public sphere: Public schools and religious symbolism-a comparative analysis* (note 83) 298-9; McGoldrick *Human rights and religion: The Islamic headscarf debate* (note 82) 61; and Poulter 'Muslim headscarves in school: Contrasting legal approaches in England and France' (note 34) at 71.

[137] Weil 'Symposium: Constitutionalism and secularism in an age of religious revival: The challenge of global and local fundamentalisms religious symbols in the public space' (note 26) at 2705-2706.

A headscarf ban is often advocated as being necessary to protect against religious extremism and protect the public safety. A headscarf is seen to symbolise terrorism or to indicate that the wearer of the headscarf supports terrorism.[138] However, the headscarf's political significance, why it is a symbol of religious extremism or how a ban would protect the safety of the public has never adequately been explained. Smith and Wing postulate that a headscarf is interpreted as a symbol of religious extremism because the act of wearing a headscarf is seen as a strict and extreme interpretation by Islamic fundamentalists of the *Qur'anic* verses.[139] Accordingly there is a fear that individuals who wear a headscarf hold and promote fundamentalist views, proselytise and exert pressure on others to convert to their extremist views.[140] The desire to convert others to an extremist point of view is seen as a threat to safety.[141]

However, the connection between a headscarf and religious extremism is tenuous. A headscarf ban to protect against religious extremism imposes a symbolic meaning onto the headscarf and overlooks the fact that wearing a headscarf may be a valid interpretation of the requirements of the Islamic faith. A ban assumes that all women wearing a headscarf hold and promote fundamentalist views when in fact there is no evidence to support this.[142] This is a simplistic approach that may reveal an anti-Muslim sentiment and the prejudice that all Muslims are terrorists.

It must be acknowledged that post September 11, Islam and Muslims are associated with terrorism. A headscarf ban may actually be an expression of an anti-Muslim sentiment which blames the general Muslim population for the terrorist acts perpetrated by a minority of

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[138] Idriss '*Laïcité* and the banning of the 'hijab' in France' (note 22) at 279.
[139] Wing and Smith 'Critical race feminism lifts the veil?: Muslim women, France and the headscarf ban' (note 108) at 769-770.
[140] Erica Howard *Law and the wearing of religious symbols: European bans on the wearing of religious symbols in education* (2012) 31.
[141] Ibid.
[142] Anastasia Vakulenko 'Islamic headscarves and the European Convention on Human Rights: An international perspective' (2007) 16 *Social and Legal Studies* 183 at 187; Christopher D Belelieu 'The headscarf as a symbolic enemy of the European Court of Human Rights jurisprudence: Viewing Islam through an European legal prism in light of the Sahin judgment' (2006) 12 *Columbia Journal of European Law* 573 at 619.

Muslims. This may exacerbate the division between Muslims and non-Muslims as the ban effectively excludes all Muslim women who wear a headscarf from the public sphere. A headscarf ban motivated by prejudice coupled with the alienation and exclusion of Muslim women from society is a breeding ground for hatred and distrust and may cause even moderate Muslim to align themselves with extremist groups.

5.5.Safety and order

This section briefly examines the peripheral goals of protecting the safety of individuals wearing a headscarf and maintaining order at schools which may justify a ban on wearing a headscarf.

The *Dogru v France* judgment articulates legitimate health and safety concerns regarding the wearing of headscarves at schools. A flowing headscarf may be caught in physical education equipment (and even laboratory equipment in a science class) or may pose a choking hazard during physical education classes. Similarly, a school uniform policy may be important to instil discipline and order at schools and to minimise conflict between students. However, it is questionable whether a headscarf ban is a reasonable means of addressing these concerns and whether there are less restrictive means of protecting these interests. The question of reasonability will be examined later in this chapter.

A headscarf ban may be advocated for a number of reasons such as preserving secularism, preventing coercion, promoting equality and ensuring safety and order. This section argues that the state often attempts to regulate religion and the expression thereof under the guise of protecting secularism. This section examines both the liberal, which allows public manifestations of religion, and strict conception of secularism, which relegates all manifestations of religion to the private sphere and argues that neither conception justifies a

headscarf ban. On the other hand, while the goals of preventing coercion, promoting equality and maintaining safety and order are not without their problems, they constitute legitimate state interests which may justify an infringement of religious freedom.

6. REASONABLENESS OF A HEADSCARF BAN

In addition to pursuing a legitimate state interest, a headscarf ban must also be reasonable in order to be upheld. As discussed in chapter three, the reasonability enquiry examines the importance of the objective of the limitation, the connection between the limitation and objective, whether there are less restrictive means of achieving the objective and the proportionality of the effects of the limitation in relation to the importance of the objective.[143] This section examines whether a headscarf ban enacted to prevent coercion, promote equality or preserve safety and order is a reasonable limitation of religious freedom.

6.1.Coercion

A headscarf ban enacted to protect against coercion is arguably not a reasonable limitation of religious freedom. First, it is not clear why or how a headscarf ban will prevent the physical harassment or verbal abuse of girls or curb the societal pressure to wear a headscarf. The rationale behind a headscarf ban appears to be that girls cannot be intimidated and forced into wearing a headscarf if the wearing of a headscarf is banned by the state.[144] However, it is not clear that the perpetrators of coercion will adopt this reasoning. The architects of the abuse may nonetheless believe that girls have a choice whether or not to wear a headscarf and should wear a headscarf even if it means foregoing their education. This is supported by Bleiberg who notes that the authors of the pressure may simply use their influence to prevent

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[143] Chapter three *Limitations on the manifestation of religion* 56-7.
[144] Weil 'Symposium: Constitutionalism and secularism in an age of religious revival: The challenge of global and local fundamentalisms religious symbols in the public space' (note 26) at 2709.

girls from attending school or university if they are not allowed to wear a headscarf.[145] Girls who choose to attend school without a headscarf may thus still find themselves to be the victims of abuse and harassment but this time in the form of pressure to forgo their education. A ban on a headscarf is therefore unlikely to achieve the goal of preventing coercion.

Secondly, as some girls voluntarily choose to wear a headscarf, a headscarf ban balances the religious freedom of girls who choose to wear a headscarf against the rights of girls who are coerced into wearing a headscarf. In this regard, Weil has conceded that the French Headscarf Ban denies the religious freedom of girls who voluntarily wear a headscarf.[146] This is because a headscarf ban prevents individuals who view a headscarf as a religious obligation from acting in accordance with their religious beliefs. Accordingly, a headscarf ban can only be enacted after a careful balancing of conflicting rights which takes into account the effects of a headscarf ban which have been canvassed earlier in this chapter. A headscarf ban may cause significant emotional distress and humiliation to those who are prevented from wearing it, alienate Muslims who perceive the law to be anti-Muslim and perpetuate gender inequality. These harsh effects may not be justified in light of the fact that it is unclear that the ban achieves its intended purpose of preventing the coercion of girls.

Furthermore, it is arguable that the state should prohibit the coercion itself rather than enact an obscure headscarf ban which may not combat coercion. Zhurnalova argues that a more appropriate solution to coercion is communicating with families and social service activities[147] directed at identifying and ending the coercion of girls. Furthermore, implementing proper disciplinary measures and criminal law enforcement can prevent

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[145] Bleiberg 'Note unveiling the real issue: Evaluating the European Court of Human Rights' decision to enforce the Turkish headscarf ban in *Leyla Sahin v Turkey*' (note 39) at 163.
[146] Weil 'Symposium: Constitutionalism and secularism in an age of religious revival: The challenge of global and local fundamentalisms religious symbols in the public space' (note 26) at 2712.
[147] Zhurnalova *Religion in the public sphere: Public schools and religious symbolism-a comparative analysis* (note 83) 158.

coercion when in the form of harassment and abuse.[148] Weil, however, notes that these alternative solutions, while preferable, may be practically difficult to achieve.[149] Coercion is often hard to identify, prove and sanction and young victims may also be reluctant to identify perpetrators for fear of being ostracised and victimised by their community.[150] Weil notes that pupils who have been the victims of emotional and physical abuse have lied to their parents to avoid identifying the perpetrators.[151] However, the difficulty in implementing these measures does not justify enacting a headscarf ban which infringes on the religious freedom of those who choose to wear a headscarf and does not really prevent coercion. The alternative measures proposed by Zhurnalova are complex and involved, but offer a real solution to what is a deeply-rooted social problem which cannot be addressed by a law which focuses on the outcome of coercion and not the coercion itself.

Similarly, a headscarf ban enacted to prevent indirect coercion is not a reasonable limitation of religious freedom. First, as previously discussed there is no evidence that a teacher wearing a headscarf has an unacceptable coercive effect on children. While wearing a headscarf may force children to confront different beliefs, it does not force children to accept or proclaim certain beliefs or undermine the religious freedom of children or their parents. Secondly, any misconceptions that the state is endorsing a religion could be easily dispelled by a school clarifying that while it allows teachers to manifest their individual beliefs, the school does not endorse such beliefs. As there is no real evidence of teachers wearing headscarves unduly influencing students and schools could easily clarify that they do not endorse the religious beliefs of a teacher, a headscarf ban is an unreasonable infringement of the religious freedom of teachers.

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[148] Ibid.
[149] Weil 'Symposium: Constitutionalism and secularism in an age of religious revival: The challenge of global and local fundamentalisms religious symbols in the public space' (note 26) at 2707.
[150] Ibid.
[151] Ibid.

6.2.Equality

A headscarf ban is not capable of protecting the equality rights of women, is not necessary to achieve this goal and, in fact, has a disproportionate effect on the rights of Muslim women. As discussed earlier in this chapter, there is a striking lack of evidence that Muslim women are forced to wear a headscarf and it is therefore questionable whether a headscarf ban is required to protect the equality rights of women forced into wearing a headscarf. Furthermore, a headscarf ban precludes Muslim women who wear a headscarf, either from choice or compulsion, from education and employment and therefore perpetuates gender inequality. Dominic McGoldrick furthermore notes that a headscarf ban has a disproportionate effect on Muslim women and actually results in Muslim women being treated unequally.[152] A headscarf ban requires Muslim women to forgo fulfilling a religious requirement in order to comply with the ban while their Christian counterparts can abide by the ban without sacrificing their religious obligations.[153] Fairness does not require the identical treatment of individuals but rather that individuals should be treated with equal concern and respect.[154] A ban on the wearing of religious symbols does not accord equal concern and respect to the religious beliefs of Muslim women who believe they are obligated to wear a headscarf and therefore does not treat them equally. It is the ban on wearing a headscarf which is unfair and may result in the unequal treatment of women as opposed to the practice of wearing a headscarf itself.

6.3.Safety and order

Furthermore, a headscarf ban cannot reasonably be said to protect against religious extremism. Timothy Welch notes that the threat to any state is from fundamentalism and not

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[152] McGoldrick *Human rights and religion: The Islamic headscarf debate* (note 82) 252.
[153] Ibid.
[154] *MEC for Education Kwazulu-Natal, and others v Pillay* 2008 (1) SA 474 (CC) at 508-509 para 103.

the headscarf itself,[155] and it is questionable whether a ban on a headscarf actually protects against fundamentalism. In this regard, there is no evidence that individuals who wear a headscarf actually hold extremist views and, as discussed earlier in this chapter, the mere wearing of a headscarf should not be equated with holding fundamentalist views. Even if it is assumed that Muslim women who wear a headscarf hold extremist views, banning the headscarf does not mean that these women will cease to hold or spread these views. A headscarf ban may, in fact, have the converse effect of marginalising moderate Muslims and breed religious extremism as discussed earlier in this chapter. Accordingly, a ban on the headscarf cannot be justified on the basis of preventing the spread of religious extremism.

In respect of whether schools may reasonably ban a headscarf to protect the safety and health of students and order at schools, it is arguable that there are less intrusive means of protecting the school's interest. Welch notes that in light of similar safety and health concerns that a headscarf may be caught in equipment and poses a health and safety risk to individuals wearing it, Ikea the furniture manufacturing company, tailored the headscarf with clips to address health and safety concerns.[156] Similarly, a school may prescribe that a headscarf be clipped or pinned in a certain manner to address health and safety risks to students. This approach has been adopted by FIFA who in July 2012 lifted its headscarf ban and stated that it would allow female players to wear a specially designed headscarf that would satisfy their religious requirements and address safety concerns.[157] As these measures adequately address safety and health concerns while respecting religious freedom, a headscarf ban is arguably not a reasonable limitation of religious freedom.

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[155] Welch 'The prohibition of the Muslim headscarf: Contrasting international approaches in policy and law' (note 10) at 208.

[156] Idem at 199.

[157] 'Muslim soccer players allowed to wear headscarves', 6 July 2012, available at http://articles.cnn.com/2012-07-06/worldsport/sport_soccer-headscarf-ban_1_headscarf-asian-football-confederation-muslim?_s=PM:WORLDSPORT [last accessed on 13/09/12].

Similarly, a headscarf ban enacted with the aim of maintaining order at schools is not a reasonable limitation of religious freedom. A school may easily prescribe the colour, type and manner in which a headscarf is to be worn and tied, which would ensure uniformity between students at school and achieve the goal of regulating student's attire while respecting a student's religious freedom to wear a headscarf. In respect of minimising conflict between students, Zhurnalova notes that in France there was no evidence of violence emanating from girls who wore a headscarf in school and where a headscarf identifies girls for victimisation, a ban actually penalises the victims and prevents them from manifesting their religion peacefully.[158] Zhurnalova notes a more appropriate response is to enforce disciplinary measures against offending students rather than penalising students who may be the victims of harassment from wearing a headscarf.[159]

While a headscarf ban may pursue legitimate state interests, it is not a reasonable limitation of religious freedom. The connection between a headscarf ban and the state interests is tenuous and there is no real evidence that a ban is capable of achieving its goals. The aforegoing discussion demonstrates that a ban has the unintended effect of alienating and marginalising Muslim women wearing a headscarf which in fact perpetuates gender inequality and increases the scope for religious extremism. Furthermore, there are more appropriate and proportionate measures available for achieving the state's goals. The proper enforcement of laws, mediation between parties, counselling and education are more likely to achieve the state goals and offer a real, but less intrusive, solution than a headscarf ban. A headscarf ban does not address the real social problems and is therefore not a reasonable limitation of religious freedom.

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[158] Zhurnalova *Religion in the public sphere: Public schools and religious symbolism-a comparative analysis* (note 83) 174-175.
[159] Idem 333.

7. CONCLUSION

A headscarf is an innocuous piece of cloth worn by Muslim women in accordance with their religious beliefs to conceal the head, neck and ears. The headscarf is distinguishable from the more severe veil which conceals the face and leaves only the eyes exposed. While there is some ambiguity in the *Qur'anic* verses, the general consensus amongst Muslim scholars is that women are required to cover their heads and a headscarf is a mandatory requirement of the Islamic faith. Accordingly a headscarf, which is central to the Islamic faith, would constitute an observance and practice of the Islamic faith and is therefore protected by the right to manifest a religion.

This chapter examined certain prominent bans on wearing a headscarf, such as the French Headscarf Ban, the ban on university students wearing a headscarf in Turkey and the ban on public officials wearing a headscarf during working hours. In examining the effects of a headscarf ban, this chapter demonstrated that a headscarf ban precludes individuals from acting in accordance with their freely held beliefs and therefore may be interpreted as an attack on an individual's identity. Furthermore, Muslim women are forced to choose between abiding by their religious beliefs or obtaining a benefit such as education or employment. The undermining of a woman's identity coupled with her exclusion and alienation from the public sphere may cause significant emotional distress and humiliation and is a breeding ground for religious extremism. Accordingly, this chapter demonstrated that a headscarf ban imposes a substantial and non-trivial burden on religious freedom which cannot be justified.

As discussed in chapter three, an infringement of religious freedom may be justifiable if the limitation pursues a legitimate state purpose and is reasonable. This chapter examined the main justifications advanced to support a ban on wearing a headscarf, namely, preserving secularism, preventing coercion, promoting equality and ensuring health, safety and order.

Secularism is the idea that there should be a separation between religion and the state and the state should be neutral in respect of religion. Neutrality, however, requires the state to guard against endorsing a religion and also hindering the practice of a religion. As a headscarf ban inhibits the practice of religion, it is the ban itself that breaches the notion of state neutrality and threatens secularism. Accordingly, it is arguable that banning the headscarf does not in reality pursue the goal of secularism and cannot be justified on this basis.

Coercion may be direct, indirect or systemic and this chapter examined whether the prevention of coercion is a legitimate state interest. Direct coercion is when girls are coerced with verbal and physical abuse to wear a headscarf. While there is no evidence that verbal and physical coercion is so prevalent to warrant state intervention, a state would be entitled to intervene to prevent such coercion where it exists. This chapter thereafter examined the indirect coercive effect a teacher wearing a headscarf may have on young students. In this regard, the state has a legitimate interest in protecting the religious freedom of young, vulnerable students who cannot escape the views expressed by a teacher without considerable hardship. Systemic coercion is the idea that an individual's choices are moulded by the society in which they live and it has been argued that a woman can never voluntarily choose to wear a headscarf because it is based on values antithetical to autonomy. However, all choices in life are fashioned to a certain degree by social influences and the state lacks the expertise to assess the legitimacy of religious practices. Accordingly, the prevention of systemic coercion is not a legitimate state interest that would justify a headscarf ban.

The argument that a headscarf ban is necessary to protect the equality rights of women is popular with courts and authors though not with the actual advocates of the headscarf ban. The argument is based on the idea that the practice of wearing a headscarf is a sexist practice as it is imposed on women and not men and that a headscarf is a symbol of the subordination

of women in Islam which should not be tolerated. However, most religions discriminate between men and women and the interpretation of a headscarf as a symbol of the oppression of women is only one interpretation which does not accord with how Muslim women themselves view the headscarf. The protection of the equality rights of women is nonetheless an important state interest that states may wish to protect.

A headscarf is also often viewed as a symbol of Islamic terrorism and a ban being necessary to protect against terrorism. In this regard, ensuring the safety of citizens would constitute a legitimate state interest as states have a duty to protect against terrorism. Furthermore, the protection of the health and safety of individuals wearing a headscarf would also constitute a legitimate state interest because the loose and flowing nature of a headscarf means that it may sometimes pose a health and safety risk to individuals.

However, while a headscarf ban may pursue legitimate state interests, a ban is not a reasonable limitation of religious freedom. A headscarf ban is unlikely to achieve its objectives and may in fact have the converse effect of worsening problems of gender inequality and religious extremism. This is because a headscarf ban does not address the real social problems of violence, abuse, harassment or the exploitation of positions of power to influence others but rather focusses on the headscarf and treats the headscarf as symptomatic of the aforementioned problems. This coupled with the fact that there are more appropriate and proportionate measures available for achieving the state's goals means that a headscarf ban is an unreasonable limitation of religious freedom and therefore not justifiable.

CHAPTER 5

CONCLUSION

The right to freedom of religion is a fundamental human right which evolved from the need to protect religious minorities from unwarranted state interference. Accordingly, religious freedom today functions to protect religious minorities from discrimination and persecution, allows them to hold and practise beliefs without illegitimate interference from the majority or the state and assists in the attainment of social cohesiveness and world peace. Religious freedom also protects beliefs which define individuals and are central to identity and autonomy.

The importance of the right to freedom of religion is underscored by the fact that it is recognised in almost all major international and regional treaties and domestic constitutions, typically as the right to hold a religion or belief and the right to manifest a religion or belief. The importance of the distinction being that the right to hold a religion is considered an inviolable right while the right to manifest a religion may be subject to necessary limitations. However, when belief and action are closely intertwined, preventing individuals from acting in accordance with their religious beliefs may in fact impede on their ability to hold a belief.

The right to hold a religion protects the right to adopt, develop and change religious beliefs and protects against coercion, direct or indirect, to act contrary to religious beliefs. Policies that restrict access to education or employment on the basis of religious beliefs are coercive policies as they place improper pressure on individuals to change their beliefs. The right to manifest a religion protects the worship, observance, teaching and practice of a religion subject to certain necessary limitations. Worship and observance protect conduct by which religious adherents honour a religious deity or comply with a religious law and includes the wearing of headgear such as a headscarf. There are conflicting tests for determining whether

conduct constitutes a manifestation of religion in practice. The necessity test applied by the European Court of Human Rights requires that the conduct be required by a religion or belief and is stricter than the more widely applied test which merely requires the conduct to express a belief.

The right to manifest a religion may be limited to maintain the orderly functioning of society by ensuring that individuals do not avoid compliance with basic civic obligations on the basis of religious beliefs. Furthermore, limitations may be necessary to reconcile conflicting rights and ensure the peaceful co-existence of individuals in society. However, not every interference with religious freedom constitutes an infringement of the right requiring justification. Only laws that substantially burden religious freedom require justification. Laws that interfere with a religious belief or practice, exert coercive pressure on the religious decision-making process, exclude an individual from the public school system or prevent an individual from engaging in a practice for several hours a day may constitute a substantial burden on religious freedom.

An infringement of religious freedom may nonetheless be upheld if the infringement is justifiable. Generally, this requires an examination of whether the limitation is prescribed by law, pursues a lawful aim and is necessary or reasonable. The aims most frequently relied upon by states to justify a limitation of religious freedom are the protection of public safety, order, health, or the rights and freedoms of others. The question of reasonableness is a proportionality enquiry which examines the importance of the objective of the limitation, the connection between the limitation and objective, whether there are less restrictive means of achieving the objective and the proportionality of the effects of the limitation in relation to the importance of the objective.

This thesis demonstrates that a headscarf worn by Muslim women in accordance with their religious beliefs to conceal the head, neck and ears, is generally regarded as a mandatory requirement and fundamental part of the Islamic faith. A headscarf constitutes an observance and practice of the Islamic faith and is therefore protected by the right to manifest a religion.

A headscarf ban which precludes individuals from acting in accordance with their freely held beliefs may be interpreted as an attack on an individual's identity. Furthermore, Muslim women who are forced to choose between abiding by their religious beliefs or obtaining a benefit such as education or employment may find themselves excluded and alienated from the public sphere. As there are not always alternative avenues of education or employment opportunities, Muslim women may have to forgo these benefits entirely. Accordingly, a headscarf ban constitutes an infringement of religious freedom which is required to be justified.

An infringement of religious freedom may be justified if the limitation of the right to freedom of religion pursues a legitimate state purpose and is reasonable. This thesis demonstrates that a headscarf ban needlessly infringes on the right to freedom of religion. While a headscarf ban is hailed as a solution to a number of problems such as preserving secularism, preventing the coercion of young girls, protecting the equality rights of women and combating terrorism, there is no evidence that a headscarf ban actually achieves any of its goals. A headscarf ban may in fact exacerbate some of the very problems it is meant to combat.

While a headscarf ban may be enacted with the aim of preserving secularism, a ban actually evidences an entanglement between religion and the state. State policies that prohibit women from wearing headscarves are as problematic as state policies that compel women to wear headscarves. A state would be acting more in accordance with the principle of neutrality and separation of religion and state, if it simply allowed individuals to act in accordance with

their freely-held beliefs. Furthermore, when a state interprets a headscarf as a symbol of the oppression and inequality of women in the Islamic faith and imposes its interpretation on adherents, the state fails in its duty of neutrality and impartiality and is in fact assessing the legitimacy of religious beliefs.

A headscarf ban in educational institutions or in the workplace bars Muslim women who wear a headscarf from accessing education or employment. Without an education and limited employment opportunities, the prospects of Muslim women are severely undermined which in fact perpetuates gender inequality. Furthermore, a headscarf ban paradoxically attempts to prevent the coercion of young girls forced to wear a headscarf by coercing girls who voluntarily wear a headscarf to give it up. A headscarf ban undermines the importance of, and in some instances completely ignores, the fact that Muslim women often voluntarily choose to wear a headscarf and that the practice of wearing a headscarf is an autonomous action to be respected. A headscarf ban in fact criminalises the wearing of a headscarf and thereby subjects the very people a ban is meant to protect to a level of criminality and abuse by the law and society at large.

A headscarf ban is in reality rooted in two antithetical stereotypes, namely that Muslim women need to be rescued from the oppressive Islamic faith and Muslim women who wear a headscarf pose a terrorist risk to the world. In this regard, the increase in the number of laws prohibiting the wearing of a headscarf should be understood in the current political and social context. Post September 11, the fear of terrorism has been translated into a fear of Islamic practices. A headscarf ban in some instances is more an attempt to supress the Islamic faith and its practices which is often threatening to Western values rather than a real attempt to curb terrorism.

Accordingly, a prohibition on wearing a headscarf constitutes an unjustifiable infringement of the right to freedom of religion as such right is universally understood.

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