

## **THE WEARING OF THE HEADSCARF – THE PLIGHT OF MUSLIM WOMEN: A BRIEF COMPARATIVE SYNOPSIS\***

“O Prophet, tell your wives and daughters and the believing women that they should cast their outer garments over their bodies so that they should be known and not molested” (Qur’an 33:59).

### **1 Introduction**

In 2002 Prof JMT Labuschagne published a South African legal perspective on the Muslim headscarf entitled “Die Regsstatus van die Islamkopdoek: Opmerkinge Oor die Begrensing van Religieuse Simbole en Gebruike in die Regstaat” (2002 17 *SA Public Law* 382). In this note he referred to the legal solutions regarding the wearing of a headscarf and other religious symbols in two European countries, Germany and Switzerland, and noted that a distinction is generally made between the wearing of religious symbols in the private and public spheres with specific reference to educational institutions. He concluded that in these countries the freedom of religion, belief and opinion is one of the cornerstones of a democratic society and that there is a duty on society to be tolerant towards divergent views to ensure social peace; and that this also applies in an educational environment. However, the majority of courts, with regard to the headscarf in the public domain, require that teachers especially must be seen to be strictly neutral, making the wearing of the headscarf in a public school unacceptable.

The aim of this note is to provide an update on Germany, one of the jurisdictions discussed by Labuschagne; to expand the comparative view to other jurisdictions that have also grappled with the issue; and to set out the South African legal position.

Before the South African legal situation is discussed, the position in other jurisdictions is described. With regard to the wearing of the headscarf at educational institutions, be it schools or universities, the situation in Singapore, Turkey, France, Germany and England is of comparative interest, whilst regarding the wearing thereof at work, the French and German solutions are considered. For reasons to become clear subsequently, this distinction in South Africa is not of particular importance as the same legal principles are applicable to both scenarios.

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## 2 Foreign jurisdictions

### 2.1 Germany

In Germany, the state and church share a more co-operative approach (Eberle "Free Exercise of Religion in Germany and the United States" 2004 *Tulane LR* 1029) than in some of the other jurisdictions discussed below. The German right regarding religious freedom is that the Constitution explicitly protects the freedom of faith, conscience and religious or philosophical creed. The Constitution also protects the undisturbed practice of religion (Von Campenhausen 2004 *Brigham Young University LR* 695; and Eberle 2004 *Tulane LR* 1083). The aim of this right is to empower a person to live relatively unimpeded according to chosen tenets and to accommodate conscience in ways that complement social order (Eberle 2004 *Tulane LR* 1027-1028).

The history of state-employed teachers wearing religious dress commenced in 1986 with a few teachers wearing the reddish coloured clothing of the Bhagwan (Osho) religious movement in state schools. The court confirmed the prohibition of this activity without much debate (Hamburg High Administrative Court NVwZ 1986, 406 and Bavarian Court of Administrative Appeals, NVwZ 1980, 406 (Von Campenhausen 2004 *Brigham Young University LR* 665)). A storm was however created by three later cases. The first was a decision by the Federal Labour Court that declared the dismissal of a headscarf-wearing Muslim employee unlawful (Federal Labour Court (BAG): 10 Oct 2002, 2 AXR 472/01, NJW 2003, 1685 as quoted in Schiek "Just a Piece of Cloth? German Courts and Employees with Headscarves" 2004 *Industrial LJ* 68). The second decision, by the Federal Constitutional Court, found that a qualified schoolteacher could not be denied employment on grounds of her wearing a headscarf (Headscarf Decision (Sept 24, 2003) B Verf GE 108, 282 NJW 56 (2003), 3111, 2 BvR 1436/02 as quoted by Schiek 2004 *Industrial LJ* 68). The third case revolved around the dismissal of a crèche teacher employed through a private contract (*ie*, not a civil servant) for her refusal to remove her headscarf. Again her dismissal was set aside as unlawful (Labour Court of Dortmund, Jan 16, 2003 as quoted by Schiek 2004 *Industrial LJ* 71). Each of these three cases will be discussed in more detail.

In the first case, although not in an educational environment, a female employee employed as a qualified salesperson in the cosmetic/perfume section of the only department store in the town of Hesse donned a headscarf. Her employer dismissed her as he deemed her attire inappropriate in that it would probably negatively affect the store's sales (Schiek 2004 *Industrial LJ* 69). Although she was successful in the Labour Court (*a quo*), the Regional Labour Court ruled against her, finding that the employer may justly require employees to adapt their dress style to conform to majority standards that do not include the wearing of Muslim headscarves. This court further held that the employer rightly feared loss of sales. The Federal Labour Court, on the other hand, upheld the trial court decision and "considered that the employee's right to freedom of religion had to be balanced against the employer's economic interest". The court noted that the dispute could have been solved by less drastic means – such as moving her to another area in the shop. It further stated that a fear by an employer that sales will fall as a result of the staff member wearing a headscarf is not

sufficient reason for a dismissal. The employer can only do so after he has proved a substantial drop in sales as a direct result of the salesperson's wearing of a headscarf. In such a case the balancing of interests may lead to the opposite conclusion. The Federal Constitutional Court confirmed that the employer should be unsuccessful with a constitutional challenge (Schiek 2004 *Industrial LJ 69*).

In the second case, the headscarf-wearing applicant, Ludin, completed her degree in education, passed her preliminary state education examination and commenced her practical training in 1996. The Minister of Education granted her special permission to wear the headscarf whilst doing the required practical teaching training that was a pre-requisite for the last state examination (Schiek 2004 *Industrial LJ 69*; and Von Campenhausen 2004 *Brigham Young University LR 672-673*). The passing of this examination would under normal circumstances have secured her a teaching post first as a supply teacher and ultimately as a teacher. Unfortunately all teaching opportunities offered were subject to the condition that she remove her headscarf before entering the school (Schiek 2004 *Industrial LJ 69*). This was so even though, in one of the state schools, a Catholic nun was employed as a teacher and taught in full religious dress (Schiek 2004 *Industrial LJ 70*). Ironically, in the same year, 1998, the parliament of Baden-Wurtemberg expressly decided not to enact a general statute prohibiting a teacher from wearing a headscarf (Von Campenhausen 2004 *Brigham Young University LR 673*). The first three courts, the Stuttgart Administrative Court, the Regional Administrative Court and the Federal Administrative Court, denied her claim for equal access. She approached the Federal Constitutional Court on the basis that the following rights as contained in the constitution had been violated: the right to human dignity (art 1); the right to personal freedom (art 2); equality before the law (art 3-I); the right not to be discriminated against on the grounds of sex, parentage, language, homeland and origin, faith or religious or political opinion (art 3-III-1); freedom of faith (art 4-I) and undisturbed practice of religion (art 4-II); and equal access to public office without disadvantage on grounds of religious denomination (art 33-II) or philosophical creed (art 33-III) (Schiek 2004 *Industrial LJ 70*).

The Department of Education argued that their rejection of her application was based on the idea that the religious freedom of a teacher is limited by the fundamental rights of the students from negative religious freedom, the parent's right to upbringing of their children and the obligation of the state to neutrality (Von Campenhausen 2004 *Brigham Young University LR 674*). Specifically, that the objective effect of the headscarf was to symbolize a desire for cultural disintegration that was irreconcilable with the state's obligation to neutrality (Schiek 2004 *Industrial LJ 70*). The rights of a teacher to act in accordance with her convictions must thus retreat from the competing religious freedom of students and parents during the time of teaching (Von Campenhausen 2004 *Brigham Young University LR 675*). Neither the requirement of tolerance, nor the principle of practical harmony compelled the conclusion that the parents' right to the upbringing of their children and the religious freedom of the parents and children must be subservient to the right of the teacher to wear a headscarf (Von Campenhausen 2004 *Brigham Young University LR 675-676*).

The Federal Constitutional Court held that to deny her employment violated her right to equal access to public office, together with her freedom of faith and practice of religion and the right not to be disadvantaged on the

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grounds of religious denomination of the Federal Constitution (Schiek 2004 *Industrial LJ 70*; and Von Campenhausen 2004 *Brigham Young University LR 677-678*). The decision was a 3-5 split decision. The majority judgment found that the crux of the matter was that the area of Baden-Württemberg did not have any specific legislation to address the religious dress issue. In principle the exercise of a fundamental right, such as the right to freedom of religious expression, by a civil servant (such as a teacher) while at work, may be limited by the general demands of the position or by special requirements of the public office (Von Campenhausen 2004 *Brigham Young University LR 677*). The legislature is free to legislate the balance between the religious freedom of the teacher on the one hand and the religious freedom of pupils and parents on the other hand (Schiek 2004 *Industrial LJ 70*; and Von Campenhausen 2004 *Brigham Young University LR 677*). The minority judgment, however, *inter alia*, emphasized the role that a teacher plays as a representative of the state. Teachers, as civil servants, do not enjoy the same protection of their fundamental rights as do children and their parents, and as a civil servant, the teacher must identify herself with the state (Von Campenhausen 2004 *Brigham Young University LR 683*).

This case attracted severe criticism by Von Campenhausen (2004 *Brigham Young University LR 680-690*): firstly, for the lack of guidance by the court and the fact that the court did not grant a transition period to develop legislation; secondly, for contradicting existing judicial precedent that emphasized the primacy of protecting children and teenagers from the various dangers to their development; thirdly, for the fact that the decision would see the powerful special interest groups pressurizing for more instances to change society, making the decision "ominous". He further argued that the minority judgment was correct as it made the crucial distinction between citizens who are subject to compulsory education in public schools and the applications of teachers who have voluntarily chosen to become part of the civil service. Eberle also argues that she could have justifiably been denied a position as a teacher as the state is under an obligation of neutrality in matters of religion as civil servants are viewed as neutral agents of legal order and thus not able to exercise full basic rights in their official capacity (2004 *Tulane LR 1066*).

In the third case, a crèche teacher who was employed privately and not by the state was dismissed when she refused to continue to take off her headscarf upon entering the school as she had done for six years. The Labour Court of Dortmund held that she was an employee under a private employment contract and not a public servant. As parents are not obliged to send their children to the nearest public crèche, they are free to choose a Catholic crèche to avoid their children meeting confessing Muslims. In addition, the crèche in question could not state that they provide religiously neutral teaching, as the children are involved in preparing festivities such as Christmas and Easter. The court found that the crèche could not claim to educate the children in a religiously neutral way. This prevented the employer from requiring a neutral appearance from its employees and the employer could thus allow teachers to display signs of his/her convictions, including a headscarf (Schiek 2004 *Industrial LJ 71*). Schiek however argues that the court's approach in the headscarf issue, as a balancing of religious freedoms against entrepreneurial freedom or educational aims, ignores the relevance to religious dress of the law relating to equality (2004 *Industrial LJ 71-72*).

In Germany the crux of the cases is a balancing of rights, although the Federal Constitutional Court showed sensitivity to equality problems. These decisions have, as in France, been trumped by legislation in certain provinces. As a direct consequence of this judgment, the Baden-Württemberg parliament sought a legislative amendment arguing that as Christian values expressly underlie its Constitution, Muslim women may not be allowed to wear headscarves whilst teaching in a public environment, although nuns may (Schiek 2004 *Industrial LJ* 70). This ban was adopted ("First German State Outlaws Headscarves" 2004 *iafrica.com* sourced electronically from <http://www.iafrica.com/pls/cms/iac.page?>). Two other provinces in Germany also intend to bring in legislation to prohibit teachers from wearing headscarves while teaching (Von Campenhausen 2004 *Brigham Young University LR* 667).

The issue in Germany has, in conclusion, not been dealt with consistently. On the one hand, various courts have found that a ban on wearing the headscarf is an unjustified infringement of the rights of the Muslim woman, whilst on the other hand certain legislatures have introduced a ban on the headscarf in public schools.

## 2 2 Turkey

"Those in favour of the headscarf see wearing it as a duty and/or form of expression linked to religious identity, whereas those against regard it as a symbol of a political Islam that is seeking to establish a regime based on religious precepts and threatens to cause civil unrest and undermine the rights acquired by women under the republican system" (*Leyla Şahin v Turkey* (ECHR) 29 June 2004 App No 44774/98 par 31).

For decades there has been a struggle between secularism and Islamists over female dress code in Turkey, specifically with regard to the wearing of the headscarf in public schools and universities. Although the population of the country is 99.8% Muslim (CIA *The World Factbook* <http://www.cia.gov/cia/publications/factbook/geos/tu.html>), Turkey is a secular state adhering strictly to the separation of state and church (art 2 of the Turkish Constitution). All individuals are regarded as equal before the law without any distinction based on *inter alia* philosophical belief, religion, membership of a religious sect or other similar grounds (art 10§1 of the Constitution). Everyone further has the right to freedom of conscience, belief and religious conviction (art 24§1) and no person may exploit or abuse religion, religious feelings or things held sacred by religion (art 24§4). Article 14§1 states that "none of the rights and freedoms referred to in the Constitution shall be exercised with the view to undermining the territorial integrity of the State and the unity of the nation, jeopardizing the existence of the Turkish State or republic, abolishing fundamental rights and freedoms ... introducing discrimination on the grounds of language, race, religion ..."

The Turkish Constitutional provisions were a result of the principle of secularism developed during the reforms of the Republic and after the Ottoman Empire that required people to dress in accordance with their religion. The Constitution was based on the evolution of society to create a religion-free zone where all citizens were guaranteed equality without distinction on the grounds of religion or denomination (*Leyla Şahin v Turkey supra* par 27-29). The Headgear Act of 28 November 1925 (Law 671) treated dress as an issue of modernity and a ban was placed on the wearing of religious attire other than at places of worship (par 29). The debate

opened again in the 1980s although the ban on the wearing of the headscarf by staff and students of higher educational institutions in lecture theatres was reiterated by Cabinet (par 33-34).

In 1988 the Council of Higher Education, by means of a bylaw, allowed female students to cover their hair with a turban that was, at the time, interpreted to be a modern version of the traditional headscarf (Higher Education Act (Law 2547); *Leyla Şahin v Turkey supra* par 36; and Hirschl "Constitutional Court vs Religious Fundamentalism: Three Middle Eastern Tales" 2004 *Texas LR* 1819 1849). This was not acceptable to all. Islamic women wishing to wear the headscarf argued that a ban on the wearing of the headscarf violated their constitutional right to freedom of religious expression as well as their right to be free from discrimination based on religious creed. They argued that these provisions guaranteed their right to wear it and thus rendered the bylaw unconstitutional (Hirschl 2004 *Texas LR* 1850). In 1989 the Constitutional Court declared the bylaw unconstitutional, reconfirming the ban on the headscarf. However, "the Constitutional Court dismissed the religious freedom and equity argument because the practice of wearing a headscarf contrasted with Turkey's long-term commitment to and constitutional entrenchment of modernity" (Hirschl 2004 *Texas LR* 1850). The court went further and held that the wearing of headscarves would constitute unfair discrimination against students who adhere to other religious creeds. Religious clothing, which was not contemporary, was regarded as being incompatible with secularism (Hirschl 2004 *Texas LR* 1850 fn 212).

In 1993 the same court found that the refusal to hand over a degree certificate to a female student until she submitted a photograph of herself with her head uncovered as required by the University, was constitutional (Hirschl 2004 *Texas LR* 1850, with reference to *Karaduman v Turkey*, App 16278/90, 74 Eur.Comm HR, Dec & rep 93, 103 (1993), a decision the European Court of Human Rights (ECHR) agreed with on appeal (ECHR 29 June 2004 App No 44774/98)).

The *Şahin* judgment in the ECHR further contributed to the jurisprudence of the Turkish state. Şahin wore a headscarf during her medical studies at a Turkish university. In her fifth year the university circulated a notice that students wearing the headscarf would not be admitted to lectures, courses and tutorials and would not be included on the lists of registered students. As she fell foul of the circular, she was denied access to her examinations (par 1-2 and 10-13). This ban was found to be lawful by the Supreme Administrative Court which held: "Beyond being a mere innocent practice, wearing the headscarf is in the process of becoming a symbol of a vision that is contrary to the freedoms of women and the fundamental principles of the Republic" (par 34). The court referred to a new section 17 (1990 version) of the Higher Education Act, stating that the choice of dress must be free, provided that it does not contravene any law. This section was also interpreted by the Constitutional Court to mean that a ban on headscarves is constitutional (par 37-38 with reference to a decision of the court on 9 April 1991). It was these interpretations and decisions that induced Şahin to take the matter to the ECHR in 1998.

In the ECHR she argued that the ban on the wearing of a headscarf was an unjustified interference with her right to freedom of religion and in particular her right to manifest her religion in terms of s 9 of the European

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Convention of Human Rights. The Turkish government argued that the ban is justified under the Convention as it is prescribed by law and necessary in a democratic society in the interests of public safety, for the protection of public order, health and morals, or for the protection of the rights and freedoms of others (par 64-65). The ECHR concluded firstly that the ban did constitute an interference with her right to manifest her religion (par 71). However, secondly, it found that the ban was based on a general law preventing her from access to lectures if she continued to attend lectures in defiance of the circular (par 81). As the provision to ban is primarily in pursuance of legitimate aims of protecting the rights and freedoms of others and of protecting the public order (par 84), the court found that it was necessary in a democratic society as required by the Convention (par 114).

The ECHR based its finding on the following principles: firstly, that in democratic societies several religions co-exist and it may be necessary to place restrictions on the freedom to manifest one's religion in order to reconcile the interests of the various groups (par 97 with reference to *Kokkinakis v Greece* EHRM 25 May 1993, EHRC (A) 260); secondly, such a decision would be in line with previous ECHR cases relating to the wearing of the headscarf (par 98, with reference to *Karaduman v Turkey* (16278/90 Commission decision of 3 May 1993, DR 74, 93) and *Dahlab v Switzerland* (42393/98, ECHR 2001-V)); thirdly, the principle of secularism in Turkey had been found to be the fundamental principle of the State. This is in harmony with the rule of law and respect for human rights (par 99, with reference to *Refah Partisi (The Welfare Party) v Turkey* 41340-44/98 ECHR Grand Chamber decision of 13 February 2003); fourthly, that the role of the Convention is subsidiary to the evaluation of national authorities of local needs and conditions, especially with the wearing of religious symbols (par 100-102); and lastly, the court noted the view of the Constitutional Court in Turkey, when interpreting the significance of the headscarf as a symbol, where it is presented or perceived to be a compulsory religious duty that may have an effect on those who choose not to wear it, as well as the fact that there is an extremist political movement in the country who seek to impose on society their religious symbols as a whole (par 108-109).

The ban on the headscarf in higher education institutions was thus found to be both constitutional and also not in contravention of the European Convention of Human Rights. This judgment was taken on a further appeal to the Grand Chamber of the ECHR. This court confirmed, on 10 November 2005, that the interference in the issue was justified in principle and proportionate to the aims pursued and it could therefore be considered to have been "necessary in a democratic society". As a result the court again found that there was no violation of Art 9 (par 123). The Grand Chamber, contrary to the Chamber, was however of the view that, having regard to the special circumstances of the case, the fundamental importance of the right to education and the position of the parties, the complaint under Art 2 of Protocol No 1, could be considered as separate from the complaint under Art 9 and therefore warranted separate examination (par 129-130). As it was found that the ban had not impaired the very essence of her right to education (par 162), this issue is excluded from discussion in this note.

### 2.3 Singapore

In Singapore the government's educational policy prohibits the wearing of religious dress in public schools. The reason for the policy is to "create a 'common space' where the Singapore youth may interact without consciousness of racial or religious difference and with the goal of promoting solidarity amongst different ethnic groups" (Thio "Constitutional Development" 2003 *International Journal of Constitutional Law* 516). This ban is enforced by expulsion of learners who wear religious dress – even at primary school level. Thio notes that the nature of the issue is cultural and that the Singaporean Constitution does not safeguard minority rights expressly, although article 152 does oblige the government to "exercise its functions in a manner that takes cognisance of the 'special position of the Malay' as Singapore's indigenous people" (517), although the Malay-Muslim population in Singapore constitutes only about 14% of the total population (Thio 2003 *International Journal of Constitutional Law* 516 fn 26).

As in Turkey, the ban on the headscarf in public schools was found to be constitutional.

### 2.4 France

Likewise in France, there is complete separation between the church and the state, and religion has been banished from the public sphere as well as state institutions, especially from public schools (Von Campenhausen "The German Headscarf Debate" 2004 *Brigham Young University LR* 695). The word *laïcité* summarises this relationship between religion and state (Gunn "Religious Freedom and Laïcité: A Comparison of the United States and France" 2004 *Brigham Young University LR* 417 420).

In 2004 both the French National Assembly and the Senate passed legislation to ban students from wearing any obvious religious symbols in French public schools, including Islamic headscarves (Law 2004-228 of March 15, 2004 "*Loi encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics.*") Loosely translated as: "Law, as part of the implementation of the principle of *laïcité*, on wearing symbols or clothing that indicate religious adherence in publicly-operated schools, *college years* and *lycées years*" sourced electronically from *Wikipedia, the Free Encyclopedia* <http://www.reference.com>; and Beller "The Headscarf Affair: The Conseil D'Etat on the Role of Religion and Culture in French Society 2004 *Texas International LJ* 581 581). The initiation of disciplinary proceedings, however, should be preceded by dialogue with the student. (Beller argues that the law itself may still be subject to legal challenge to the ECHR as it may be in contravention of art 9 of the Convention as interpreted by the case law, specifically *Kokkinakis v Greece* where the court interpreted religious freedom to include the freedom to manifest one's religion (Beller 2004 *Texas International LJ* 620). No such litigation has been instituted.)

The legislation was a direct response to the recommendations of the Stasi Commission that was commissioned as a result of political debate arising from a situation in 1989 when three Muslim girls were temporarily barred from attending a public school because they insisted on wearing Muslim headscarves in the classroom. The Stasi Commission Report itself was



subject to severe criticism (Gunn 2004 *Brigham Young University LR 456ff* argues that the Report is unconvincing, inconsistent and based on unacceptable and untested evidence and research and furthermore had not taken the right to freedom of religion seriously. A discussion of this aspect falls outside the scope of this note).

The history of the headscarf issue started in 1989 when the Minister of Education requested a formal opinion from the highest French Administrative Court (*Conseil d'Etat*) on the question whether school children may wear religious insignia that identify their religious affiliation in public schools (Avis du Conseil d'Etat 346893 (November 27 1989); and Gunn 2004 *Brigham Young University LR 420*). The court based its finding on recognised constitutional and legislative texts, international obligations of France and especially the principle of *laïcité* in state education that requires that teaching is conducted with respect for the principle of neutrality by the teachers and their programmes. It also considered the freedom of religion and conscience of the student, which includes the right to express and to manifest their religious beliefs inside schools. The wearing of religious symbols by the students, through which they wish to express their membership of a religion, is not on its own incompatible with the principle of *laïcité*, and acceptable religious symbols may be worn as long as they are not so ostentatious as to constitute an act of intimidation, provocation, proselytising or propaganda, threaten dignity of students or other members of the education community, or disrupt the functioning of the school (Beller 2004 *Texas International LJ 584* and 609-611; Gunn 2004 *Brigham Young University LR 455*; Weydert "The Separation of Church and State in France" in Naber (ed) *Freedom of Religion: A Precious Human Right* (2000) 80; and Tahzib-Lie "The Advancement of Woman's Equal Empowerment of the Right to Freedom" in Naber (ed) *Freedom of Religion: A Precious Human Right* (2000) 54 58. Tahzib-Lie rejects this argument on public order as untenable and disproportionate, unnecessary and discriminatory (59). A discussion of this aspect falls outside the scope of this note).

The finding of the court, however, was only persuasive and not binding and there was little power of enforcement, although the finding was generally respected (Beller 2004 *Texas International LJ 603* and 607). The finding of the court still burdened the individual schools with the final decision (Weydert 80). Between the years of 1992 and 1999 the *Conseil d'Etat* ruled in favour of headscarf-wearing students in 41 of the 49 cases it heard, but there remained the possibility of prohibiting the wearing of scarves in individual cases (Beller 2004 *Texas International LJ 586*). One of these cases serves as an example: in Lyon in 1995, two girls were expelled for refusing to discard their scarves whilst participating in physical education. The *Conseil d'Etat* ruled that the school regulations were not unduly restrictive and did not have the effect of outlawing the scarves altogether. The refusal by the girls to remove the scarves constituted an interference with the normal functioning of their education and a disruptive violation of the school's order (Beller 2004 *Texas International LJ 619*). This uncertainty is now rather academic in light of the 2004 legislation by the French legislature banning the wearing of the headscarf.

In conclusion it is reiterated that in France there is currently a statutory ban on the wearing of the headscarf in public schools notwithstanding a record of judicial decisions to the contrary.

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## 2 5 *England*

The issue of the headscarf in state schools came to the fore in the United Kingdom in the recent Court of Appeal case of *R (On the Application of SB) v Headteacher and Governors of Denbigh High School* [2005] EWCA Civ 199, ([2005] All ER 396). SB was a devout Muslim and a pupil at a local state school where the majority of the pupils are Muslim and are required to wear a school uniform in accordance with the school policy. The policy was developed in consultation with local religious groups and included the headscarf and *shalwar kameeze* (type of pants tapered at the ankle). The clothes were designed to be in conformance with health and safety requirements. Although SB had initially been satisfied with the uniform, she later formed the view that the *shalwar kameeze* was not the religiously acceptable form of dress for a mature Muslim woman and did not comply with the strict requirements of her religion, as it does not cover the arm and leg as required by the Islamic Dress Code. In 2002 she arrived at school wearing a "*jilbab*" (sic) which concealed the shape of her arms and legs in accordance with the requirements of her faith. She was told to return home, change into acceptable school uniform and then only could she return to school (par 1-15).

SB applied for judicial review of the school's decision to "exclude" her and contended that this act was incompatible with the European Convention on Human Rights (art 9), her freedom to manifest her religious beliefs, and the right to education (Protocol No 1, Art 2). She had not attended school for two years as a result of the impasse. The Administrative Court ([2004] EWHC 1389 (Admin); [2004] ELR 374; (2004) ACD 66) dismissed her application and found that the school's refusal to allow the claimant to attend until she was wearing the correct uniform did not amount to an exclusion; and even if she had been excluded, there was no interference with art 9 because the exclusion was as a result of her refusal to abide by the uniform policy rather than her religious beliefs. There furthermore had not been an interference with the Protocol as the claimant could have continued to receive an education by complying with the school's policy or by attending a different school which did allow the *jilbab* to be worn (par 16).

On appeal, the Court of Appeal found that the school had excluded the claimant and that the application of the uniform policy was an interference with her freedom to manifest her religion or beliefs and pointed out that the starting point should have been that the claimant had a right to manifest her belief and that the onus was on the school to justify its interference with that right as being necessary in pursuance of a legitimate aim. The school had failed to do this and it was therefore concluded that on procedural grounds the school had acted unlawfully (par 82).

In conclusion, the court did point out that it would not be impossible for a school to justify its stance if it were to consider its uniform policy in the light of the court's judgment. This might include a determination not to alter its policy in any significant way. The role of the court was not to undermine the school or the school authorities, but rather to decide whether the claimant was unlawfully excluded and unlawfully denied her right to manifest her religion (par 81). It should be noted that an appeal has been lodged in the House of Lords – to be heard early in 2006.

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The current situation in the English courts is thus that a ban on the wearing of certain religious clothing may be appropriate, but that the matter should be dealt with procedurally correctly and in light of the Convention and judicial precedent.

### 3 South Africa

“Freedom of religion includes the right (a) to have a belief; (b) to express that belief publicly and (c) to manifest that belief by worship and practice, teaching and dissemination” (Currie and De Waal *The Bill of Rights Handbook* (2005) 5ed 339. See also *Prince v President, Cape Law Society* 2002 2 SA 794 (CC) par 38; *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) par 19; and *S v Lawrence* 1997 4 SA 1176 (CC) par 142 *et seq*).

The following two South African incidences serve as illustration of the legal problems relating to the headscarf: In 1998 the state-aided public high school in Ladysmith refused to enrol a headscarf-wearing Muslim pupil as her headscarf did not form part of the dress code of the school (Henrard “The Accommodation of Religious Diversity in South Africa Against the Background of the Centrality of the Equality Principle in the New Constitutional Dispensation” 2001 45 *Journal of African Law* 51 70 fn 132). It was only after the intervention of the KwaZulu-Natal Education Department that she was allowed re-entry to the school. The Department argued that the learner should not be prejudiced by the fact that a parent did not agree with certain aspects of the code of conduct for learners at a public school by insisting on their daughter wearing the headscarf (Cassim “Understanding Woman’s Rights in Islam” 1999 40(1) *Codicillus* 2-9). This matter was settled and did not reach the courts.

The second incidence came to the fore in July 2005 when a social worker of the Department of Correctional Services was twice suspended for wearing a headscarf and refusing to tuck her shirt into her trousers. She chose to cover her body’s shape in accordance with Muslim dress code. Her second suspension came after she had been found guilty of gross insubordination, but she was reinstated on condition that she removed her headscarf and tucked in her shirt in accordance with the Departmental dress code, which she refused to do (Rickard “Muslim Prison Worker Barred for Headscarf” 2005-07-24 *Sunday Times* <http://allafrica.com/stories/printable/200507240040.html>). The outcome of this matter was still unknown at the time of completion of this note. Although she was dismissed in October 2005, the internal appeal process has not yet been completed (confirmed telephonically by Ms A Malan, Legal Advisor, Department of Correctional Services, Regional Office, to Professor M Carnelley, co-author of this note).

In South Africa there is not a strict separation between church and state – even after promulgation of the Constitution of the Republic of South Africa, 1996 – as religious observances are allowed at state and state-aided institutions (s 15(2) of the Constitution, on an equitable basis; Currie and De Waal 346-351; and Smith “Freedom of Religion Under the Final Constitution” 1998 *SALJ* 217 221). The Constitution provides that “everyone has the right to freedom of conscience, religion, thought, belief and opinion” (s 15), that includes the right to have a belief; to express that belief publicly and to manifest that belief by worship and practice, teaching and dissemination. This right is horizontally applicable (see Currie and De Waal 346ff for their discussion of s 9(4)). In fact, the Constitutional Court held that the state is required to acknowledge the value of religious diversity and the right to be

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different (*Christian Education South Africa v Minister of Education supra* par 19-24; and see discussion of Roos "Gender Differentiation within Religious Communities" 2004 *Speculum Iuris* 96-106).

Any Muslim woman is thus entitled to express her religious belief publicly and to manifest that belief, *inter alia*, by the practice of the wearing of the headscarf, whether it is at a public school or in her place of employment (in analogy with *S v Lawrence supra* par 92; *Prince v President, Cape Law Society supra* par 77; and *Christian Education South Africa v Minister of Education supra* par 19). Any exclusion from a school or from her place of employment, based on her wearing a headscarf, should in principle be regarded as an infringement of her right to freedom of religion. In similar vein, the extent to which any school's Code of Conduct or an employers' Conditions of Service fails to accommodate the wearing of such religious symbols *prima facie* would constitute an infringement of her rights, as these documents must also be interpreted in light of the constitutional rights expressed in the Constitution (see discussion of *Antonie v Governing Body, Settlers High School* 2002 4 SA 738 (C)).

The right to freedom of religion may, however, be justifiably limited in certain instances where it conflicts with other rights. The onus of proof is on the party asserting that a violation of the right is justified by the limitation clause (*Ferreira v Levin NO* 1996 1 SA 984 (CC) par 44). A justifiable limitation was noted in relation to corporal punishment in schools, as it violates the right to human dignity (s 10) and the protection against cruel, inhumane and degrading treatment or punishment (s 12(e); and *Christian Education South Africa v Minister of Education supra* par 50-52). Similarly, the general statutory prohibition on the possession of cannabis was regarded as a violation of a Rastafarian's right to freedom of religion, but justifiable in terms of the limitation clause (s 36) as an exception to the statutory provision would not be feasible, would be difficult to police and would undermine the general prohibition (*Prince v President, Cape Law Society supra* par 38 and 133ff). On the other hand, in *Wittmann v Deutscher Schülverein, Pretoria* 1998 4 SA 423 (T), the court found that the right to freedom of religion includes the right to exclude non-conformers in a *private* education scenario based on the right of freedom of association. The last two judgments can be distinguished for current purposes as wearing of a headscarf is firstly not against the law and secondly our focus is on state schools, not private schools.

Although the issue of the headscarf in a public school or in an employment scenario has not served before the South African courts, the case of *Antonie*, however, is helpful. In this matter the court had to decide whether the suspension of a 15-year-old school girl was lawful. Her suspension arose from the wearing of dreadlocks and a head covering in accordance with her Rastafarian religion that, according to the governing body, was in contravention of the school's code of conduct. The court, in considering the issue, *inter alia* interpreted the legislation (South African Schools Act 84 of 1996 as read with the Guidelines) and the school's code of conduct in light of the applicable constitutional principles: specifically the right to dignity and freedom of expression (and not the right to freedom of religion). Although these rights are not absolute, the court found that any prohibition on dreadlocks and a cap, if it was prohibited (which they doubted), would not be justifiable in an open and democratic society (par 14-15).

Looking at the headscarf issue in the light of the limitation clause in the Constitution (s 36), it is clear that to be justifiable, limit any human right may only be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (s 36(1)), taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and whether there are less restrictive means to achieve the purpose. With regard to the nature of the right, the Constitutional Court noted in both the cases of *Christian Education South Africa v Minister of Education* (*supra* par 36) and *Prince v President, Cape Law Society* (*supra* par 75; 223) that the right to freedom of religion, belief and opinion is one of the most important human rights. In limiting this right, the limitation must be important and serve a legitimate purpose. Could it be argued that permitting the wearing of the headscarf would cause a disturbance, as was argued in *Antonie*? “The disturbance presumably relates to the behaviour of other learners, who presumably would think that the Rules no longer have value” (Applicant’s Heads of Argument (par 90)). The answer hereto is that any infractions of the Code of Conduct must be dealt with individually and on their own facts (Applicant’s Heads of Argument (par 90-92)). In South Africa, where diversity and pluralism should be encouraged by the protection of religious differences (*Christian Education South Africa v Minister of Education supra* par 23-24), “a limitation based on the intolerance of difference cannot be justified” (Applicant’s Heads of Argument (par 93)). There is thus no significant importance and purpose of the limitation on the wearing of a headscarf as a religious observance. It is further important to note that the nature and extent of the limitation on the wearing of a headscarf is significant, as it strikes at the heart of the religion of the Muslim woman. The last point to be considered is the possibility of a less restrictive means to limit the right. An expulsion from school or dismissal from employment arising from the wearing of the headscarf, may not necessarily be the least restrictive manner in dealing with the issue. Other options should be investigated and would depend on the facts of each case. The question of justifiability in terms of the limitation clause is problematic. In the case of the social worker, could it not be successfully argued that the headscarf could potentially create a security risk within the prison and that as such the limitation on the freedom of religion (*ie* the ban) might be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom? It could be argued that a lesser option would be to go through a daily security check if it is not done already. If her rights are weighed up against the corporate identity of the Department, her rights should surely weigh heavier than a dress code and such a dress code cannot be a sufficient reason to overrule her human rights. But any finding would ultimately depend on the circumstances and facts applicable to the situation – circumstances and facts that are not currently at our disposal.

Currie and De Waal identify three techniques from the jurisprudence, used by the courts to restrict the scope of this right to freedom of religion: firstly, investigating the sincerity of the claimant’s belief; secondly, the claimant must show a “substantial burden” on the exercise of the freedom of religion or that the prohibited practice is a “central tenet” of the religion; and thirdly, the court will not protect practices under section 15 of the Constitution that are specifically excluded from protection elsewhere in the Constitution (342).

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Applying the three techniques identified above to the headscarf controversy, an applicant wishing to challenge a ban on the wearing of a headscarf would need to show firstly, that her belief is sincere, secondly, that the practice is a “central” tenet of the religion and thirdly, that the practice is not specifically excluded elsewhere in the Constitution. With regard to the first issue the evidence would have to show that the applicant is sincere in her beliefs. This is normally not an issue. The next question is whether the wearing of the headscarf is a central tenet of her religion. There is not always conformity by women in the Muslim faith regarding the wearing of the headscarf. Does this mean that it is not a central tenet of Islam? In the *Christian Education* judgment the practice of “biblical correction” was held not to be a central tenet to the Christian religion (9601-J), and in *Garden Cities Inc Association v Northpine Islamic Association* 1999 2 SA 269 (C) the electronic amplification of the call to prayers was held not to be a central tenet to the Islamic faith. There has not been a finding on the headscarf issue specifically. However, not once in all the judgments around the world, was the headscarf not regarded as a central tenet of the Islamic religion. There is no reason why this should not be the case in South Africa. With regard to the third technique relating to other applicable provisions in the Constitution, it cannot be said that the Constitution elsewhere excludes the headscarf from protection.

It might be argued that, by signing the school’s Code of Conduct or the Employment Conditions, the woman waived her future rights to express her religion. The Constitutional Court has however found that the fundamental freedoms and rights cannot be waived (*Mohamed v President of the RSA* 2001 3 SA 893 (CC) par 55-56).

In view of the above it is submitted that a scholar wishing to attend a state-aided school and an employee should be able to wear a headscarf as a manifestation of her religion unless the limitation is justifiable in terms of the Constitution.

With regard to scholars, the submission is in line with the Draft National Guidelines on School Uniforms presented to the Education Portfolio Committee in April 2005 (<http://www.pmg.org.za/viewminute.php?id=5741>). The purpose of the guidelines is to ensure that practices related to school uniforms do not impede access to education or infringe on the constitutional rights of learners. The guidelines include a provision that “a school uniform policy must accommodate pupils whose religious beliefs are substantially burdened by a uniform requirement. When the wearing of particular attire, such as yarmulkes and headscarves, during the school day is part of a pupil’s religious practice, under the Constitution schools generally may not prohibit the wearing of such items”. This is not a final document and is subject to further debate and possible change. It seems as if the right to wear a headscarf would be, on the face of it, protected. However it nonetheless leaves open the possibility that it might in certain circumstances be challenged.

#### **4 Conclusion**

The wearing of a headscarf in certain instances is clearly controversial in various countries. How the issue is dealt with differs from country to country in light of the relationship between the state and the church, as well as the

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relevant constitutional provisions. Where there is a complete separation of church and state, such as in France, Turkey and Singapore, and even where the population is predominantly Muslim such as in the latter two countries, the wearing of the headscarf by public officials and in educational institutions is prohibited.

In countries where the separation is not so strict, such as Germany and England, the courts have mostly ruled that a ban on the wearing of the headscarf is in contravention of the human rights of the woman. What is notable is that in both Germany and France there is a trend, by the legislative bodies, to place a ban on the headscarf notwithstanding judicial decisions to the contrary. In South Africa the legal environment seems more tolerant and such a legislative ban on the headscarf is unlikely.

It should lastly be noted that the principles regarding the headscarf should in South Africa also be applicable to other religious symbols such as the Roman Catholic nun's habit and priest's collar, the Jewish yarmulke (skullcap), and the Sikh turban, to name a few. Whether it would extend to mere cultural symbols, as opposed to religious symbols, such as a Hindu nose stud, is doubtful, but this issue falls outside the scope of this note (see in this regard *Pillay v KwaZulu-Natal Minister of Education* (Durban Equality Court) 2005-09-39 unreported case number 61/2005).

In conclusion, the words of Labuschagne:

“Elke geval sal op eie regstaatlike meriete hanteer moet word, dit wil sê die veel geroemde idee van praktiese konkordansie sou in 'n deurslaggewende gewaad in spel kom. Dit sou myns insiens in finale instansie slegs optimal verwesenlik kon word deur ... geestelik-intellektuele interaksie, diskoersvoering, derhalwe, van al die betrokkenes” (2002 *SA Public Law* 393).

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