

# Islamic headscarves, sikh turbans, crucifixes and proselytism: What has become of religious freedom in Europe?

## 1 Introduction

Religious freedom as a right is expressed in article 18 of the Universal Declaration of Human Rights;<sup>1</sup> article 18(1) of the International Covenant on Civil and Political Rights;<sup>2</sup> article 8 of the African Charter on Human and Peoples Rights;<sup>3</sup> article 12 of the American Convention on Human Rights<sup>4</sup> and article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>5</sup> Also deserving mention is the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.<sup>6</sup>

It is trite that no single topic generates greater controversy than the relationship between the state institutionalisation of religion or a religious belief and human rights norms.<sup>7</sup> Religious beliefs and human rights can be complimentary in that they convey similar sentiments. On the other hand it can be submitted that religious practices may impinge on human rights where the primacy of such practices, for example, is asserted over human rights. One finds secular states that seek to limit the role of any organised religion. At the other extreme there are fundamentalist states that do not tolerate other forms of religious expression. States vary from supporting religious culture, to neutrality and to active opposition to religious teachings and demands. The spectrum is wide ranging from a strict separation between church and state in the United

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<sup>1</sup>GA Res 217 A(111) 10 December 1948.

<sup>2</sup>999 UNTS 171; (1967) 6 *ILM* 368.

<sup>3</sup>(1982) 21 *ILM* 58.

<sup>4</sup>1144 UNTS 123; 1970 9 *ILM* 673.

<sup>5</sup>213 UNTS 221; European TS 5.

<sup>6</sup>1981 UNGAR 55(VI) (1982) 21 *ILM* 205. See Sullivan 'Advancing the freedom of religion or belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination' (1988) 82 *AJIL* 487.

<sup>7</sup>Van der Vyver and Witte (eds) *Religious human ights in global perspective* (1996).

States<sup>8</sup> to a pervasive interrelationship between Islam and the state such as in Iran, which became an Islamic republic in 1979.<sup>9</sup> In Africa the constitutions of the Comores, Mauritania, Libya and Somalia proclaim Islam as the state religion. In the Sudan all legislation must conform to Islamic prescriptions. In Norway, the king and a majority of cabinet are required to be members of the state church. In England the Anglican Church (as 'representative' of the official religion) remains at the centre of public policy and receives substantial support from the state. Some European countries such as Spain, Italy, Greece and Belgium provide for certain religious dominations in the state budget.

The large flow of immigrants in recent times from developing countries to Europe has led to complex cultural mixes. Many migrants bring cultural and religious beliefs and practices with them and seek to continue to adhere to such beliefs and practices. One or other form of dress is frequently a burning issue or some traditional practice causes hostility in host states. Conflicts arise as to whether such practices should be allowed to be continued in the host state. Severe sanctions may await those who refuse to surrender their beliefs and ways. Such conflicts raise serious human rights issues.

An example of such conflicts has played out and continues to dominate the human rights debate in Europe. Europe has experienced a ghettoised and rapidly growing minority population. By 2004 for example Muslims constituted nearly 5 per cent of that continent's population.<sup>10</sup> The waves of immigrants and asylum seekers from the Middle East and North Africa to Europe are increasing. Such growing immigrant populations are highly visible in the industrialised urban areas such as Berlin's Kreuzberg district, London's Tower Hamlets and the *banlieus* of major French cities. Such migrants no longer constitute temporary guest workers but have become a permanent part of the national landscape of Western Europe. The current generation of migrants to Europe and their children are acculturating to modern European society at a rapid rate. They are adopting attributes of the European societies in which they live by means of language, schooling and socialisation. Such assimilation does however not necessarily mean that the immigrants and their children do not want to maintain their distinct identity, beliefs and practices. They fear that total assimilation and immersion will strip them of their distinct identity. The idea of a secular society is for the most part alien to the immigrant societies of Europe.

Featuring heavily in the mix of immigrant populations and their religions plus the traditional populations of Europe and their religions, are the ECHR and the

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<sup>8</sup>The so-called 'establishment clause' of the First Amendment to the Constitution of the United States. See *Lynch v Donnelly* 465 US 669; 104 S CT 1355 (1984).

<sup>9</sup>Alston and Goodman *International Human Rights* (2013) 531.

<sup>10</sup>Savage 'Europe and Islam: Crescent waxing, cultures clashing' (2004) 27 *The Washington Quarterly* 25.

European Court of Human Rights. The principal role of the European Court of Human Rights is to pronounce on applications which can be brought by both individuals and states under the ECHR.<sup>11</sup>

## 2 European Convention on Human Rights

Article 9 of the ECHR provides

1. Everyone has the right to freedom of thought, conscience and religion; the 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.
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 or public order, health or morals, or for the protection of the rights and freedoms of others.

Religious freedom is not only a matter of belief: it can also be a matter of symbols, observance and rituals. The ECHR accordingly guarantees the right to manifest one's religion or beliefs in practice and observance, subject to the requirements of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others.

Looking at the religious diversity one now finds in Europe it stands to reason that differences may arise as to the *interpretation* of Article 9 of the ECHR which mandates the right to manifest one's religion or belief in practice or observance subject to certain requirements. Would the wearing of distinctive clothing or head coverings or the displaying of basic religious symbols be protected by article 9 of the ECHR? One's initial reaction would be to react positively to the posed question. One's initial assumption would be that wearing the Islamic headscarf<sup>12</sup> and the Sikh turban and displaying the Christian crucifix would be protected by the freedom of religion expressed by article 9 of the ECHR. Such an assumption would be incorrect if one were to rely on decisions of the European Court of Human Rights in interpreting article 9 of the ECHR. In *Leyla Sahin v Turkey*,<sup>13</sup> *Suku Phull v France*<sup>14</sup> and *Lautsi v Italy*<sup>15</sup> the European Court of Human Rights prohibited the wearing of a *hidjab* (veil or headscarf); it initially held (in a

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<sup>11</sup>For the proceedings before the European Court of Human Rights see Barrie 'International Human Rights Conventions' in LexisNexis *Bill of Rights Compendium* (issue 31) 1B64.

<sup>12</sup>See the United Nations Human Rights Committee, General Comment No 22: The Right to Freedom of Thought, Conscience and Religion, CCPR/C/31/Rev 1/Add 4, 30 July 1993, para 4.  
<sup>13</sup>(2005) 41 EHRR 8.

<sup>14</sup>ECHR *Phull v France* 11 January 2005.

<sup>15</sup>(2010) 50 EHRR 42.

Chamber) that the presence of a crucifix in a state school classroom was *incompatible* with freedom of religion and declared a complaint regarding a Sikh who was compelled to remove his turban at an airport security check as inadmissible due to the complaint being manifestly unfounded. As can be expected these European Court of Human Rights' decisions created much publicity – much of it was adverse.<sup>16</sup>

### 3 Sahin

In *Sahin's* case the applicant was a fifth-year medical student. She was denied access to lectures, examinations and enrolment at a Turkish university and was eventually suspended for wearing a *hidjab*<sup>17</sup> (veil or headscarf). The Turkish administrative courts ruled that the measures taken by the university were *not* contrary to article 9 of the EHRC because they had a statutory basis and complied with settled Turkish constitutional jurisprudence. According to the latter it was contrary to the principles of secularism and equality for the neck and hair to be covered by a veil or headscarf on grounds of religious conviction at institutions of higher education. Sahin then filed an application before the European Court of Human Rights. A Chamber found that the university regulations had interfered with Sahin's right to manifest her religion but went on to find that the interference was prescribed by law and complied with two of the legitimate aims of the second paragraph of article 9 of the ECHR ie protecting the rights and freedoms of others and protecting the public order. The Chamber held further that the interference was justified in principle and proportionate<sup>18</sup> to the aims pursued and could thus be seen to be necessary in a democratic society.

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<sup>16</sup>Richards 'Voluntary codes of conduct for religious persuasion' (2011) 6 *Religion and Hum Rts* 151; Rorive 'Religious symbols in the public space: In search of an European answer' (2009) 30 *Cardozo L Rev* 669; Danchin 'Islam in the secular nomos of the European Court of Human Rights' (2011) 32 *Mich J Int'l L* 663; Calo 'Pluralism: Secularism and the European Court of Human Rights' (2010-11) 26 *J L and Religion* 261; Canchin 'Of prophets and proselytes: Freedom of religion and the conflict of rights in international law' (2008) 49 *Harv Int'l L J* 249; Evans 'The Islamic scarf in the European Court of Human Rights' (2006) 7 *Melbourne Law Journal* 52; McGoldrick *Human rights and religion: The Islamic headscarf debate in Europe* (2006); Marshall 'Conditions for freedom: European human rights law and the Islamic headscarf debate' (2008) 30 *Human Rights Quarterly* 631.

<sup>17</sup>A *hidjab* is a square scarf worn by women that covers the head and neck but leaves the face clear. It differs from the *niqab* which covers the face but leaves the area around the eyes clear. It also differs from the *burqa* which covers the entire face and body leaving a mesh screen to see through.

<sup>18</sup>For the application of proportionality see Barrie 'The application of the doctrine of proportionality in South African courts' (2013) 28 *SAPL* 40; Barak *Proportionality, constitutional rights and their limitations* (2012).

Sahin requested that the case be referred to a Grand Chamber. The Grand Chamber<sup>19</sup> dismissed Sahin's claim that her freedom of religion as guaranteed by article 9 of the ECHR had been violated. The interference with Sahin's freedom of religion was acknowledged but in view of the Turkish states' margin of appreciation for the principle of secularism enshrined in the Constitution, the Grand Chamber saw the interference as justified in principle and proportionate to the aim pursued. Sahin's claims based on article 8 (respect for private life); article 10 (freedom of expression); article 14 (non-discrimination) and article 2 of Protocol 1<sup>20</sup> of the ECHR (right to education) were also rejected by the Grand Chamber of the European Court of Human Rights.

The dissenting opinion of judge Tulkens is very much in line with the criticism the majority judgment in *Sahin's* case received. Tulkens was of the opinion that in a democratic society it is necessary to harmonise the principles of secularism, equality and liberty, and not to weigh one against another. Tulkens could see no basis for the majority holding that, by wearing a headscarf Sahin had breached the principle of secularism. On the contrary: he held that Sahin had no intention of calling secularism into doubt. Sahin's headscarf was worn as a religious symbol, was not ostentatious or aggressive, was not used to provoke a reaction, to proselytise or to spread propaganda or to undermine the convictions of others. He held further that it was never suggested nor demonstrated that Sahin had disrupted the teaching or everyday life at the university. He also could not see how the wearing of a headscarf could be associated with fundamentalism or extremism and found that there was nothing to suggest that Sahin held fundamentalist views. Tulkens could not see how the wearing of a headscarf could be synonymous with the alienation of women or how a ban on wearing the headscarf could be seen to be promoting equality between men and women. He did not see how wearing a headscarf could symbolise the submission of women to men, as was held by the majority. According to Tulkens, Sahin wore her headscarf of her own free will. Tulkens also disagreed with the majority's views that there was no breach of article 2 of Protocol 1 regarding the right to education. He finally expressed concern, in the European context, of a climate of hostility against Muslims and emphasised that the best means of preventing and combating fanaticism and extremism is to uphold human rights.

*Sahin's* case followed on *Dahlab v Switzerland*<sup>21</sup> where the European Court of Human Rights had four years earlier, held that an application brought by a primary school teacher who had been sacked for wearing a headscarf was

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<sup>19</sup>(N 13).

<sup>20</sup>Article 2 of Protocol 1 provides that no person shall be denied the right to education. Further that the state shall respect the rights of parents to ensure that teaching and education is in conformity with their own religious convictions.

<sup>21</sup>No 42393/98, ECHR 2001-V.

manifestly unfounded. *Sahin* can also be seen following *Karaduman v Turkey*<sup>22</sup> where the then European Commission of Human Rights found that a university regulation prohibiting Muslim students from wearing a headscarf on identity cards did not constitute interference with the right to manifest one's religion.

*Sahin's* impact has been significant and is seen as a cornerstone of the European Court of Human Rights' views on religious freedom in the public space. In *Kurtulmus v Turkey*<sup>23</sup> the Court saw secularism as a fundamental principle of the Turkish state and found Turkey's decision to ban the wearing of headscarves by university lecturers acceptable. In *Kervanci v France*<sup>24</sup> the Chamber of the European Court of Human Rights quoted *Sahin* nine times in holding that there was no violation of article 9 of the ECHR when a pupil in a French public school had been expelled for wearing a headscarf in the gymnastics class. In *Jasvir Singh v France*<sup>25</sup> the Court upheld the expulsion of a boy from a French public school pursuant to a 2004 law forbidding religious clothing at schools. The boy had worn a small unobtrusive turban known as a *keski*. All these post-*Sahin* European Court of Human Rights decisions relating to article 9 of the ECHR were motivated by the aim of safeguarding the principle of secularism.<sup>26</sup>

Certain political developments post-*Sahin* require mention. In 2008 Turkey's parliament, by an overwhelming majority, amended the Constitution to allow women to wear headscarves on university campuses. The Constitutional Court, however, invalidated the measure on the ground that it violated the Turkish Constitution's foundational commitment to secularism. In 2010 sweeping changes were made to the Turkish Constitution after a national referendum.<sup>27</sup> In the same year the Turkish Higher Education Council eased restrictions on headscarves at state universities by announcing that no disciplinary action could be taken for infractions of dress codes. The ban on headscarves however remained unaltered in secondary schools. In mid-2012 the Education Ministry announced that a proposed educational reform bill would allow secondary school female students to wear headscarves during lecture courses on religion.<sup>28</sup>

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<sup>22</sup>74 DR 93 (1993).

<sup>23</sup>No 65500/01, 24 January 2006 (admissibility).

<sup>24</sup>No 31645/04, 4 December 2008.

<sup>25</sup>No 25463/08, 30 June 2009.

<sup>26</sup>Brems (ed) *Diversity and European Human Rights* (2013) 196.

<sup>27</sup>For a discussion of the changes see Herzog 'FPC Briefing: Analysing Turkey's 2010 constitutional referendum available at <http://fpc.org.uk/articles/485> (accessed 2014-02-14).

<sup>28</sup>Alston and Goodman (n 9) 642.

## 4 Suku Phull

In *Suku Phull v France*<sup>29</sup> a Sikh, who was compelled to remove his turban at a security check at the Strasbourg airport, complained that this act violated his freedom of religion. Suku Phull argued that it was not necessary to make him remove his turban as he did not object to walking through the scanner nor did he refuse to be checked by a hand-held detector.

The European Court of Human Rights declared the application was manifestly ill-founded. The Court's reasoning consisted of two distinct parts. Firstly the Court accepted that interference with Suku Phull's freedom of religion took place, but held that the interference was prescribed by law and that it pursued a legitimate aim listed in article 9 of the ECHR ie public safety. Secondly the Court asked whether the interference was necessary in a democratic society in the interests of public safety as set out in the second paragraph of article 9. For the necessity test the European Court of Human Rights referred to a European Commission of Human Rights case, *X v United Kingdom*,<sup>30</sup> where a turban-wearing Sikh who failed to comply with safety regulations concerning the compulsory wearing of a motor helmet, alleged a violation of his freedom of religion. The European Commission of Human Rights held that the claim was ill-founded because the obligation to wear a helmet was a necessary safety measure and that any interference with applicant's freedom of religion was justified for the protection of applicant's health as set out in article 9(2) of the ECHR. This reasoning of the European Court of Human Rights transposed to the case of Phull. It concluded that Phull's claim was manifestly ill-founded as security checks at airports are necessary in the interests of public safety.

This reasoning of the European Court of Human Rights was followed in *El Morsli v France*<sup>31</sup> where a Muslim woman refused to remove her veil in a French Consulate during an identity check. The Court saw the application as inadmissible and saw no reason to deviate from the reasoning in *Phull*. The decision is open to criticism as El Morsli argued that she would not have been opposed to an identity check if it had taken place in front of a woman.

*Phull's* case is in stark contrast to the Canadian case of *Multani v Commission Scolaire Marguerite-Bourgeoys*,<sup>32</sup> which concerned a pupil who was prohibited from wearing his *kirpan*<sup>33</sup> at school. According to the Canadian Supreme Court, an absolute prohibition on wearing a *kirpan* would stifle the

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<sup>29</sup>(n 14).

<sup>30</sup>EcommHR 12 July 1978, <http://strasbourgconsortium.org/document.php? DocumentID = 4845> (accessed 2014-02-14).

<sup>31</sup>ECHR, 4 March 2008.

<sup>32</sup>(2006) 1 SCR 256; 2006 SCC 6.

<sup>33</sup>A *kirpan* is a religious object that resembles a dagger and is made of metal.

promotion of values such as multi-culturalism, diversity and the development of an educational culture respectful of the rights of others. According to the Canadian Supreme Court, the deleterious effects of a total prohibition on wearing a *kirpan* outweighed its salutary effects. *Multani* is an example of how courts can acknowledge the religious conviction of a person belonging to a religious minority by seeing the issue in a broader social context of multi-culturalism.

The main criticism against *Phull* is that the state did not show that any alternative approach had been considered and that the state did not adequately show that the measure was necessary in a democratic society. Critics conclude that France violated Phull's right to freedom of religion by compelling him to remove his turban.<sup>34</sup>

## 5 Lautsi

A third case that requires reference is *Lautsi v Italy*. The initial decision of the Chamber<sup>35</sup> of the European Court of Human Rights had an unprecedented political response in terms of human rights in Europe. The decision of the Chamber caused widespread opposition and twenty states joined Italy in their vociferous protests.<sup>36</sup> The case caused a major controversy around the presence of crucifixes in state school classrooms in Italy.

The Chamber held that the practice of exhibiting crucifixes in state school classrooms was incompatible with the freedom of religion. The Chamber held that it was impossible not to notice crucifixes in classrooms, and that in the context of public education crucifixes were necessarily perceived as powerful external symbols in the school environment. The Chamber held further that crucifixes could be seen by pupils as a religious sign causing them to feel that they were being brought up in a school marked by a particular religion. This fact, the Chamber held, could be emotionally disturbing for pupils of other religions or who profess no religion.

The Grand Chamber<sup>37</sup> held a different view. The Grand Chamber could find no evidence that the display of a religious symbol on classroom walls could influence pupils. That the fact that the applicant might have seen crucifixes in state school classrooms as a lack of respect for teaching her children in conformity with her own philosophical convictions, was a subjective view of article

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<sup>34</sup>Brems (n 26) 235; Brems 'Human rights: minimum and maximum perspectives' (2009) 9 *Hum Rts L Rev* 362.

<sup>35</sup>ECHR (GC) 18 March 2011, application No 30814/06.

<sup>36</sup>Brems (n 26) 218; McGoldrick 'Religion in the European public square and in European public life: Crucifixes in the classroom?' (2011) 11 *Hum Rts L Rev* 451.

<sup>37</sup>(N 15).



2 of Protocol No 1<sup>38</sup> of the ECHR, and not sufficient to be a breach of Protocol No 1.

The Grand Chamber accepted the state's submission that the presence of crucifixes in state school classrooms was part of Italy's historical development, part of its traditions, determined Italy's identity and symbolised values on which western civilisation was based. Should the state wish to perpetuate certain traditions, the Grand Chamber held, fell within the margin of appreciation<sup>39</sup> of the state itself. The *caveat* however, was that the tradition the state wished to perpetuate must not relieve a contracting state of the ECHR of its obligation to respect the rights and freedoms enshrined in the ECHR and its Protocols.

In conclusion the Grand Chamber stated that crucifixes in state school classrooms must be seen in perspective. Firstly, the presence of crucifixes is not associated with compulsory teaching of Christianity. Secondly, Italy opens up its school environment to other religions and does not forbid students to wear Islamic headscarves or other symbols of a religious connotation. Thirdly, alternative arrangements were made to accommodate non-majority religious practices. Fourthly, there was nothing to suggest that authorities were intolerant of pupils who believed in other religions or were non-believers.

## 6 Kokkinakis

A fourth decision of the European Court of Human Rights which engendered extensive criticism and gave cause for much debate was *Kokkinakis v Greece*<sup>40</sup> which must be seen in conjunction with *Sahin*, *Phull* and *Lautsi*. Decided as early as 1993 the case is still subjected to heavy criticism.<sup>41</sup> The case concerned proselytism.<sup>42</sup> Kokkinakis was a Jehovah's Witness, a Christian sect known for its intense door-to-door canvassing. He was arrested more than 60 times for proselytism and on several occasions imprisoned. In 1986 Kokkinakis and his wife called at the home of Mrs Kyriakaki to engage her in a discussion about religion. Her husband, a cantor at the local Orthodox Church, informed the police who arrested Kokkinakis. Kokkinakis was convicted under Law No 1363/1938 of the crime of engaging in proselytism and sentenced to four months imprisonment.

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<sup>38</sup>(n 20).

<sup>39</sup>In assessing the extent of a state's margin of appreciation the Court must have regard to what is at stake; the need to protect the rights and freedoms of others; the preserving of public order and the securing of civil peace, true religious pluralism and the survival of a democratic society. See *Sahin v Turkey* (n 13) para 110.

<sup>40</sup>European Court of Human Rights 1993 Ser A No 260-17; (1994) 17 EHRR 198.

<sup>41</sup>Taylor 'Religion and freedom of thought' in Witte and Green (eds) *Religion and Human Rights* (2011) 19.

<sup>42</sup>According to the *Compact Oxford English Dictionary* (2005) to 'proselytise' means 'to convert someone from one religion, belief, or opinion to another'.

After losing all appeals in domestic courts Kokkinakis brought his case to the European Commission of Human Rights claiming that his conviction violated *inter alia* article 9 of the ECHR. The Commission found that Greece had violated article 9 of the ECHR and referred the case to the European Court of Human Rights.

Kokkinakis submitted that Law No 1363/1938 was incompatible with article 9 of the ECHR which catered for changing one's religion and submitted further that it would surpass the wildest academic hypothesis to imagine the possibility that an orthodox Christian would be prosecuted for proselytising on behalf of the dominant religion in Greece.

The European Court of Human Rights held that the freedom to manifest one's religion under article 9 of the ECHR is not only exercisable in community with others, but includes in principle the freedom to convince one's neighbour through teaching to change one's religion or belief.<sup>43</sup> But, held the Court, having regard to the circumstances of the case the impugned Law No 1363/1938 protected the rights and freedoms of others<sup>44</sup> as set out in article 9(2)<sup>45</sup> of the ECHR. The Court ultimately held that

First of all, a distinction has to be made between bearing Christian witness and *improper proselytism*. The *former* corresponds to true evangelism, which a report drawn up in 1956 under the auspices of the World Council of Churches describes as an essential mission and a responsibility of every Christian and every Church. *The latter represents a corruption or deformation of it.* It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others.

Scrutiny of section 4 of Law No 1363/1938 shows that the relevant criteria adopted in the Greek legislature are reconcilable with the foregoing if and *in so far as they are designed only to punish improper proselytism, which the Court does not have to define in the abstract in the present case.*<sup>46</sup>

These paragraphs have been subjected to intense criticism for the uncertainty they created. What is 'improper proselytism which the Court does not have to define'? Is this an example of the Court giving states a wide discretion to

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<sup>43</sup>(N 39) para 31.

<sup>44</sup>*Id* para 44.

<sup>45</sup>Article 9(2) states that 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 or for the protection of the rights and freedoms of others.

<sup>46</sup>(N 39) para 48. Italics supplied.

use limitation provisions? A valid question to be asked is whether the ECHR, seen as a whole, does not protect the right to proselytise through the principles of free speech, assembly and association? Do human rights not propagate the principle that no one culture or religion is sovereign in relationship to any other culture or religion? Do human rights not assume that all cultures and religion are equal? Do human rights not reject the notion that there is a hierarchy of cultures or religions and that some are more superior to others? Should the human rights culture not encourage the crossbreeding of cultures and religions and promote tolerance for diversity? Pope John Paul II on his 1999 visit to India emphasised that religious freedom is the very heart of human rights and that its inviolability is such that individuals must be recognised as having the right to change their religion, if their conscience so demands.<sup>47</sup>

## 7 South Africa

South African courts have not experienced as yet the same type of issues as those specifically set out above relating to religious symbols and proselytism. The reason for this could be an approach based on accommodation of religious beliefs, there being no established religion or coercion and a prevailing spirit of cooperation between the state and the various religions. The preamble to the South African Constitution has multiple references to deity and reflects a bias in favour of religion as opposed to atheism and agnosticism. The Constitutional Court however has held that the invocation of the deity does not 'constitute any form of discrimination against non-theists'.<sup>48</sup> Article 15 of the Constitution provides for the right to freedom of conscience, *religion* [emphasis mine], thought, belief and opinion and further that religious observances may be conducted at state and state-aided institutions provided that '(a) those observances follow rules made by the appropriate public authorities; (b) they are conducted on an equitable basis; and (c) attendance at them is free and voluntarily'. An overview of the precise implications of the South African Constitution's provision for religious freedom in article 15 of its Bill of Rights must be gleaned from decisions of the courts.

It is not the purpose of this note to enter into a discussion of precisely how section 15 of the Constitution is applied in practice. This has been adequately

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<sup>47</sup>*New York Times* 8 Nov 1999 A 3.

<sup>48</sup>*In re Certification of the Constitution of the RSA*, 1996 1996 10 BCLR 1253 (CC) par 33. In *In re: Certification of the Constitution of the Western Cape*, 1997 1997 9 BCLR 1167 (CC) the Constitutional Court held that reference to deity in the preambles of the Western Cape Constitution and the Constitution of the Republic had no operative effect and is of no constitutional significance. That the reference to God was a time honoured way of adding solemnity used in many cultures and a variety of contexts. Devenish *The South African Constitution* (2005) 89 differs from this view and states that it violates the principle of equality encapsulated in s 9 of the Constitution in that it favours believers over non-believers.

done elsewhere.<sup>49</sup> It would be an interesting exercise to surmise how South African courts would approach issues of the wearing of Islamic headscarves and Sikh turbans, the display of crucifixes in state-aided schools and proselytism. Significant decisions on religious freedom have been *S v Lawrence*; *S v Negal*; *S v Solberg*;<sup>50</sup> *Christian Education South Africa v Minister of Education*;<sup>51</sup> *Prince v President of the Law Society of the Cape of Good Hope*<sup>52</sup> and *Wittmann v Deutscher Schulverein Pretoria*.<sup>53</sup>

It would appear that South Africa could be classed as an accommodationist regime<sup>54</sup> when it comes to the state's approach to religion. The state officially follows the view that there is a separation between church and state but retains a posture of benevolent neutrality towards religion. Accommodationism could be described as cooperationism without any direct official link to religion. An accommodationist regime recognises the importance of religion as part of the national culture and arguably accommodates religious symbols in public settings allowing religious holidays, the Sabbath *etcetera*. Freedom of religion in South Africa, it is submitted, can be seen to mean that the government does not prescribe orthodoxy or prohibit religious or beliefs subject to the constraints of article 15(2) of the Constitution.<sup>55</sup>

## 8 Conclusion

Article 9 of the ECHR is clearly one of the most controversial and difficult provisions to apply in practice. History has shown that in Europe differences in religious beliefs are a potent source of conflict and bloodshed. The answer seems to be encapsulated in *Serif v Greece*<sup>56</sup> where the European Court of Human Rights was of the view that in circumstances of religious tension European governments should rather work to promote pluralism and ensure tolerance between different religions. The problem seems to be that to allow one person to manifest his or her religion or belief in his or her personal way could be seen to impinge on the rights of others. According to some commentators the European

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<sup>49</sup>Currie and De Waal *The Bill of Rights Handbook* (2013) 314; Rautenbach and Malherbe *Constitutional Law* (2003) 337; Devenish (n 47) 87; Smith 'Freedom of religion' in Chaskalson *et al The Constitutional Law of South Africa* (1996) 19-4; Van der Schyff *The Right to Freedom of Religion in South Africa* (LLM dissertation RAU 2001).

<sup>50</sup>1997 10 BCLR 1348 (CC).

<sup>51</sup>2000 10 BCLR 1051 (CC).

<sup>52</sup>2002 3 BCLR 231 (CC).

<sup>53</sup>1999 1 BCLR 92 (T).

<sup>54</sup>Durham 'Perspectives on religious liberty: A comparative framework' in Van der Vyver and Witte (n 7) 12.

<sup>55</sup>Religious observances must follow rules by the appropriate public authorities, are conducted on an equitable basis and attendance to them is free and voluntary.

<sup>56</sup>(2001) 31 EHRR 561.

Court of Human Rights has demonstrated a lack of empathy to believers and has appeared only to pay lip-service to the commitment to religious freedom.<sup>57</sup> *Sahin, Phull and Kokkinakis*, in contrast to *Lautsi* (in the Grand Chamber of the Court), would appear to bear this opinion out.

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<sup>57</sup>Ovey and White *European Convention on Human Rights* (2002) 275.