


9-1-2008

## Religious Symbols in the Classroom: A Controversial Issue in the United Kingdom

Javier Garcia Oliva

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>

 Part of the [Comparative and Foreign Law Commons](#), [Education Law Commons](#), and the [Religion Law Commons](#)

---

### Recommended Citation

Javier Garcia Oliva, *Religious Symbols in the Classroom: A Controversial Issue in the United Kingdom*, 2008 BYU L. Rev. 877 (2008).  
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2008/iss3/5>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

# Religious Symbols in the Classroom: A Controversial Issue in the United Kingdom\*

Javier García Oliva\*\*

## I. INTRODUCTION

In the last two decades, the United Kingdom has witnessed an evolution from general religious tolerance, although extremely high, to an explicit acknowledgment of religious freedom as a basic right. This has taken place as a result of the enactment of the *Human Rights Act 1998*, which came into effect in 2000.<sup>1</sup> Despite such an unambiguous recognition of religious freedom, courts have had difficulty in deciding exactly how to enforce this right. In this context, the question of what religious symbols can be worn in the classroom is relevant and has become highly controversial.

While the right to wear religious symbols is arguably a manifestation of fundamental religious freedom, Article 9 jurisprudence of the European Court of Human Rights has put significant restrictions on this freedom, and the *Human Rights Act 1998* strongly encourages British courts to take into account this jurisprudence. Part II of this paper provides a brief history of the United Kingdom's developments in religious freedom from the sixteenth century until the *Human Rights Act 1998*. This section includes a discussion of Article 9 of the European Convention on Human Rights, the role of the European Court of Human Rights, and how Article 9 has been interpreted in the European Court, as illustrated by *Sahin v. Turkey*.<sup>2</sup> This section then discusses the

---

\* This article is an updated version of J. García Oliva, *La cuestión de la simbología religiosa en el Reino Unido*, 2008 REVISTA GENERAL DE DERECHO CANONICO Y ECLESIASTICO DEL ESTADO (J. Martínez Torron ed.).

\*\* Lecturer in Law, Bangor University; Research Associate, Centre for Law and Religion, Cardiff University.

1. See generally DAVID HOFFMAN & JOHN ROWE Q.C., *HUMAN RIGHTS IN THE UK: AN INTRODUCTION TO THE HUMAN RIGHTS ACT 1998* (2d ed. 2006); IAN LOVELAND, *CONSTITUTIONAL LAW, ADMINISTRATIVE LAW AND HUMAN RIGHTS: A CRITICAL INTRODUCTION* (4th ed. 2007).

2. App. No. 44774/98, 41 Eur. H.R. Rep. 8 (2005), available at <http://www.echr.coe.int>.

reactions of British courts in response to the *Human Rights Act 1998*.

Part III is a case study that illustrates how, in the post-*Human Rights Act 1998* environment, British courts have treated the wearing of religious symbols in public places, such as schools. This section analyzes the case of *R. (on the application of Begum) v. Denbigh High School Governors* and suggests what the outcome means for future religious-symbol cases.

Part IV concludes that while the restrictions on religious symbols in the classroom constitute an infraction on a fundamental religious freedom, this result is the application of the limits recognized by Article 9.2 of the European Convention on Human Rights.

## II. A SURVEY OF RELIGIOUS FREEDOM IN THE U.K.

### A. British Legislation Before the Human Rights Act 1998

Historically, after the breaking apart of the Roman Catholic Church and the establishment of the Church of England, the sixteenth-century English Parliament enacted legislation that was, broadly speaking, antagonistic toward individuals who opposed the Anglican faith. On many occasions, the conflicts between partisans of the new national Church and both those who continued professing Catholicism and non-conformists who embraced theological schisms of Anglicanism were extremely complicated and difficult—if not impossible—to overcome.<sup>3</sup>

Over time, English authorities assumed a certain degree of tolerance toward minority denominations and created statutes which are still in place today. One step toward tolerance was the *Act of Toleration 1689*. At this time in British history, the country worried that King James II's conversion to Roman Catholicism, his marriage to a Catholic, and the birth of his son in 1688 would result in the succession of the English crown to a Roman Catholic.<sup>4</sup> In what is known as the "Glorious Revolution," the English opposition brought in Mary, James' oldest daughter from his first wife, to claim

---

3. VID J. GARCIA OLIVA, EL REINO UNIDO: UN ESTADO DE NACIONES, UNA PLURALIDAD DE IGLESIAS [THE UNITED KINGDOM: A STATE OF NATIONS, A PLURALITY OF NATIONS] 39-85 (2004).

4. Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1413.

the throne along with Mary's husband, William of Orange, a Protestant leader.<sup>5</sup> One of the conditions to the rule of Mary and William was the adoption of the *Act of Toleration 1689*, which "extended legal recognition and, hence, official tolerance, to non-Anglican Protestants (Presbyterians, Congregationalists, Quakers, and Baptists), while leaving in place the establishment of the Church of England."<sup>6</sup> Roman Catholics were not protected by the act because they were viewed as not only antithetical to Anglican doctrine, but as a political threat.<sup>7</sup> Almost two hundred years later, the *Catholic Relief Act 1829* illustrated an increased tolerance toward religious minorities, allowing Catholics to serve in Parliament.<sup>8</sup>

It should be born in mind that, in compliance with the Common Law tradition, religious freedom was perceived as a right of a negative nature, in the same way as other fundamental rights.<sup>9</sup> A negative right allows an individual to do anything that is not explicitly prohibited by public authorities. The approach in 1829 was obviously different from the approach today because it emphasized the prevailing role of the State in religion while making clear that the individual was simply a supporting actor. Moreover, there was no general protection of individuals who faced discrimination on the grounds of religion. The legal framework relied on the good faith and integrity of the Common Law system, and was thought sufficient to provide various groups with certain, explicit religious freedoms.

The enactment of the *Race Relations Act 1976* was undoubtedly an important step towards the protection of minorities. This Act made it unlawful to discriminate on racial grounds in fields such as employment and education.<sup>10</sup> However, the Act aimed at protecting

5. *Id.*

6. *Id.*

7. *Id.* at 1413-14.

8. Previous Catholic Relief Acts were passed to improve the position of British Roman Catholics. See Matthew C. Mirow, *Roman Catholicism on Trial in Victorian England: The Libel Case of John Henry Newman and Dr. Achilli*, 36 CATH. LAW 401, 401-02 n.7 (1996) (discussing how previous Catholic Relief Acts improved the rights of English Roman Catholics by "lessen[ing] restrictions on schools, places of worship, and membership in the legal profession" and by repealing a law that "required religious conformity of civic and military office holders").

9. See JOHN ALDER, CONSTITUTIONAL AND ADMINISTRATIVE LAW 444 (6th ed. 2007).

10. Race Relations Act, 1976, c. 74, §§ 4-9, 17-19 (Eng.).

only those groups that, in addition to being religious groups, were also individual races. Consequently, only distinct racial bodies such as Sikhs (originally from Punjabi) and Jews enjoyed the benefits of this legislation.<sup>11</sup> Many others, however, including Muslims, Catholics, Methodists, and all other non-racial minority groups, remained unprotected from religious discrimination.

### *B. The European Court of Human Rights*

Prior to discussing the *Human Rights Act 1998*, it is important to take note of the European Convention of Human Rights (the "Convention") and the effect that Article 9 of the Convention and the jurisprudence of the European Court of Human Rights have had on the movement toward greater religious freedom in the United Kingdom. After the atrocities of WWII, the European powers entered into the Convention to achieve greater unity among the Convention's signing members, including the United Kingdom.<sup>12</sup> The Convention's stated objective is "the maintenance and further realization of Human Rights and Fundamental Freedoms."<sup>13</sup> The Convention set up the European Court of Human Rights as a mechanism to enforce the obligations of the contracting states.<sup>14</sup>

While the Convention includes many provisions that protect fundamental human rights, Article 9 stands out as the most important guarantee of the freedom of religion. Article 9 states:

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.
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

---

11. See *id.* § 1(b)(ii) (protecting against discrimination due to "colour, race, nationality or ethnic or national origins" and not by religion).

12. See Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, available at <http://www.hri.org/docs/ECHR50.html#Convention> [hereinafter Human Rights Convention].

13. *Id.* pmbl.

14. *Id.* art. 19.

protection of public order, health or morals, or for the protection of the rights and freedoms of others.<sup>15</sup>

Regarding the importance of Article 9, the European Court of Human Rights held that Article 9's "freedom of thought, conscience and religion is one of the foundations of a 'democratic society'" and that Article 9 is "one of the most vital elements that go to make up the identity of believers and their conception of life [and a] precious asset for atheists, agnostics, sceptics [sic] and the unconcerned."<sup>16</sup>

While Article 9(1) guarantees the freedom of religion to everyone, Article 9(2) limits this freedom. Specifically, Article 9(2) explains that the government can infringe on the religious rights of others when necessary for the preservation of the democratic society. Jurisprudence of the European Court of Human Rights (also referred to as the Court of Strasbourg), has helped define the limits of a government's power under this article. The contours of these limits can be seen through a study of a case in the Court of Strasbourg, *Sahin v. Turkey*.<sup>17</sup> This extremely important judicial decision established at least one limit to the right of religious freedom recognized by Article 9 of the European Convention on Human Rights. The court determined that it was indeed permissible for Turkish authorities to refuse to allow a Turkish female citizen to wear the Islamic veil in classes, lectures, and examinations.<sup>18</sup>

Sahin, the Turkish woman who brought the action, argued that her religious freedom had been violated when authorities forbade her from wearing the Islamic veil. The majority of judges, however, rejected her claim. The judges suggested that the right to religious freedom can be subject to what is known as the specific situation rule.<sup>19</sup> Under this rule, the specific situation of the individual, who

15. *Id.* art. 9.

16. *Kokkinakis v. Greece*, (1993) 260 Eur. Ct. H.R. (ser. A) at 17.

17. App. No. 44774/98, 41 Eur. H.R. Rep. 8 (2005), available at <http://www.echr.coe.int>.

18. *Id.* ¶¶ 17, 104–23. The recent changes in Turkey in relation to the use of religious veils and other symbols in public venues should be taken into consideration.

19. See *Kalac v. Turkey*, (1997) 27 Eur. H.R. Rep. 552, ¶ 27 ("Article 9 . . . does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account."); *Ahmad v. United Kingdom*, (1982) 4 Eur. H.R. Rep. 126, ¶ 11 ("[T]he freedom of religion, as guaranteed by Article 9, is not absolute, but subject to the limitations set out in Article 9(2). Moreover, it may, as regards the modality of a particular religious manifestation, be influenced by the situation of the person claiming that freedom.").

may be an inmate in a prison, a member of the Armed Forces, or a student in a university, may justify certain restrictions. While it would not be justifiable to automatically apply these restrictions—which would clearly violate Article 9—the specific situation rule defines certain instances where such restrictions are allowed.

The court held that the school's rules against the headscarf interfered with Sahin's right to manifest her religion.<sup>20</sup> However, the court found that the interference was justified under Article 9(2).<sup>21</sup> There was a legal basis under Turkish law for the interference,<sup>22</sup> and there was a legitimate aim to "protect[] the rights and freedoms of others and . . . [the] public order."<sup>23</sup> The ban was also necessary for a democratic society such as Turkey to protect the principle of secularism.<sup>24</sup> Because "there was a reasonable relationship of proportionality between the means employed and the legitimate objectives pursued by the interference,"<sup>25</sup> the court concluded that the interference was justified.<sup>26</sup>

This judicial decision contains an interesting dissenting vote by Judge Tulkens, who agreed with some of the court's analysis, but strongly disagreed with the court's treatment of Article 9.<sup>27</sup> Judge Tulkens noted that Article 9 is a "precious asset" for all citizens, believers, and nonbelievers alike; yet, he conceded that Article 9 does not protect every religiously motivated act and that some restrictions on religious freedom are necessary in a democratic society.<sup>28</sup> Judge Tulkens continued, stating that the "ideals and values of a democratic society must also be based on dialogue and a spirit of compromise . . . ."<sup>29</sup> Persons in authority should not "remove the cause of tensions by eliminating pluralism, but . . . [should rather] ensure that the competing groups tolerate each other."<sup>30</sup> Ironically, interferences such as the headscarf ban tend to prolong the

---

20. Sahin v. Turkey, (2005) 41 Eur. H.R. Rep. 8, ¶¶ 76-78.

21. *Id.* ¶¶ 122-23.

22. *Id.* ¶ 98.

23. *Id.* ¶ 99.

24. *Id.* ¶ 116.

25. *Id.* ¶ 117.

26. *Id.* ¶ 122.

27. *Id.* ¶¶ 1-13 (Tulkens, J., dissenting).

28. *Id.* ¶ 1 (Tulkens, J., dissenting).

29. *Id.*

30. *Id.*

prejudices and social injustices that they are intended to fight.<sup>31</sup> Judge Tulkens declared, "As we are all aware, intolerance breeds intolerance."<sup>32</sup>

Regardless of the dissent, the Strasbourg court appears to embrace the specific situation rule. In fact, the court had previously recognized its viability in two additional cases.<sup>33</sup> Such opinions by the Court of Strasbourg become very important for United Kingdom courts in clarifying the bounds of religious freedom, as explained in the next section.

### C. Human Rights Act 1998

The *Human Rights Act 1998*, enacted on October 2, 2000, was the first piece of legislation in British history to acknowledge religious freedom as a positive right. And the individual, as opposed to the State, became the center of this framework. Many members of religious groups, particularly minorities, welcomed with enthusiasm the enactment of this statute, regarding it as an essential mechanism of protection for individuals.<sup>34</sup> The Act gives further effect to the rights in the European Convention of Human Rights, making clear statements about fundamental freedoms.

The Act also states that any question that arises in connection with Convention rights must be decided taking "into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights."<sup>35</sup> The enforcement of Convention rights no longer has to be managed solely by the Court of Strasbourg. Violations of the European Convention of Human Rights can also

31. *Id.* ¶ 19 (Tulkens, J., dissenting).

32. *Id.*

33. *See Kalac v. Turkey*, (1997) 27 Eur. H.R. Rep. 552, ¶ 27 ("Article 9 does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account."); *Ahmad v. United Kingdom*, (1982) 4 Eur. H.R. Rep. 126, ¶ 11 ("The freedom of religion, as guaranteed by Article 9, is not absolute, but subject to the limitations set out in Article 9(2). Moreover, it may, as regards the modality of a particular religious manifestation, be influenced by the situation of the person claiming that freedom.").

34. *See* J. Garcia Oliva, *Sociology, Law and Religion in the United Kingdom*, 152 *LAW & JUST.* 8, 16 (2004).

35. Human Rights Act 1998, § 2(1).



be remedied in United Kingdom courts.<sup>36</sup> That being said, in the above-cited section of the Act, the British legislature invites the judiciary to “take into consideration” the decisions of the Court of Strasbourg, while not actually declaring those decisions legally binding.<sup>37</sup> This makes the task of defining the bounds of religious freedom all the more difficult as United Kingdom courts try to bring their decisions into alignment with decisions by the Court of Strasbourg wherever possible.

The Human Rights Act also brought with it controversy concerning the extent to which certain individuals, groups, churches, and others would have to change their religious practices in order to comply. Section 6 of the Act, for example, provides that public authorities must act in accordance with Convention rights, except in the case of certain enumerated exceptions.<sup>38</sup> This has led to interesting debates about the nature of the Church of England and the Church of Scotland, and whether such established denominations are “public authorities” under the Act. The House of Lords responded to these debates in *Cantlow v. Wallbank*,<sup>39</sup> stating that a parochial church council of the Church of England is not a public body under the Act.

*Cantlow* illustrates just one example where the court has been charged with determining the best way to enforce Convention rights. Courts in the United Kingdom have addressed a number of other issues with respect to religious freedom under the Human Rights Act, one of which is particularly controversial: religious symbols.

---

36. See DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, A GUIDE TO THE HUMAN RIGHTS ACT 1998 5 (3d ed. 2006), available at <http://www.justice.gov.uk/docs/act-studyguide.pdf>.

37. See J. García Oliva, Comentario a la Sentencia Copsey v. WWB Devon Clays Ltd, de la Corte de Apelacion Britanica [2005] EWCA Civ 932, 10 (2006) *Revista General de Derecho Canonico y Eclesiastico del Estado*.

38. Human Rights Act 1998, c. 42, § 6.

39. [2003] UKHL 37.

III. BRITISH COURTS AND RELIGIOUS SYMBOLS<sup>40</sup>

British courts have taken a very restrictive stance regarding the right to wear controversial religious clothing in public. Specifically, they have justified denial of the right to wear certain religious garments in particular establishments by citing the need to protect the rights of others and the public order. Understandably many commentators have not found this rationale persuasive.<sup>41</sup> This section will address British court decisions and analyze the rationale given to support decisions which restrict the rights recognized by Article 9 of the European Convention on Human Rights.

Before addressing these cases, it must be understood why the cases are controversial in the United Kingdom. In today's post-9/11 world, mainstream society treats Muslim citizens with increasing distrust.<sup>42</sup> Recent studies document that "Islamophobia" is sweeping across the United Kingdom and Europe as a whole.<sup>43</sup> Attempting to fight back against terrorists, Britain has enacted anti-terrorism legislation, and its effect on the civil liberties of Muslim citizens has been fiercely debated.<sup>44</sup> Thus, despite some efforts to appreciate diversity and foster racial and religious unity, important and potentially divisive differences among the citizens of the United Kingdom still exist. It does not appear that this cultural divide will disappear by itself. The 2001 census of the United Kingdom revealed

40. For information regarding religious symbols, religious freedom, and religious pluralism, see SEBASTIAN M. POULTER, *ASIAN TRADITIONS AND ENGLISH LAW* (1990); SEBASTIAN M. POULTER, *ETHNICITY, LAW AND HUMAN RIGHTS* (1998); ROGER RUSTON, *HUMAN RIGHTS AND THE IMAGE OF GOD* (2004); Ivan Hare, *Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred*, PUB. L. 521 (2006); Paul Weller, *Addressing Religious Difference and Islamophobia*, 17 J. ISLAMIC STUD. 297 (2006); Mark Hill, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United Kingdom*, 19 EMORY INT'L L. REV. 1129, 1131-32 (2005); Sebastian M. Poulter, *Muslim Headscarves in School: Contrasting Legal Approaches in England and France*, 17 OXFORD J. LEGAL STUD. 43, 68-69 (1997); Julian Rivers, *Religious Dress: British Perspectives and OSCE Developments*, Address at the Strasbourg Conference, available at <http://www.strasbourgconference.org/papers/Religious%20Dress%20British%20Perspective%20and%20OSCE%20Developments.pdf>.

41. See Mark Hill & Russell Sandberg, *Is Nothing Sacred? Clashing Symbols in a Secular World*, PUB. LAW 488-506 (2007); see also Mark Hill & Russell Sandberg, *Muslim Dress in English Law: Lifting the Veil on Human Rights*, 1 RELIGION Y DERECHO 302-28 (2006).

42. See, e.g., Tahir Abbas, *Muslim Minorities in Britain: Integration, Multiculturalism and Radicalism in the Post-7/7 Period*, 28 J. INTERCULTURAL STUD. 287 (2007).

43. *Id.*

44. *Id.*

that more than a million and a half British citizens are Muslim.<sup>45</sup> This number represents approximately three percent of the English population and over one percent of the Welsh.<sup>46</sup> And the Muslim population in the United Kingdom is not only large, but also it is growing at a very healthy rate.<sup>47</sup> Given, therefore, the increasing diversity of the United Kingdom, as well as the seemingly unending war on terror, issues involving individual religious liberty in the United Kingdom are here to stay.

It is within this context that British courts address cases regarding religious apparel in public places. Although the courts have been mindful of the societal and cultural implications of their decisions, their decisions have nonetheless been subject to great criticism. This is particularly evident in *Rahman v. Headteacher and Governors of Denbigh High School*,<sup>48</sup> a recent decision by the House of Lords that will be discussed below.

#### A. *Rahman v. Headteacher and Governors of Denbigh High School*

##### 1. *Case facts and trial court ruling*

Although it began in relative obscurity, *Rahman* escalated into an unexpectedly high profile dispute. The controversy began when a Muslim teenager named Shabina Begum refused to continue wearing to school a religious dress known as the *shalmar kameeze*.<sup>49</sup> Shabina had previously worn this dress in harmony with the school's policy regarding student uniforms.<sup>50</sup> Trouble arose, however, when Shabina abandoned the *shalmar kameeze* in order to wear the *jilbab*, a garment designed for Muslim women that covers the majority of the body and does not reveal arms or legs.<sup>51</sup> When Shabina arrived to school in the *jilbab*, Denbigh High School authorities prevented her

---

45. National Statistics, KS07 Religion, Key Statistics for Urban Areas, Results by Population Size of Urban Area, available at <http://www.statistics.gov.uk/STATBASE/ssdataset.asp?vlnk=8288>.

46. *Id.*

47. See e.g., Ceri Peach, *Muslims in the 2001 Census of England and Wales: Gender and Economic Disadvantage*, 29 ETHNIC AND RACIAL STUDIES 629 (2006).

48. *R (on the application of Begum) v. Headteacher and Governors of Denbigh High School*, [2006] UKHL 15 (Eng.).

49. *Id.* [9].

50. *Id.*

51. *Id.* [10].

from entering the school premises because she was no longer in compliance with the school's uniform policy.<sup>52</sup> Shortly thereafter, Shabina's family challenged this decision before the subdirector of the high school, claiming that Shabina's rights had been violated.<sup>53</sup>

Despite Shabina's criticisms, the educational authorities of Denbigh High School had consistently showed concern for the religious needs of their students. In fact, the school had worked hard to provide a range of alternatives that would meet the school's uniform requirements and had been unquestionably committed to allowing Muslim students to attend school in religious clothing.<sup>54</sup> To this end, the school employed a Muslim woman who had conscientiously sought satisfactory solutions for Muslim families with students enrolled in the school.<sup>55</sup> Despite its attempts to find common ground, however, Denbigh High School held true to its stated policy that school uniforms were necessary symbols of unity and coexistence amongst different religious groups.<sup>56</sup> For this reason, the school upheld its initial decision not to allow Shabina to attend school while wearing the *jilbab*.<sup>57</sup>

Unsatisfied with the school's decision, Shabina's family filed suit. The trial judge, however, dismissed the action, holding that Article 9 of the European Convention on Human Rights had not been violated because Shabina was denied entry into the school based on her refusal to abide by the school's uniform policy, rather than on specific religious grounds.<sup>58</sup> Commentators have criticized this decision, pointing out that the trial court's reasoning contradicts decisions by the Court of Strasbourg, which in the last few years, have not followed the specific situation rule.<sup>59</sup> Instead of avoiding the issue altogether by arguing that the school board's decision had nothing to do with religion, Hill and Sandberg believe the court should have squarely addressed the straightforward issue of whether,

---

52. *Id.*

53. *Id.* [12].

54. *Id.* [7]-[8].

55. *Id.*

56. *Id.* [13]-[16].

57. *Id.* [16].

58. *Id.* [25].

59. See Hill & Sandberg, *Is Nothing Sacred?*, *supra* note 41, at 495-97.

under Article 9, the school's actions were justified as a reasonable limitation imposed for the "public order."<sup>60</sup>

## 2. Appellate court decision

The Court of Appeal set aside the trial court's ruling and determined that Denbigh High School violated Shabina's religious freedom.<sup>61</sup> While the trial court focused on whether the school's decision was motivated by religious discrimination, the Court of Appeal focused on the proportionality requirement imposed by the European Convention.<sup>62</sup> Specifically, the court held that the school authorities failed to show that their actions were sufficiently proportionate to the need for order in schools.<sup>63</sup> Despite coming to the opposite conclusion as the trial court, the appellate court's decision has been criticized by some of the same scholars who found fault with the trial court's ruling. Hill and Sandberg, for example, argue that the court misread the European Convention because Article 9 does not impose a duty on public authorities to use the proportionality test in their actions.<sup>64</sup> Although the Convention requires that British courts review legislation in light of proportionality, legality, rationality, and procedural impropriety requirements, such a requirement does not apply to school officials.<sup>65</sup> For this reason, a compelling argument can be made that the appellate court's ruling rests on a foundation that cannot withstand scrutiny.

## 3. Appeal to the House of Lords

Denbigh High School challenged the appellate court's decision, and the House of Lords, despite the intense controversy surrounding this case, arrived at a unanimous decision. In a five to zero ruling, the House of Lords held that the school authorities acted properly.<sup>66</sup>

---

60. Human Rights Convention, *supra* note 12, at art. 9.

61. R (on the application of) v. Denbigh High School, [2005] EWCA (Civ) 199 (Eng.).

62. *Id.* [25]-[26].

63. *Id.* [50]-[61], [78].

64. Hill & Sandberg, *Is Nothing Sacred?*, *supra* note 41, at 497.

65. See Human Rights Act, §§ 3-4; R (on the Application of Begum) v. Headteacher and Governors of Denbigh High School, [2006] UKHL 15, [78] (Eng.).

66. R (on the application of Begum) v. Headteacher and Governors of Denbigh High School, [2006] UKHL 15 (Eng.).

Despite this unanimity, however, the court's opinion revealed a split among the Law Lords regarding the applicability of Article 9 of the European Convention. Three members of the Chamber—Lord Scott, Lord Hoffman, and Lord Bingham—stated that the facts of the case fell outside of the scope of Article 9, and they instead used the specific situation rule to uphold the school's decision.<sup>67</sup>

Lord Bingham, on the other hand, acknowledged that the proportionality principle had become a vital tool for British Courts after the enactment of the *Human Rights Act of 1998*.<sup>68</sup> This Law Lord noted that courts examine not only whether the actions (or omissions) of public bodies are compatible with the law, but also whether the court is able to strike down actions that are not proportionate.<sup>69</sup> Using this framework and applying the proportionality principle, Lord Bingham ultimately voted to uphold the school's decision because, given the tendency of religious symbols to lead to undesirable conflicts, the school needed to act in order to achieve peaceful coexistence among a diverse student body.<sup>70</sup>

Lord Hoffman highlighted that by enrolling in a school with very clear uniform requirements, Shabina consented to follow the school's rules.<sup>71</sup> He held for the school because finding for Shabina

67. *Id.* [25] (“I am of opinion that in this case . . . there was no interference with the respondent's right to manifest her belief in practice or observance. I appreciate, however, that my noble and learned friends Lord Nicholls and Lady Hale of Richmond incline to a different opinion. It follows that this is a debatable question, which gives the issue of justification under Article 9(2) particular significance.”).

68. *Id.* [30]–[32].

69. *Id.*

70. *Id.* [34] (“On the agreed facts, the school was in my opinion fully justified in acting as it did. It had taken immense pains to devise a uniform policy which respected Muslim beliefs but did so in an inclusive, unthreatening and uncompetitive way. The rules laid down were as far from being mindless as uniform rules could ever be. The school had enjoyed a period of harmony and success to which the uniform policy was thought to contribute. On further enquiry it still appeared that the rules were acceptable to mainstream Muslim opinion. It was feared that acceding to the respondent's request would or might have significant adverse repercussions.”).

71. *Id.* [64] (“In my opinion a domestic court should accept the decision of Parliament to allow individual schools to make their own decisions about uniforms. The decision does not have to be made at a national level and national differences between Turkey and the United Kingdom are irrelevant. In applying the principles of *Sahin v. Turkey* the justification must be sought at the local level and it is there that an area of judgment, comparable to the margin of appreciation, must be allowed to the school. That is the way the judge approached the matter and I think that he was right.”).

could only come at the expense of a sophisticated uniform policy, which the school had efficiently designed.<sup>72</sup>

Lord Scott of Foscote agreed with Hoffman and Bingham and held that Article 9 of the Convention did not apply to the facts of the case.<sup>73</sup> Like the other judges, Lord Foscote praised the school's previous efforts to accommodate the needs of Muslims students, and he noted in particular that Shabina could have always gone to a school which allowed her to wear the *jilbab*.<sup>74</sup>

Despite a consensus among these judges, Lord Nicolls and Baroness Hale disagreed with the reasoning employed by their judicial colleagues. Although they ultimately decided that the school's clothing restrictions were reasonable, both judges held that Shabina's complaint fell within the confines of Article 9.<sup>75</sup> The judges also voiced support for individuals seeking greater individual religious freedom. Judge Nicolls in particular declared that the difficulties faced by a student fighting to change a school policy that denied her the use of a particular religious symbol should not be underestimated.<sup>76</sup> Similarly, Baroness Hale voiced support for the general freedom to wear religious clothing. Although Hale noted the discrimination suffered by women in many religious traditions, she stated that as a general rule, such women are undoubtedly entitled to wear the symbols of their religious traditions.<sup>77</sup> Nonetheless, Baroness Hale's support for religious freedoms actually led her in some ways to support the school's decision. First, the judge praised the Denbigh High School's uniform policy and its commitment to accommodating its Muslim students while providing them with a wide range of options in terms of uniform.<sup>78</sup> Second, she expressed

---

72. *Id.* [64]-[67].

73. *Id.* [89] ("So, too, in my opinion, Shabina's disinclination to comply with the school uniform rules cannot be represented as a breach by the school of her article 9 right to manifest her religion. There are, as Shabina has discovered, schools in the Luton area whose rules would permit her to wear a jilbab. Arrangements could have been made for Shabina to transfer to one or other of these schools but she did not take up the chance of doing so . . . . In these circumstances, in my opinion, the contention that Denbigh High infringed her article 9 rights must be rejected.").

74. *Id.* [88]-[89].

75. *Id.* [41], [93].

76. *Id.* [41].

77. *Id.* [96] ("If a woman freely chooses to adopt a way of life for herself, it is not for others, including other women who have chosen differently, to criticise or prevent her . . . .").

78. *Id.* [98].

concern for the Muslim female students who could be pressured into wearing the *jilbab*,<sup>79</sup> if this piece of clothing were permitted.

#### *4. Analysis and conclusion*

It seems clear that Article 9 is vague enough to allow anyone to justify his or her position based on the text of the Article. Thus, proponents of broad religious rights can argue that the right to use religious symbols under Article 9 is protected by the clause which "guarantees" religious freedom. At the same time, supporters of government or agency actions can point to the second paragraph in Article 9 which lists policy reasons justifying limitations of religious freedoms. Despite this reality, the insistence on the part of the first three judges to sever the link with Article 9 is troubling because, if the Convention is inapplicable in similar situations, plaintiffs similar to Shabina will be prevented from claiming protection under Article 9 in the future. If this is the case, Article 9, instead of being open to interpretation by sides, would become a means whereby institutions could too easily justify decisions to restrict individual religious liberties.

Despite this concern, it cannot be denied that both Strasbourg and British courts have held that manifestations of religious freedom are subject to restrictions necessary to guarantee peaceful coexistence and social balance. And in *Rahman*, the House of Lords made it clear that maintaining order in schools is necessary to achieve this peace and social balance. *Rahman* thus stands for the proposition that the wearing of certain religious clothing in school can be an obstacle to the public good if it is not subject to certain limits. This is an understandable statement, and even though religious freedom is one of the fundamental pillars of our democracies, some limitations are absolutely unavoidable as the existence of unlimited rights is simply not possible.

#### *B. Post-Rahman and the Judicial Interpretation of Religious Liberty*

##### *I. R. v. Headteachers & Governors of Y School*

Although they have generally followed the *Rahman* Court's rationale, later decisions regarding religious apparel in schools are

---

79. *Id.* [95]-[96].



also worth considering because they have added to the discussion regarding the exercise of religious liberty in educational settings. For example, in *R v. Headteachers & Governors of Y School*, the specific situation rule was invoked once again.<sup>80</sup> In this case, the family of a twelve-year-old Muslim girl requested judicial review of a school board's decision to deny the girl the right to wear a *niqab*—a veil that covers the face and head and leaves only the eyes exposed.<sup>81</sup> In the past, the student's three sisters had been allowed to wear this veil.<sup>82</sup> After modifying their policy regarding the *niqab*, however, the school asked the student instead to wear a religious dress that conformed to its newly revised uniform policy.<sup>83</sup> In an attempt to be fair to the student's family, the school offered to teach the student at home and even to help find a school where the *niqab* was allowed.<sup>84</sup> The plaintiffs rejected these ideas and in their request before the Queen's Bench Division at the High Court, they presented three arguments: (1) the school violated Article 9 of the Convention; (2) the student never would have attended the school had she known that the *niqab* would eventually be prohibited; and (3) the student's sisters had been in a similar situation and were permitted to wear the *niqab*.<sup>85</sup> The school director vigorously defended against the lawsuit, arguing that the restriction was implemented for the public good and not to discriminate against a certain religion.<sup>86</sup>

---

80. [2007] EWHC (Admin) 298 (Eng.).

81. *Id.* [1].

82. *Id.* [2].

83. *Id.* [10].

84. *Id.* [14]–[15].

85. *Id.* [22].

86. *Id.* [83]–[84] (“The case for the school is that by wearing the niqab, the claimant would hamper her learning and the ability of the school to teach her . . . . The head teacher explains that effective learning depends on pupils being able to interact with each other and in particular with the teacher. She says that effective teaching depends on the teacher being able to see if the pupils understand what she is being taught and if she is paying attention as well as discovering if she is distressed or enthusiastic. The head teacher also explained that in foreign language tuition and to some extent in English lessons, the teacher needs to see how the pupil forms and shapes words in order to help the pupil to pronounce them correctly. This evidence was supported by members of the teaching staff at the school. It was pointed out that History is now taught with the extensive use of role play and so the wearing of the niqab by the claimant would inhibit the ability of the claimant to participate in these activities and to communicate with her peers.”).

Judge Silber heard the family's case and held for the school board.<sup>87</sup> In doing so, he reiterated much of what the House of Lords had decided in *Rahman*, commending the school's efforts to accommodate the student and her family.<sup>88</sup> In addition, like Lord Scott of Foscote, Judge Silber held that the school adequately protected the plaintiff's freedom of religion by permitting the student to change schools.<sup>89</sup> Some judges have been persuaded by this reasoning. However, if prohibiting the use of religious clothing may constitute a violation of religious freedom, it is arguable that allowing students to change schools diminishes the infringement. For this reason, it is essential to determine whether or not the prohibition of the use of *niqab* in a school, regardless of the possibility of wearing it in another school, is justifiable under the provisions of the European Convention on Human Rights. When the use of religious clothing creates an obstacle for student integration into the wider community, the use of such clothing can be restricted.

## 2. *Azmi v. Kirklees Metropolitan Council*

In *Azmi v. Kirklees Metropolitan Council*, a teaching assistant told school administrators that, for religious reasons, she could not teach without using a veil to completely cover her face.<sup>90</sup> Her insistence on wearing the veil arose because on many occasions she was to teach alongside a male teacher, and in compliance with her religious convictions, she could not show her face in such a situation.<sup>91</sup> The local authorities ultimately denied her request because her teaching would be severely undermined if the students could not look into their teacher's eyes.<sup>92</sup> Following the school's decision, the teaching assistant brought suit alleging religious discrimination in the workplace.<sup>93</sup> The Employment Tribunal decided that direct religious discrimination had not occurred because the teaching assistant failed to prove that she had been treated less

---

87. *Id.* [100].

88. *Id.* [128].

89. *See id.* [110]–[112].

90. [2007] UKEAT, Appeal No. 0009/07/MAA, [25] (Eng.).

91. *Id.* [9].

92. *Id.* [17].

93. *Id.* [25].

favorably than non-Muslim teachers.<sup>94</sup> The tribunal also held that the teaching assistant was not a victim of indirect discrimination, and that the school's actions were sufficiently proportionate given the strong public interest in having uniform rules in the classroom to provide a better learning environment.<sup>95</sup>

The Employment Appeal Tribunal dealt with this case in a similar fashion. Confirming the trial court's decision, the appeal tribunal held that direct religious discrimination had not occurred because non-Muslim women who covered their faces would have found themselves in an identical situation regardless of their religious convictions.<sup>96</sup> The tribunal also held that the school had not directly discriminated against the teacher because its uniform rules did not single out Muslim practices. Nor had the school indirectly discriminated since the school's actions were sufficiently proportional to the public interest in providing children a good learning environment.<sup>97</sup>

### 3. Conclusion

*Rahman* and its progeny demonstrate that British courts are committed to protecting religious freedom and at the same time are willing to accept what they consider to be legitimate limitations on the exercise of religious freedom.<sup>98</sup> The right to wear a religious

---

94. *Azmi v. Kirklees Metropolitan Council*, [2007] ET, Case No. 1801450/06 (Eng.).

95. *Id.* [45].

96. *Azmi*, Appeal No. 0009/07/MAA, [56].

97. *Id.*

98. Only last year in August 2007 the High Court rejected Lydia Playfoot's request to wear a "virginity ring" to school. This sixteen-year-old English student claimed that wearing the ring was a manifestation of her Christian beliefs, and she felt discriminated against when the school did not permit her to wear it. The High Court endorsed the school rule that prohibited the use of any jewelry as part of the required uniform. See Sam Greenhill, Teenager Loses High Court Battle Against School Ban on Chastity Ring, MAIL ONLINE, July 16, 2007, available at <http://www.dailymail.co.uk/news/article-468760/Teenager-loses-High-Court-battle-school-ban-chastity-ring.html>.

This judgment is in stark contrast with a recent decision of the High Court concerning the use of a bracelet by a Sikh student made in July 2008, which indicates that restrictions will become more difficult to justify in the future. See <http://news.bbc.co.uk/1/hi/wales/7529694.stm>. Sarika Singh, a Sikh pupil had been excluded by Aberdare Girl's School in South Wales for refusing to take off her religious bangle. The school authorities argued that the bangle was a piece of jewelry and this was prohibited by the internal rules of the institution. Judge Silber rejected this claim and stated that "in this case there is very clear evidence it was not a piece of jewelry but to Sarika was, and remains, one of the defining focal symbols of being a Sikh." Judge Silber, whose decision is to be praised for his unquestionable

symbol is a manifestation of religious liberty, and therefore Baroness Hale and Lord Nicolls' statements in *Rahman* are correct: this is a clear case of judicial interference into strictly personal decisions. However, according to Article 9 of the Convention, this right, although personal and worthy of protection, is subject to reasonable restrictions.<sup>99</sup> Understandably, this is a very sensitive matter—religious freedom cannot lightly be curtailed—but sometimes there is no other choice. Appropriate institutional interference must be allowed so that schools can become forums for teaching, learning, exchanging ideas, and at the same time, modeling peaceful coexistence.

On the other hand, we cannot underestimate the disappointment of Muslim women who feared that endorsement of Shabina's request by the judiciary would lead to widespread use of the *jilbab*. Although evidence indicates that many Muslim women do not wish to wear this garment,<sup>100</sup> and that the use of this clothing may potentially cause inequality between genders, the principal remains the same: public authorities must realize that curtailment of religious freedoms is a last resort and should be employed only when absolutely necessary. Given this complex and controversial issue, the only thing that remains certain is that balancing individual religious rights in these circumstances is an incredibly difficult task—one that will surely cause greater controversy in the future.

### C. Defining Religious Freedom, One Step at a Time

Since the *Human Rights Act 1998*, other laws have been developed to better define religious freedom. For example, Directive 2000/78/EC (implemented by the *Employment Equality (Religion or Belief) Regulations 2003*) was established to prohibit religious discrimination in the workplace on the grounds of religion or

support to the manifestations of religious freedom also emphasized that there was "an enormous difference" between rulings allowing schools to ban the Muslim niqab or jilbab and the "unostentatious," "very small" bangle. See Frances Gibb, *Sikh Teenager Sarika Watkins-Singh Wins Right to Wear Bangle*, TIMES ONLINE, July 30, 2008, <http://business.timesonline.co.uk/tol/business/law/article4425925.ece>. This will obviously not please some sectors of the Muslim community and further discussion will take place in the coming months.

99. Human Rights Convention, *supra* note 12, at art. 9.

100. See, e.g., Gita Saghal & Nira-Yuval Davis, *Fundamentalism, Multiculturalism, and Women in Britain*, in REFUSING HOLY ORDERS, WOMEN AND FUNDAMENTALISM IN BRITAIN 14 (2000).

philosophical ideas.<sup>101</sup> These instruments, alongside the very recent *Equality Act 2006*,<sup>102</sup> condemn direct or indirect discrimination on religious or ideological grounds, and discrimination with regard to employment, employment training, and the provision of goods and services. These will hopefully provide a better understanding to both individuals and to courts of how best to balance individuals' fundamental religious freedom with others' individual rights.

#### IV. CONCLUSION

We are currently in a fascinating period in the history of the United Kingdom. In an increasingly heterogeneous community and in one of the most cosmopolitan societies in the world, discrimination against religious minorities—particularly Muslims—is a problem that urgently needs to be addressed. And this problem is not limited solely to the United Kingdom. Other member states of the European Union have tried to combat Islamophobia and other unacceptable practices. This commitment to equality in Europe is evident by the legislation enacted by Westminster in the last few years which prohibits direct and indirect discrimination.

Religious freedom is a crucial element of a democratic society and the right to wear religious symbols is one of its manifestations. Although public authorities must make every effort to strongly protect these manifestations, some limitations, as it has been argued throughout this paper, are unavoidable.

---

101. Employment Equality (Religion or Belief) Regulations 2003, <http://www.opsi.gov.uk/si/si2003/20031660.htm>.

102. Equality Act, 2006, c. 3, available at [http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga\\_20060003\\_en.pdf](http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga_20060003_en.pdf).