
THE POWER OF SYMBOLS AND SYMBOLS AS POWER: SECULARISM AND RELIGION AS GUARANTORS OF CULTURAL CONVERGENCE

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INTRODUCTION: THE CONFLICTS OVER RELIGIOUS SYMBOLS

This paper focuses on the conflicts that arise in relation to “the place” of religious symbols in the public sphere, and, specifically, in State schools. Such conflicts, I believe, do not only reflect most of the dilemmas that liberal democracies face in the attempt to reconcile constitutionalism and religion through adherence to secularism in the public place—they actually challenge the very legitimacy of the dominant conception of constitutionalism and its nexus to the principle of secularism.

Religious symbols in the public schools typically raise two sets of conflicts. The first set of conflicts arises over the extent to which the right to wear religious symbols and clothes can be limited in the name of other rights and principles of equal constitutional value. In principle, this type of conflict may arise both in relation to the denomination of the majority as well to those of religious minorities. The French Law of March 17, 2004, which prohibits “the wearing of symbols or clothing by which students conspicuously manifest a religious appearance” in all State schools,¹ is neutrally worded and therefore applicable to all symbols, including Christian ones. In practice, however, controversies have arisen exclusively in relation to the right of pupils belonging to religious minorities to wear *their* symbols and have almost exclusively concerned Islamic schoolgirls.

The second type of conflict arises when a religious symbol, such as the crucifix, or the crèche, is used as a “public language” of identity by State authorities. In this case, unlike in the first type of conflict, the contested symbol represents the dominant religion and not that of minority groups.

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¹ Law No. 2004-228 of Mar. 15, 2004, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190.

Most academic works on religious symbols address either the first or the second set of conflicts. Many works have focused on the *hijab* cases in different contexts (*e.g.*, in France), while many others have addressed the polemic over the display of the crucifix in the public schools (*e.g.*, Germany, Italy, and Switzerland) or that of the Ten Commandments and the crèche (*e.g.*, the United States). In this paper, I propose to jointly address the two different sets of conflicts, as they both have to do with the relationship between religion and constitutional identity as well as with the different understandings, uses and driving principles of secularism as a constitutive element of constitutionalism.

In the first place, in a pluralistic society, both for majorities as well as for minorities, religious symbols play a peculiar role in identity-related dynamics. Their role cannot be compared with that of official State symbols such as the national flag, which do not represent any “official truth” but rather testify to the existence of a political community that shares a (limited) set of common political values.² The consequences of globalization, large scale migration, and the aftermath of September 11 have dramatically increased the demand for social cohesion and for strong collective identities,³ which are better expressed by religious symbols thanks to their capacity to evoke absolute and therefore reassuring truths. Religious symbols, however, can easily turn into catalysts of aggression because they express and generate a primitive intellectual and relational level of human development—the level of blind fixations and belongings.⁴ Religious symbols unite, but at the same time they strengthen division and support the building of barriers between one’s self and the other. Majorities and minorities seek shelter in religious symbols as a reflex of the increasing difficulty they experience in finding a common core of shared civic values.

Moreover, conflicts over majority and minority symbols reveal an increasing blurring of the line between secularism and religion. On the one hand, religions have become “de-privatized” and seek a wider role in the public sphere and in the political arena. On the other hand, the neutral character of secularism and its ability to solve religious conflicts in pluralistic societies is increasingly contested. Conflicts over religious symbols arise as a consequence of the *de facto* pluralistic character of

² For example, according to the Italian Constitutional Court, “given the fact that the State cannot impose ideological values that are common to citizens as a whole and to each citizen individually,” the national flag is a symbol that simply identifies a given State and represents the ideals that constitute the basis of popular sovereignty.” Corte cost., May 21, 1987, n.189, available at http://www.cortecostituzionale.it/giurisprudenza/pronunce/scheda_indice.asp?sez=indice&Comando=LET&NoDec=189&AnnoDec=1987&TrmD=&TrmM=.

³ Silvio Ferrari, *Individual Religious Freedom and National Security in Europe After September 11*, 2004 BYU L. REV. 357, 377.

⁴ Luigi L. Vallauri, *Simboli e Realizzazione*, in *SYMBOLON/DIABOLON: SIMBOLI, RELIGIONI, DIRITTI NELL'EUROPA MULTICULTURALE* 14 (Edoardo Dieni et al. eds., 2005).

European societies. However, a comparative analysis of the reactions of courts and legislators confronted with such conflicts shows a tendency to counter or minimize pluralism, rather than to seek a reasonable accommodation for the different religious components of the polity. In both conflicts over majority as well as over minority symbols, courts and legislators tend to secularize the meaning of religious symbols and interpret them according to the sensitivities, prejudices, and claims of the majority. On the one hand, the religious significance of majority (Christian) symbols is watered down and interpreted in “cultural” terms, not as the symbols of a given religion, but rather as indicia of the historical and cultural dimensions of national identity. On the other hand, minority—and particularly Islamic—symbols are interpreted as expressions of cultural and political values and practices which are at odds with liberal and democratic ones. The wearing of traditional female Islamic clothing, for example, is often prohibited or limited because it supposedly clashes with gender equality. The practical result of this attitude is that crucifixes may be displayed in the public schools because secularized Christianity represents a structural element of the western constitutional identity, while the wearing of Islamic symbols is either banned or restricted because it represents values and practices that are cast as illiberal and undemocratic.

In the following pages, I will analyze cases decided and laws adopted in various jurisdictions with sharply different models for managing the relationship between the state and religion: Italy, Germany, France, and the United Kingdom. I will also consider the case law of the European Court of Human Rights (ECHR), which is invested with the task of striking a balance between unity and diversity in 47 nations with deeply divergent constitutional traditions. Despite the differences among all of these systems, all cases rely more or less explicitly on a dichotomous construction of the relationship between Christianity and Islam, according to which the former—to be sure in a secularized form—is projected as a central component of Western civilization, while the latter is cast as a threatening “other.” Both the imposition of Christian symbols in the public schools as cultural mainstays and the restrictions on the right to wear Islamic symbols in the name of secularism correspond to this logic. Secularized religion and secularism are used in order to exclude the other and protect the culturally homogeneous character of European societies that is perceived—and even explicitly described—as threatened by pluralism and globalization.

I. SYMBOLS AS POWER: CULTURAL CHRISTIANITY AND THE FEAR OF THE OTHER IN THE ITALIAN AND BAVARIAN CRUCIFIX CASES

The display of Christian symbols in state schools has been challenged in many countries, including the United States, Switzerland, Germany, and Italy. Among the various cases, the Italian and Bavarian judgments on the display of the crucifix show a number of surprising analogies.

In both cases the courts made a choice among the various possible meanings of the crucifix and picked the one which was most congenial to their argument, *i.e.*, the crucifix may be legitimately displayed in state schools because it does not clash with the principle of secularism. As a consequence, all other meanings—including the ones that are most central to religion—are left in the limbo of an interpretive no-man's land, devoid of constitutional protection.⁵

Moreover, despite the fact that in both the Italian and in the Bavarian cases the display of the crucifix was not challenged by Muslims, but by a Finnish atheist parent and a German Steinerian family respectively, the two judgments rely explicitly on a comparison between Christianity and Islam, concluding that while the first one is rooted in the state's democratic values, the second one is not compatible with them.

A. *The Desecration of the Cross*

In 2005, the regional administrative tribunal of Veneto issued a judgment that was subsequently confirmed by the Italian Supreme Administrative Court. The two courts had to rule on the legitimacy of the display of the crucifix in State schools.⁶ Their conclusion was that

⁵ Alessandro Morelli & Andrea Porciello, *Verità, potere e simboli religiosi* (unpublished manuscript, presented at the Annual Congress of the Italian Association of Constitutional Law on *Problemi della laicità agli inizi del secolo XXI*, Naples, Oct. 26-27, 2007), available at http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/paper/0031_morelli_porciello.pdf.

⁶ The crucifix is listed in the "furnishing of all classrooms" of public schools in two royal decrees that date back to the 1920s. Royal Decree, Apr. 26, 1928, n.1297, art. 19; Royal Decree, Apr. 30, 1924, n.965, art. 118. The two royal decrees had been enacted by the fascist government before the Italian Constitution came into force in 1948. The aim of the decrees was to introduce a confessional system, which was actually established by the Lateran Treaty of 1929 with the Vatican, when Catholicism became the official state religion. These decrees are administrative law sources, and thus the Italian Constitutional Court cannot not review them. In the Italian system, administrative acts can be repealed only by administrative courts, while the Italian Constitutional Court may review only primary (legislative) sources. Since the Italian Constitutional Court had never constitutionally reviewed the decrees that establish that it is

“[t]he crucifix . . . may be legitimately displayed in the public schools because it does not clash with the principle of secularism, but, on the contrary, it actually affirms it.”⁷ As secularism has been achieved in Italy thanks to the founding Christian values, it would be a paradox to exclude a Christian symbol from the public domain in the name of a principle such as secularism, which is actually rooted in the Christian religion.

According to the courts, the crucifix does not have a univocal religious significance. Its significance depends on the place where it is displayed. In a church, it has a religious significance; in other contexts, such as a school, it also embodies social and cultural values that are also shared by non-believers. In the specific context of public schools, the crucifix is a religious symbol for believers, but it also evokes the fundamental state values that constitute the basis of the Italian legal order for all citizens. Therefore, it has an important educative function regardless of the religion of the schoolchildren.

Analogously, the Bavarian Supreme Court in its pronouncement of June 3, 1991,⁸ also separated the religious from the cultural significance of the crucifix. The Court held that:

[w]ith the representation of the cross as the icon of the suffering and Lordship of Jesus Christ . . . the plaintiffs who reject such a representation are confronted with a religious worldview in which the formative power of Christian beliefs is affirmed. However, they are not thereby brought into a constitutionally unacceptable religious-philosophical conflict. Representations of the cross confronted in this fashion . . . are . . . not the expression of a conviction of a belief bound to a specific confession. They are an essential object of the general Christian-occidental tradition and common property of the Christian-occidental cultural circle.⁹

It follows that the placing of a crucifix or other representation of the cross in classrooms of State schools does not injure the basic rights to negative freedom of pupils and parents who, on religious or

obligatory for crucifixes to be displayed in public schools, different judges had in the past given very different solutions. While administrative courts (which traditionally have a conservative approach) have consistently upheld the effectiveness of the two decrees—with the consequence that they were never repealed—decisions by ordinary judges, which tend to be more liberal, often went in the opposite direction, but could not repeal the “fascist decrees.” For an in-depth analysis of this case, see Susanna Mancini, *Taking Secularism (Not Too) Seriously: The Italian “Crucifix Case,”* 1 RELIGION & HUM. RTS. 179-95 (2006).

⁷ TAR, Mar. 17, 2005, n.1110, para. 16.1.

⁸ The *Kreuzesbefehl* [Code of the Cross] stated that a “cross must be hung in every classroom” and was contained in § 1313 of the School Ordinance for Primary Schools in Bavaria (1983). It had legal force in all Bavarian primary schools.

⁹ Bayerischer Verwaltungsgerichtshof [BayVGH] [Bavarian Higher Administrative Court] June 3, 1991, 122 Bayerische Verwaltungsblätter [BayVBI] 751 (751-54) (F.R.G.), reprinted in NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NEW JOURNAL OF ADMINISTRATIVE LAW], Issue 11, 1991, at 1099.

philosophical grounds, reject such representation.

Interpreting the crucifix as a cultural symbol has many advantages. The most obvious one has to do with consensus: The numbers of those who supposedly share the same national/cultural identity is much higher than the number of those who actually believe in and practice the Catholic religion. European societies are becoming increasingly secular, and the number of those who seriously engage in religious practices has vertically dropped in the past decades. Religions, however, “in the eyes of states do keep an important significance as social resources, both culturally . . . and politically.”¹⁰ Culturally, religion serves the purpose of helping to build a European identity as opposed to other civilizations.¹¹ Politically, religion plays an important role in strengthening social cohesion. Religion thus is used instrumentally in order to satisfy the needs of the political community.

The crucifix obviously has a cultural significance also, but precisely because it is a religious symbol. In other words, it is impossible to separate the cultural and the religious values that the crucifix embodies in a Catholic society. The crucifix has a specific historical and cultural significance in Italy and Bavaria *because of* the historical and cultural influence of Catholicism and of the Roman Catholic Church in such countries. The significance of the crucifix is not twofold, as both the Italian and the Bavarian courts explicitly claim when they state that even in the context of a public school only believers accord the crucifix a religious significance. The crucifix is essentially a Catholic symbol of an unequivocal confessional nature that has a cultural significance, but the two are necessarily linked together and cannot be separated. In order to legitimize the compatibility of the display of the crucifix in public with the principle of secularism, it is necessary to weaken or neutralize its religious significance.

To confirm that there is an obligation to display the crucifix in public schools, the Italian and Bavarian courts had to engage in a process of disarticulation of the semantic significance of the crucifix.¹² In this way the crucifix loses its specific (religious) value and becomes

¹⁰ Silvio Ferrari, *Dalla tolleranza ai diritti: le religioni nel processo di unificazione*, CONCILIUM, Issue 2, 2004, at 64, 67.

¹¹ See José Casanova, *The Long, Difficult, and Tortuous Journey of Turkey into Europe and the Dilemmas of European Civilization*, 13 CONSTELLATIONS 234, 235-36 (2006), according to whom, the struggle over the access of Turkey in the European Union shows that:

Europeans are not sure whether European civilization is to be defined by the particular historical legacy of Western “civilization,” of which cultural Christianity, to be sure in an increasingly secularized form, remains a central component. Or, alternatively, whether European civilization ought to be defined by the cosmopolitan “civilization” of secular modernity, which Europe itself claims to have produced.

¹² Alessandro Morelli, *Simboli, religioni e valori negli ordinamenti democratici*, in I SIMBOLI RELIGIOSI TRA DIRITTO E CULTURE 85 (Edoardo Dieni et al. eds., 2006) [hereinafter I SIMBOLI RELIGIOSI].

a symbol of civilization and culture, which can be freely used and displayed by state institutions to satisfy the needs of the political community.¹³ But such an instrumental use of religion is not only inappropriate from a political and ethical point of view, as it is likely to set the premises for the introduction of neo-confessional elements in the state system,¹⁴ but it also constitutes a form of government interference in church matters that is contrary to the principle of state neutrality or equidistance.¹⁵ This was actually underlined by the German Federal Constitutional Court in its judgment of 1995, which struck down the Bavarian law on the grounds that the pressure to learn “under the cross” is in conflict with the neutrality of the State in religious matters.¹⁶ Moreover, according to the German Federal Constitutional Court, not considering the crucifix as a religious symbol connected with a specific religion violates the religious autonomy of Christians and actually produces a desecration of the crucifix itself.¹⁷ It is interesting to note that this argument is actually shared by some religious communities who feel that the attribution of a generally cultural significance to the crucifix by a state authority is contrary to Vatican II. A joint declaration by three Catholic Missionary Communities, for example, argues against the obligatory display of the crucifix in state schools because this:

reduces the Christian religious symbol par excellence to a mere symbol of European civilization and culture. The Cross, according to St. Paul, is “a scandal for the Jews and foolishness to Gentiles” (1 Cor 1:23), but it is a symbol of salvation for all believers who recognize in it the manifestation of divine love. To present the cross as Europe’s “cultural symbol” means to resurrect the logic of the ancient and tragic combination of power and the cross that marked

¹³ Ferrari, *supra* note 10, at 64, 67.

¹⁴ Jlia Pasquali Cerioli, *Laicità dello stato ed esposizione del crocifisso nelle strutture pubbliche*, in I SIMBOLI RELIGIOSI, *supra* note 12, at 144.

¹⁵ “State neutrality” is sometimes used (*e.g.*, by the Swiss Federal Tribunal) as a synonym for “secularism.” I have not used the two terms as equivalents, because “state neutrality” is only one component of the principle of secularism. The Italian Constitutional Court elucidated this issue, stating that secularism also implies the duty of the state organs to avoid “a penetrating interference in the way of being and in the activities of the religious communities” and implies “the safeguard of freedom of religion in a confessionally and culturally pluralistic system.” Corte cost., Mar. 25, 1990, n.259, *available at* http://www.cortecostituzionale.it/giurisprudenza/pronunce/indice_annuale.asp (referring to the Jewish community). Moreover, the Court has stated that the principle of secularism is “essentially characterized by the distinction between the sphere of temporal questions and the sphere of religious experiences”; therefore, “religion . . . cannot be imposed as a mean to achieve a State objective.” Corte cost., Oct. 8, 1990, n.334, *available at* http://www.cortecostituzionale.it/giurisprudenza/pronunce/indice_annuale.asp.

¹⁶ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 16, 1995 (Kruzifix-Urteil), 93 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G.), *available at* www.kirchen.net/upload/1232_Kreuz.pdf.

¹⁷ *Id.*

the period of European colonialism to the detriment of other peoples.¹⁸

With few exceptions, however, in both Italy and in Germany the church enthusiastically welcomed the judicial-theological wave that led to the cultural reading of the crucifix. Moreover, in both countries the “crucifix cases” stimulated large and heated debates.

In Bavaria, large demonstrations led by both Catholic and Protestant Bishops took place in support of the obligatory display of the cross in state schools. The issue then became the object of a tug-of-war between the Bavarian government and the Federal Constitutional Court after the latter struck down the crucifix order in 1995. First, the Bavarian Prime Minister threatened not to implement the Federal court’s ruling. Then the Bavarian Parliament enacted a law with the clear aim of side-stepping the constitutional judgment. According to this act, “[i]n consideration of the Bavarian historical and cultural connotation, a crucifix shall be displayed in all classrooms,” but if someone objects “for serious and comprehensible reasons inherent with faith or a vision of the world,” the head teacher of the school should carry out a conciliation process. If no agreement is possible, he or she shall seek a specific *ad hoc* solution that respects the freedom of religion of the dissenting pupil, finds a balance between religious and ideological convictions of the whole class, and also takes into consideration the will of the majority.¹⁹ The ambiguity of such a process clearly emerged when a school board—and later, the Bavarian administrative court—rejected the objection of two parents to the display of the cross, defining this objection as “a pretext and polemic,” adding that the parents’ atheism does not constitute a serious ground to object to the cross’s display. The judgment of the Bavarian tribunal was actually struck down by the Supreme Administrative Court (*Bundesverwaltungsgericht*), which stressed that freedom of conscience includes the freedom not to believe.²⁰ All of these reactions suggest that the implication of the case go well beyond a judicial conflict between state and federal courts. Rather, the case “was thought to have ramifications not just for Catholic Bavaria, but for the very idea of a Christian-occidental identity within an increasingly culturally and religiously heterogeneous Germany and Europe.”²¹

¹⁸ CEM MONDIALITA, MISSIONARI SAVERIANI & MISSIONE OGGI, CIRCA L’OBBLIGO DEL CROCEFISSO IN LUOGHI PUBBLICI (2002) (a declaration concerning crucifixes in public places), available at <http://www.mail-archive.com/educazione@peacelink.it/msg00085.html>.

¹⁹ Bayerische Gesetz über das Erziehungs und Unterrichtswesen [BayEUG] [Bavarian Law on Education and Upbringing], May 31, 2000, art. 7.

²⁰ Bundesverwaltungsgericht [BVerwG] [Supreme Administrative Court] Apr. 21, 1999, 109 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 40 (F.R.G.), available at www.kirchen.net/upload/1233_Kruzifix.pdf.

²¹ Howard Cayll & Alan Scott, *The Basic Law Versus the Basic Norm? The Case of the*

In Italy, the crucifix case also became a battlefield. What is at stake here is a radical challenge to the essential tenets that animate the constitutional frame of the relationship between secularism and religion. Unlike France, the principle of secularism is not explicitly enshrined in any article of the Italian Constitution. However, according to the jurisprudence of the Italian Constitutional Court,²² secularism (*laicità*) constitutes a fundamental principle of the Italian legal system. The Court has reached this conclusion thanks to the combined interpretation of various constitutional provisions: the protection of individual and collective rights,²³ specifically, of religious freedom;²⁴ the guarantee of equality before the law;²⁵ and the principle of separation between church and state,²⁶ according to which “[a]ll religious denominations shall be equally free.”²⁷ The Court also stated that secularism implies “the equidistance and impartiality with respect to different faiths, which the State must maintain in order to protect freedom of religion in a context of religious and cultural pluralism.”²⁸ The Court could not have been clearer: Secularism means that the State is not indifferent toward religion, but that it cannot prefer one religion over other denominations and non-religious manifestations of conscience. However, this notion of secularism is increasingly under attack, not only by the Vatican, but also by leading political forces. It is suggested that Italy needs a “new” understanding of secularism, which is defined as “positive” or “healthy” and is structured as a response to the relativistic wave that Western democracies supposedly experience in the era of globalization and large scale migration. “Positive” secularism does not place all denominations on an equal footing. According to its promoters, the state must recognize that the “national religious inheritance” is not just one among other denominations, but rather an element of civic cohesion.²⁹ What follows is that the “historical national religion” should enjoy a

Bavarian Crucifix Order, 44 *POLITICAL STUDIES* 505, 505 (1996).

²² Corte cost., Apr. 11, 1989, n.203, available at http://www.cortecostituzionale.it/giurisprudenza/pronunce/scheda_indice.asp?sez=indice&Comando=LET&NoDec=203&AnnoDec=1989&TrmD=&TrmM=.

²³ COST. art. 2 (Italy) (protecting “the inviolable rights of man, both as an individual and as a member of the social groups in which one’s personality finds expression”).

²⁴ *Id.* art. 19.

²⁵ *Id.* art. 3.

²⁶ *Id.* art. 7 (providing that the “State and the Catholic Church shall be, each within its own order, independent and sovereign”).

²⁷ *Id.* art. 8.

²⁸ Corte cost., July 1, 2002, n.327; Corte cost., Nov. 13, 2000, n.508; Corte cost., Oct. 11, 1997, n.329; Corte cost., Sept. 30, 1996, n.334; Corte cost., Nov. 29, 1993, n.421; Corte cost., Apr. 19, 1993, n.195; Corte cost., May 23, 1990, n.259; Corte cost., Apr. 11, 1989, n.203; Corte cost., Jan. 11, 1989, n.13. All of these cases are available at the Italian Constitutional Court’s website, http://www.cortecostituzionale.it/giurisprudenza/pronunce/indice_annuale.asp.

²⁹ Gustavo Zagrebelsky, *Stato e Chiesa. Cittadini e cattolici*, *PASSATO E PRESENTE*, Issue 73, 2008, at 16.

preferential treatment, while other denominations should simply be tolerated.³⁰

Obviously, this “positive” understanding of secularism is not at all “new.” Gustavo Zagrebelsky defines it as a “pale reincarnation of the past,” a sort of “semi-secularism” that represents what remains of the old dream of the “Christian Republic” and is based on the opposite of the Westphalian principle: *cuius religio, eius et regio*.³¹ The result is a “new form of alliance between religion and public power, where the ethical force of the first one upholds the political force of the latter and viceversa [sic].”³²

The “crucifix case” is receptive to this “new” understanding of secularism. It has been argued that the courts have officially introduced a new notion of secularism that is contrary to the one affirmed by the Italian Constitutional Court. The new principle can be defined as “post-secular”³³ or “confessional” secularism:³⁴ The judges do not contest the effectiveness of the principle of secularism, but they interpret it in a way that makes it compatible with the granting of privileges to Christianity and with the overlap between the religious and the temporal spheres; that is to say, they deny the notions of impartiality, equidistance and pluralism that the Italian Constitutional Court had attributed to it.³⁵

B. *The Putative Neutrality of Christianity and Islam as the Irreconcilable Other*

After having attributed a cultural rather than a religious significance to the crucifix, both the Italian as well as the Bavarian judges moved on to demonstrate the neutral character of cultural Christianity and the overlap of secularized Christian values with Constitutional principles.

According to the Italian courts, there is “a perceptible affinity . . . between the essential core of Christianity, which . . . focuses on tolerance and the acceptance of the other, and the essential core of the Italian Constitution,” which is based on fundamental rights. The court admits that, “during history, many incrustations were settled on the two

³⁰ *Id.* at 17.

³¹ *Id.* at 18.

³² *Id.* at 19.

³³ *Id.*

³⁴ Nicola Fiorita, *Il crocifisso da simbolo confessionale a simbolo neo-confessionalista*, in I SIMBOLI RELIGIOSI, *supra* note 12, at 182 (quoting Edoardo Dieni, *Simboli, religioni, regole e paradossi* (unpublished manuscript, presented at the Round Table on “Crocifisso, velo e turbante. Simboli e comportamenti religiosi nella società plurale, Campobasso,” Apr. 21, 2005)).

³⁵ *Id.* at 188.

cores, and especially on Christianity.”³⁶ However, the harmony between Christianity and the Constitution remains, because “despite the Inquisition, anti-Semitism and the Crusades[,]” it is “easy” to recognize the most profound core of Christianity in the principles of dignity, tolerance and religious freedom and therefore in the very foundation of a secular state.³⁷ The crucifix supposedly expresses the religious origin of the constitutional values of tolerance, reciprocal respect, human dignity, fundamental rights, solidarity and non-discrimination. The crucifix evokes the harmony of these values with the doctrine of Christianity, and therefore, when it is displayed in a school, it has the function of “reminding schoolchildren of the *transcendent foundation* of such principles, which shape the secular character of the State.” The display of the cross in public schools is therefore “indispensable in order to symbolically affirm our identity, which is characterized by the values of human dignity and respect for mankind.”³⁸ The logical conclusion is that the obligation to display the crucifix does not violate any constitutional value, but on the contrary, it affirms such values in a way that underlines their great significance: “The crucifix is the symbol of our history and our culture and, as a consequence, of our identity . . . and also of the principle of secularism.”³⁹

For similar reasons, according to the Bavarian Court, “The mere presence of the representation of the cross demands neither an identification with the *ideas of belief thereby embodied* nor any form of active behavior oriented thereto.”⁴⁰

However, these statements seem to contradict the theory of the “cultural significance” of the cross. The Bavarian court refers to the “ideas of belief” which the crucifix embodies, and the Italian judges to the “transcendent foundation” of the values it represents. In sum, there always remains a connection between the “confessional” and the “secular” significances of the crucifix. Said differently, the crucifix, despite the judges’ effort, does not become a purely cultural symbol but rather a “semi-secular” symbol that very effectively represents the “new” and “healthy” forms of the alliance between religion and state power to which I referred above. But this “cultural” or “diffused” Christianity that supposedly pervades the Constitution produces an unacceptable discriminatory effect in that non-believers are excluded from the religious meaning of the cross. In its judgment of 1990, which

³⁶ TAR, Mar. 17, 2005, n.1110, para. 11.7.

³⁷ *Id.* para. 11.6.

³⁸ *Id.* para. 12.6.

³⁹ *Id.* para. 12.4.

⁴⁰ Bayerischer Verwaltungsgerichtshof [BayVGH] [Bavarian Higher Administrative Court] June 3, 1991, 122 Bayerische Verwaltungsblätter [BayVBI] 751 (F.R.G.), *reprinted in* NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NEW JOURNAL OF ADMINISTRATIVE LAW], Issue 11, 1991, at 1099.

struck down a Cadro, Ticino regulation concerning the obligatory display of the crucifix in all primary school classrooms, the Swiss Federal Tribunal took this element seriously. Switzerland is a particularly good comparator for our purpose because in the Swiss Constitution, the principle of secularism does not imply religion-blindness and strict neutrality. To the contrary, as in Italy, religious communities in Switzerland are granted a legal status and majority religions enjoy certain privileges at cantonal level. In the “crucifix case,” the Tribunal stated that the application of secularism (“State neutrality”) obliges public schools to receive and respect individuals with different convictions and prevent them from feeling as outsiders. According to the Swiss federal judges, this obligation must be understood as granting special protection to pupils belonging to religious minorities that do not enjoy an official status and to those that are atheistic, agnostic or indifferent in respect of religious matters. The consequence is that the obligatory display of the crucifix in elementary schools violates the principle of secularism, because it suggests that schools favor the religion of the majority. It is in fact conceivable that some pupils may interpret the display of the symbol of a religion to which they do not belong, as interfering with their beliefs, “and this may produce in their spiritual development and in their religious beliefs, the kind of consequences which the principle of State neutrality is precisely aimed to prevent.”⁴¹

The Bavarian judges justified the discriminatory effect by balancing the positive freedom of religion of the majority with the negative one of religious and ideological minorities. Accordingly, the fact that pupils have different cultural and religious backgrounds does not mean that schools must represent all religious and philosophical and educational desires, nor that they have to be restricted to teaching in a completely value-neutral fashion, because such a restriction would damage the positive religious freedom of the majority and pose a tension between negative and positive religious freedom as a further limitation on the former’s sphere of validity.⁴²

In the Italian case, this judicial technique would not be acceptable.⁴³ In order to deny the discriminatory effect of the mandatory

⁴¹ Bundesgericht [BGer] [Federal Court] Sept. 26, 1990, 116 *Entscheidungen des Schweizerischen Bundesgerichts* [BGE] I 252 (Switz.), available at <http://www.servat.unibe.ch/dfr/a1116252.html>.

⁴² Bayerischer Verwaltungsgerichtshof [BayVGH] [Bavarian Higher Administrative Court] June 3, 1991, 122 *Bayerische Verwaltungsblätter* [BayVBI] 751 (F.R.G.), reprinted in *NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT* [NEW JOURNAL OF ADMINISTRATIVE LAW], Issue 11, 1991, at 1099.

⁴³ In Italy, until 1984 (when the Lateran Treaty was modified, and Article 1 of the treaty, which proclaimed the state religion, was repealed), the Italian Constitutional Court protected the privilege of the Catholic Church by upholding several articles of the criminal code that punished the disparaging of state religion and, to a lesser extent, of other religions, on the basis of a

display of the crucifix, the judge there had to return to a theological argument: Christianity, *unlike other denominations*, is naturally inclusive and contains the ideas of tolerance and freedom, which constitute the basis of a secular state. “The mechanism of exclusion of infidels is common to all religions except Christianity, which considers faith in the omniscient secondary to charity, that is to say respect for the others.” It follows that “the rejection by a Christian of those who do not believe implies the radical denial of Christianity itself, a substantial abjuration, which is not the case in other religions, where it may constitute a violation of an important prescription.”⁴⁴

So, finally, the judge has put his cards on the table: Christianity overlaps with democracy, other religions do not. Which “other religions” the judge refers to is easy to guess. After drawing a distinction between different denominations, the judgment refers to “the problematic relationship between certain states and the *Islamic* religion.”⁴⁵ The Court also refers explicitly to the two principal preoccupations that cause westerners sleeplessness after 9/11: the clash of civilizations and the threat of Islamic fundamentalism. According to the Court, globalization and large-scale migration make it “indispensable to reaffirm, even symbolically, our identity” (through the display of the crucifix), in order to “avoid a clash of civilizations.”⁴⁶ Moreover, the crucifix—which embodies the value of tolerance—must be displayed in public schools, in order to teach “*non European* pupils . . . to reject all forms of *fundamentalism*.”⁴⁷ (emphasis added).

In the Bavarian case, the Court is even more outspoken. In order to mark the difference between “neutral Christianity” and “political Islam,” the judgment explicitly draws the difference between the display of the crucifix, which is legitimate, and “cases in which the teacher through especially determined behavior—in particular through the wearing of attention-drawing clothing (Baghwan)—which unambiguously indicates a specific religious or philosophical conviction, impermissibly impairs the basic right to negative religious freedom of pupil an parent.”⁴⁸

The comparison between the display of the cross by the state and

twofold criteria: a statistical one (the overwhelming majority of citizens belong to the Catholic Church) and a sociological one (the social reaction to the offenses against the Catholic Church is wider and more intense). See Corte cost., May 13, 1965, n.39; Corte. cost., Nov. 28, 1957, n.125. The court later rejected both principles and declared unconstitutional various criminal code provisions. See Corte cost., July 8, 1988, n.925. Finally, a law, “Modifiche al codice penale in materia di reati di opinione,” extended protection under criminal law to all religions. Law No. 85 of Feb. 24, 2006, Gazz. Uff. [Official Gazette of Italy], Issue 60, Mar. 13, 2006.

⁴⁴ TAR, Mar. 17, 2005, n.1110, para. 13.3.

⁴⁵ *Id.* para. 10.1.

⁴⁶ *Id.* para. 12.6.

⁴⁷ *Id.*

⁴⁸ *Reprinted in* NEUE JURISTISCHE WOCHENSCHRIFT, Issue 38, 1995, at 1101.

the wearing of religious clothing by individuals is illogical. The principle of secularism applies to the state and its institutions. It follows that the state should be secular, but it should not expect a secular attitude from its citizens. Therefore, while state-mandated displays of majority religious symbols in public schools violates the principle of secularism (understood as neutrality), the wearing of religious symbols and clothing by individuals does not do so, at least in principle. With this statement, the Bavarian court shows how increasingly difficult it is to solve the tensions provoked by religious pluralism by sticking to the principle of secularism. It also shows the depth of the connection between conflicts over majority religious symbols and over minority symbols. I shall now turn to the latter problem.

II. THE POWER OF SYMBOLS: THE VEIL AND THE FEAR OF THE OTHER

Among European states, France, the United Kingdom, and Germany represent radically different models for managing the relationship between the state and religion and for accommodating religious diversity. France embodies the militant secularist model par excellence, bent on keeping religion completely out of the public sphere. The United Kingdom, in contrast, has an official denomination, but also a high degree of accommodation for minority religions; its system is often referred to as a model of “inclusive multiculturalism.” In Germany, there is no strict separation between the church and the state, and the Constitutions of the each *Land* regulate the role of religion in the public sphere according to its religious background. While French law has generally prohibited the wearing of the Islamic veil in state schools, in Britain the *hijab* is commonly worn in public schools. In Germany, the situation is varied, as eight of the sixteen federal states have enacted legislation to prohibit teachers in public schools from wearing visible items of religious clothing and symbols. At first glance, one would conclude that these three systems cannot be fruitfully compared.

A closer analysis of a number of Islamic clothing cases and the laws associated with them in the three countries, however, reveals that such differences are perhaps less important than they seem.

In all cases, Islamic symbols undergo a process of semantic disarticulation and are interpreted according to majoritarian cultural parameters. The mechanism is analogous to the one applied by the Italian and Bavarian judges in the crucifix cases analyzed above. Unlike in the latter, however, the conclusion in cases involving Islamic symbols is that the latter (or certain types of the latter) cannot be legitimately displayed because they are associated with beliefs and

behavior that contradict the essential values that state schools must promote. Among such values, gender equality, characterized as a singularly Western value, plays a key role.

The same pattern is applied by the ECHR in its “veil jurisprudence.” In deciding cases over the legitimacy of bans on wearing the veil, the ECHR, while formally relying on the doctrine of the margin of appreciation, consistently interprets the *hijab* as a religious symbol which cannot be reconciled with Western values. In other words, the Court does not simply grant a wide degree of deference to national authorities in deciding how to interpret the significance of the veil, but it also makes a value judgment, concluding that the use of the *hijab* can be legitimately prohibited because it objectively endangers democratic values.

A. *The French Case: The Veil that Threatens Public Order*

In order to fully understand the ideological dimension of the *affaire du foulard*, numbers are important. Wearing the *hijab* is numerically a trifling phenomenon: It has been estimated that less than one percent of the Muslim students in France actually wear the veil.⁴⁹ As Seyla Benhabib puts it, “the actions of a handful of teenagers” were enough to expose the fragility “within the French Republic (of) the balance between respecting the individual’s right to freedom of conscience and religion . . . and maintaining a public sphere devoid of all religious symbolism,”⁵⁰ and to provoke a debate which “went far beyond the original dispute and touched upon the self-understanding of French republicanism for the left as well as the right, on the meaning of social and sexual equality, and liberalism versus republicanism versus multiculturalism in French life.”⁵¹

Before the enactment of the 2004 law that prohibits the wearing of conspicuous religious symbols in state schools, the French Conseil d’Etat had struggled for 15 years over the right of this handful of Muslim teenagers to wear the *hijab*. According to its jurisprudence,

⁴⁹ Elaine R. Thomas, *Keeping Identity at a Distance: Explaining France’s New Legal Restrictions on the Islamic Headscarf* 29 *ETHNIC & RACIAL STUD.* 237, 239 (2006) (“According to official French sources, a total of 1,256 *foulards* were reported in France’s public schools at the start of the 2003-04 school year. Only twenty of these cases were judged ‘difficult’ by school officials themselves, and only four students were expelled (10 December 2003, *Le Monde*). Considering that France’s Muslim population is currently estimated at 5 million and is predominantly young, French public reaction to the problem of students in headscarves appears strikingly disproportionate.”).

⁵⁰ SEYLA BENHABIB, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* 96 (2002).

⁵¹ *Id.*

developed since 1989, in principle the right of pupils to wear religious symbols or clothing could not be the object of a general ban, but rather the object of specific limitations in case such display violated the rights of others or seriously jeopardized the carrying out of school activities. According to the Conseil, the wearing of religious symbols by pupils was not *per se* contrary to the principle of secularism, but it constituted the exercise of the pupil's right to manifest his or her religion. Therefore, while a general ban over the wearing of religious symbols was not legitimate,⁵² specific limitations on the right to wear religious symbols were admissible. Pupils could not wear symbols that—because of their nature or of the conditions under which they were displayed—individually or collectively constitute acts of pressure, provocation, proselytism or propaganda; offend the dignity or freedom of the pupil or other members of the school community; are likely to seriously threaten health or safety; disturb the school activities; or jeopardize the pedagogic role of the teachers, the “ordre scolaire” (school order) and the functioning of the educational public service.

This case law was meant to conciliate two potentially contradictory constitutional principles: secularism and freedom of conscience. In balancing between the two, the *Conseil* opted for a “soft” implementation of both principles.

However, the judge's prudence provoked a great deal of confusion among the teachers, who were ultimately responsible to interpret the “ostentatious” character of religious symbols, and correctly identify the borderline between “a ostentatious religious symbol” and the “ostentatious wearing of a religious symbol,” as well as the circumstances under which a religious symbols turns into “an act of pressure, provocation, proselytism or propaganda.”

The intervention of the French Government did not help to clear the field from such ambiguities; on the contrary, it augmented them. An act of December 12, 1989⁵³ stated that pupils were free to wear or display religious symbols, but in case of a conflict, the pupil had to be convinced through a dialogue to renounce to the display of the symbol. Another act of September 20, 1994⁵⁴ finally drew a distinction between ostentatious and discrete symbols and introduced the principle

⁵² See Conseil d'Etat [CE] [highest administrative court] Mar. 14, 1994 (Fr.) (repealing the rule implemented in a high school in the city of Angers, according to which, “[a]ucun élève ne sera admis en salle de cours, en étude ou au réfectoire la tête convertie”); Conseil d'Etat [CE] [highest administrative court] Nov. 2, 1992 (Fr.).

⁵³ Circulaire of Dec. 12, 1989, of the Minister of State, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 15, 1989, available at <http://www.assemblee-nationale.fr/12/dossiers/documents-laicite/document-2.pdf>.

⁵⁴ Circulaire No. 1649 of Sept. 20, 1994, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Sept. 24, 1994, available at <http://www.assemblee-nationale.fr/12/dossiers/documents-laicite/document-3.pdf>.

according to which certain symbols may be deemed *per se* ostentatious (“signs so ostentatious that their meaning is precisely to separate certain pupils from the rules of the communal life of the school” which are “by their nature, elements of proselytism”), which could be banned. This act overturned the relationship between rule and exception that the Conseil d’Etat had previously theorized, according to which the simple fact of wearing a religious symbol could not be automatically viewed as a violation of the principle of secularism or of other constitutional principles. This act provoked the expulsion of a number of pupils. However, its potential was practically neutralized by the subsequent intervention of the Conseil d’Etat which declared that this act was not binding and could be used only as an interpretative tool.⁵⁵

In 1994, as the *affaire du foulard* was becoming increasingly tense, a mediation committee was build up, with the aim to convince the pupils through a dialogue not to wear the veil. This is very revealing of the confusion and the ambiguity of the French “politics of the veil”: The judges affirmed the right to wear religious symbols, albeit with some exceptions, while the government practically banned their use, and a “dialogue system” was institutionalized with the aim to convince pupils not to wear them. The “dialogue system,” in any case, did not prove fruitful.

In July 2003, President Chirac set up an investigative committee, chaired by Bernard Stasi, the French State’s ombudsman, with the task of reflecting on the application of the principle of secularism. The commission interviewed representatives from different groups: political and religious leaders, school principals, social and civil rights groups. In December 2003 it issued a report,⁵⁶ which eventually led to the introduction of the law that prohibits the display of religious symbols in state schools.

The Stasi Commission’s report issued many recommendations aimed both at reaffirming secularism as well as at recognizing and accommodating religious diversity. For example, it proposed to recruit Islamic chaplains in the army and prisons, to create a national school of Islamic Studies,⁵⁷ to “take into account the main holidays of the most represented religions,”⁵⁸ and to ensure that the teaching of French history includes slavery, colonization, decolonization, and immigration.⁵⁹ The Commission also proposed to ban “clothing and

⁵⁵ Conseil d’Etat [CE] [highest administrative court] July 10, 1995 (Fr.) (Association “Un Sysiphe”), available at http://site.voila.fr/lpjf/dossiers/Laicite/CE_19950710.pdf.

⁵⁶ COMMISSION DE REFLEXION SUR L’APPLICATION DU PRINCIPE DE LAÏCITE DANS LA REPUBLIQUE, RAPPORT AU PRESIDENT DE LA REPUBLIQUE (2003) [hereinafter RAPPORTE], available at <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf>.

⁵⁷ *Id.* at 69.

⁵⁸ *Id.* at 65.

⁵⁹ *Id.* at 67.

symbols demonstrating a religious or political affiliation” in public schools.⁶⁰ Among all of the recommendations made by the Commission, this was the only one to have been included in the law of 2004—albeit only partially, as the legislative ban does not apply to political symbols. Moreover, in order to clear the field of all ambiguities concerning what symbols the law was meant to target, after its enactment the Minister of Education issued a decree according to which “[t]he prohibited signs and dress are those by which the wearer is immediately recognizable in terms of his or her religion, such as the *islamic veil*, whatever its name, the kippah or a crucifix of *manifestly exaggerated dimensions*.”⁶¹

According to the Stasi Commission, the ban on religious symbols was necessary to maintain public order. The reason for this is threefold. First, “wearing an ostensibly religious symbol . . . suffices to disrupt the tranquility of the life of the school.”⁶² The relationship between the presence of the symbols and the disruption of the studious life, however, is not at all clear. The Stasi Commission referred to a number of practices (all associated with Islam), such as “course and examination interruptions to pray or fast,” the refusal by schoolgirls to engage in sporting activities and the objections by pupils to “entire sections of courses in history or earth science,”⁶³ which certainly have a disruptive potential, but are neither provoked nor aggravated by the use of the veil. The Commission also pointed out that wearing the headscarf endangers public order because it overburdens teachers and local officials who “are often left isolated, in a difficult environment” to apply the unclear principles established by the Conseil d’Etat—that is, to distinguish between illicit ostentatious symbols and licit non-ostentatious ones.⁶⁴ This, however, suggests that the cause for the disruption of public order was the confusion generated by the unclear rules set by the French courts, not the presence of veiled schoolgirls. Finally, the Commission viewed Islamic headscarves as a threat to public order because they are associated with communitarianism.⁶⁵ The report mentions the difficult socio-economic situations of the *banlieue* inhabited by many nationalities” (unemployment, poor school attendance, etc.) and the risk that:

communitarian groups with politics based on religion exploit this actual social unrest in order to mobilize activists. They develop a strategy of intimidation of individuals to force them to comply with

⁶⁰ *Id.* at 58.

⁶¹ Circulaire No. 2004-084 of May 18, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 22, 2004 (emphasis added).

⁶² RAPPORT, *supra* note 56, at 41.

⁶³ *Id.*

⁶⁴ *Id.* at 31.

⁶⁵ *Id.* at 45-46.

the communitarian rules they advocate. These groups do so in segregated neighborhoods, submitting the most vulnerable population to a permanent state of tension. This results in pressure exerted over girls and young women to compel them to wear modest clothing and to adhere to the religious precepts as interpreted by these groups, under the threat of having to withdraw from social and communal life.⁶⁶

Again, the nexus between poverty, segregation, communitarianism and the use of the veil is not clear. All the Stasi Commission suggests is that the use of the veil is imposed on women who live in the *banlieue* by communitarian groups.

This brings us to our next point: the correlation between the use of the veil and gender equality.

The argument that the veil symbolizes the submission of women is a recurrent one, and not just in the French debate. The cases decided in Britain and by the ECHR, which will be discussed below, rely heavily on the assumption that young women do not wear the veil out of their own will but rather as the result of pressure from their family and community. In France, however, this argument seems to be particularly powerful. In 2008, for example, a young Moroccan woman, married to a French citizen and the mother of three children, was refused French nationality for adopting a radical practice of her religion that was considered incompatible with French basic values, particularly the principle of gender equality.⁶⁷ The woman, who clearly stated that she did not mean to challenge French republican values and spoke French, always wore the *burqa* when in public, but spent most of her time within her home, where she obeyed to her husband according to her religious beliefs. In other words, this woman's private choices and clothing were the elements used to deny her French citizenship, as they did not comply with gender equality. No authority, however, questioned her equally religious French husband concerning his compliance with republican values, which suggests that the duty to comply with gender equality applies to women but not to men.

The argument that Islamic clothing clashes with women's equality is a very problematic one, which would require an in-depth analysis of the complex relationship between accommodating religious diversity and protecting women's rights. Such an analysis is certainly not reflected in the Stasi Commission report, which simply assumes that young women belonging to religious minorities are often not autonomous agents within their culture, and that the latter is *per se*

⁶⁶ *Id.*

⁶⁷ Conseil d'Etat [CE] [highest administrative court] May 26, 2008 (Fr.), available at <http://www.conseil-etat.fr/cde/fr/selection-de-decisions-du-conseil-d-etat/seance-du-26-mai-2008-lecture-du-27-juin-2008-.html>.

inimical to gender equality. According to the Commission, “young girls are pressured into wearing religious symbols. The familial and social environment sometimes forces on them a choice that is not theirs,”⁶⁸ and “[t]he Republic cannot remain deaf to the cries of distress from these young women” and must therefore ban religious symbols from public schools⁶⁹ in order to advance gender equality. It follows that the Republic is best placed to decide not only how is it better for (Islamic) women to dress themselves, but also what clothing (Islamic) women would wear were they free to do so. Similar arguments have recently been used in abortion cases, in order to curtail women’s reproductive rights in the name of women’s best interest. For example, in the *Carhart II* case, decided by the U.S. Supreme Court, Justice Kennedy turned to the paternalistic argument that women must be protected against themselves, as they are likely to regret their decision of having an abortion because it is in their nature to be bonding mothers:

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. . . . Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.⁷⁰

As no hard data concerning the number of women coerced to wear the veil were presented by the Stasi Commission, one must conclude that the latter could not reliably measure this phenomenon. The Commission, however, assumed that the coercion to wear the veil is “unexceptionable” and that therefore women need to be protected against it. Just as in the *Carhart II* decision, where the Justice assumed that abortion hurt women, the Stasi Commission report assumed that the veil hurt women. Otherwise, given the state’s particular obligations to protect human rights, coercion by the state in banning religious symbols would constitute a much more serious threat than coercion by private parties. Said differently, if there were nothing intrinsically anti-feminist in the veil, why should the state be concerned with the fact that some girls might be forced to use it? Why would the state otherwise assume that it is *better* for a woman to be bare-headed than to cover her head?

The answer to this question can be found in a very troubling passage of the Stasi Commission report, which makes a direct correlation between gender equality and casting women as sexual beings: “Young men force [girls] to wear clothes that are concealing and *asexual*, and to lower their eyes on seeing a man; and if they do not

⁶⁸ RAPPART, *supra* note 56, at 58.

⁶⁹ *Id.*

⁷⁰ *Gonzales v. Carhart*, 550 U. S. 124, 159 (2007) (internal citations omitted).

conform with such rules, they are stigmatized as ‘whores.’”⁷¹ Should women uncover themselves and emphasize their sexuality in order to be free and equal?

B. *The British Case: Shabina Begum and the School Where All Muslims Must Look Alike*

While in France the *hijab* question was “solved” through a legislative ban, the United Kingdom was struggling with the particularly thorny *Begum* case, which is in many ways analogous to the ones decided by the French Conseil d’Etat.

Shabina Begum was a Bengali pupil who attended a state school in Luton, the Denbigh High School. The school was a maintained secondary community school, taking pupils of both sexes aged 11-16. It had a very diverse intake, with 21 different ethnic groups and 10 religious groupings represented. About 79% of its pupils were Muslim. The school offered three uniform options. One of these was the *shalwar kameeze*: a combination of the *kameeze*, a sleeveless smock-like dress with a square neckline, revealing the wearer’s collar and tie, with the *shalwar*, loose trousers, tapering at the ankles. It was worn by some Muslim, Hindu and Sikh schoolgirls. In 1993 the school appointed a working party to re-examine its dress code. The governors consulted parents, students, staff and the Imams of the three local mosques. There was no objection to the *shalwar kameeze*, and no suggestion that it failed to satisfy Islamic requirements. The governors approved a garment specifically designed to ensure that it satisfied the requirement of modest dress for Muslim girls. Following the working party report, the governors, in response to several requests, approved the wearing of head-scarves of a specified color and quality. The school went to some lengths to explain its dress code to prospective parents and pupils. This was first done in October of the year before a pupil would enter, and again at an open evening in the July before admission. A letter written to parents reminded them of the school’s rules on dress.

For two years Shabina Begum wore the *shalwar kameeze* without complaint. Then one day she went to the school with her brother and another young man. They insisted that Shabina be allowed to attend the school wearing a long coat-like garment known as a *jilbab*, the only garment which met her religious requirements because it concealed, to a greater extent than the *shalwar kameeze*, the contours of the female body, and was said to be appropriate for maturing girls. As compromise turned out to be impossible, Shabina Begum never returned to the

⁷¹ RAPPART, *supra* note 56, at 46.

Denbigh High. For two years she did not go to school, then she enrolled in a different high school that allowed her to wear the *jilbab*.

Shabina Begum claimed that the Denbigh High School unjustifiably limited her right, under Article 9 of the European Convention on Human Rights, to manifest her religion or beliefs, and violated her right not to be denied education under Article 2 of the First Protocol to the Convention.

The High Court rejected her claims; this ruling was then reversed by the Court of Appeal, albeit on strictly procedural grounds.⁷² Finally, the House of Lords upheld the school's (uniform) policy, accepting the school's arguments in order to justify denying Begum the right to wear her *jilbab*.⁷³ All of these arguments are very interesting, as they reveal virtually all of the ambiguities concerning the management of religious diversity in public schools. Some of them are of particular interest from a comparative perspective, as they are analogous to those used by the French Conseil d'Etat.

In the first place, the Denbigh High School argued that the uniform policy demonstrated an open and tolerant attitude. The *shalwar kameeze* was chosen in accordance with the pupils' parents and after having consulted various local imams as well as some Islamic authorities in the United Kingdom, which had affirmed that it satisfied Islamic requirements. In the second place, the school argued that the *jilbab* could have hampered sports activities and jeopardized the pupil's health and school safety (*e.g.*, during laboratory classes). Moreover, the school argued that the *jilbab* could have been turned into a means of pressure toward other female Muslim pupils, given that Shabina had said that those girls who wear a *jilbab* are better Muslims. The pressure could have induced some girls to also wear a *jilbab*, while others, refusing to do so, could have felt intimidated or simply insecure. This would have produced a tense atmosphere and introduced divisions among the pupils. The presence of a pupil wearing a *jilbab* could have also produced a chain reaction among the pupils' parents, some of whom could have felt that their daughters mustn't have appeared less modest than Begum. By imposing them the *jilbab*, these parents would

⁷² *R ex rel. Begum v. Governors of Denbigh High Sch.*, [2005] EWCA (Civ) 199, [2005] 1 W.L.R. 3372 (Eng.). This overturned a ruling made in June 2004 in the High Court by Mr. Justice Bennett, who had declared that the dress code was a "reasoned, balanced, proportionate policy" and that Ms. Begum's human rights had not been violated. [2004] EWHC (Admin) 1389. The Court of Appeal upheld the right of the school to set a uniform policy. At the same time, it agreed with Cherie Booth QC's objection that in this case the school had not done this with due care and attention to Article 9 of the Human Rights Act, which assures individuals the freedom to manifest their religious beliefs. Lord Justice Brooke, writing for a three-judge panel, called on the Department for Education and Skills to give more guidance to schools on how to comply with the obligations under the Human Rights Act.

⁷³ *Regina ex rel. Begum v. Governors of Denbigh High Sch.* [2006] UKHL 15, [2007] 1 A.C. 100 (H.L.) (appeal taken from Eng.).

have interfered with the girls' religious freedom. Finally, the school argued that both the pupils and the teachers would have felt "uncomfortable" in presence of clothes that are generally associated with fundamentalism.

The House of Lords accepted this construction. "The substance of its majority position may be summarized as follows: the head teacher is clearly a good and sensible head teacher, the dress code was drawn up in a reasonable way after wide consultation, schools are entitled to have dress codes, and therefore we feel no inclination to interfere. Added by Baroness Hale is the proposition (paraphrased here) 'and she is a child, whose religious views may be taken less seriously than those of an adult, and for whom schools should provide a place of protection from undue religious pressure from family and community.'"⁷⁴ The latter statement merits some attention, as it suggests that the appellant should also have been protected from the pressure by her family and her religious community. Many children likely suffer strong pressure in the sphere of religion within a number of communities: fundamentalist Christians and orthodox Jews, among others, come to mind. Moreover, putting a certain level of pressure on children to comply with religious duties is regarded as normal in mainstream religion. No judge has ever ruled that it is illegitimate for a Catholic family to impose on its children to attend Sunday Mass, even if they would prefer to spend the day differently. When it comes to Islam, however, judges and legislators seem to feel a greater necessity to protect children's rights.

What emerges very clearly, both from the *Begum* case as well as from the French ones, is that the problem does not have to do with the religious symbol itself, but rather with the significance that is attributed to it. In both cases, the right of pupils to wear religious symbols may be limited in basically two circumstances: when the symbol is potentially hampering or dangerous, and when it can be used as a means of pressure towards other pupils. Ironically, however, while the Denbigh High School—as well as, apparently, the House of Lords—associates these potential effects to the *jilbab*, but obviously not to the *hijab*, which is admitted by the school uniform code, the Conseil d'Etat feels that the mere *hijab* is capable of producing them.

Said differently, the limitations to the right to wear religious symbols cannot be linked to any objective characteristic of the religious symbol itself. Rather, the limitations to such right have to do with the external perception of the symbol. The first set of limitations, having to do with the potentially hampering or dangerous characteristics of the

⁷⁴ Gareth Davies, (*Not Yet*) *Taking Rights Seriously: The House of Lords in Begum v. Headteacher and Governors of Denbigh High School* (Human Rights & Human Welfare, Working Paper No. 37, 2006), available at <http://www.du.edu/gsis/hrhw/working/2006/37-davies-2006.pdf>.

religious symbols, has no objective basis. The *hijab* as an object is just the same in the United Kingdom and in France, but it is perceived differently in the two contexts. More importantly, such hampering or dangerous character is just the product of mere assumptions and is not supported by any evidence. Significantly, the Canadian Supreme Court, in a case concerning the right of a Sikh pupil to wear his *kirpan* (a dagger) to school, stated that “the existence of concerns relating to safety must be unequivocally established for the infringement of a constitutional right to be justified.”⁷⁵

The absence of any objective elements is even clearer as to the second sets of limitations to the right to wear religious symbols, those that have to do with the potential use of the latter as instruments of pressure by pupils. This is a very ambiguous argument, revealing the use of a double standard. It is well known worldwide that children, and especially adolescents, undergo tremendous pressure by their peers in order to wear fashionable clothes and comply with given groups rules. Courts however, do not usually regard this certainly criticizable phenomenon as a legitimate ground for limiting fundamental rights. Unlike other objects, however, Islamic symbols are automatically associated with negative values and conceptions and considered as potential threats to the rights of the others.

There is a final disturbing element in the *Begum* case, which is expressed in the concern that allowing the *jilbab* would create two categories of Muslims within the school, which might lead to conflict, threatening the harmony and good functioning of the school as a whole. Their Lordship are certainly aware that in the many-sided Islamic world, there exist more than two categories of Muslims and that the idea that a head-teacher, three local imams and a group of parents from Luton are entitled to declare the tastes and the needs of *all* Muslims is rather absurd. However, the Court seems to appreciate this trivialized version of Islam, where everybody looks alike, there is no room for diversity, nor is there room for minorities within minorities:⁷⁶ a watered-down version, an Islam that doesn't look too Islamic.

⁷⁵ *Multani v. Comm'n scolaire Marguerite-Bourgeois*, [2006] S.C.R. 256 (Can.).

⁷⁶ In the words of Barack Obama, “The minority assimilated into the dominant culture, not the other way around. Only white culture could be neutral and objective. Only white culture could be nonracial, willing to adopt the occasional exotic into its ranks. Only white culture had individuals.” BARACK OBAMA, *DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE* 100 (1995).

C. *The Case of the Catholic German Länder: The Ethnocentric Temptation*

In Germany, while the Federal Constitutional Court has underlined the “ambiguous” character of the veil as the symbol of women’s alienation as well as an instrument of emancipation that allows religious women to accede to the work market, some *Länder* have interpreted the *hijab*—but not religious symbols related to Christianity and Judaism—as a political symbol that clashes with constitutional values. Five German *Länder* have adopted laws that prohibit Islamic symbols but specifically permit Christian ones in the public schools (Baden-Württemberg, Saarland, Hesse, Bavaria, and North Rhine-Westphalia).⁷⁷

These laws constitute a direct reaction to a Federal Constitutional Court judgment concerning the wearing of the veil by a teacher. The woman was refused a permanent civil servant post as a teacher in a primary school in the conservative *Land* of Baden Wuerttemberg because she insisted on wearing the veil; this was interpreted as a “lack of personal aptitude.” The Federal Constitutional Court ruled that German *Länder* had the right to ban teachers wearing the veil as long as they passed specific laws on the matter. As a result, the *Länder* with the strongest Catholic traditions adopted specific laws on the issue. The law adopted in Baden Württemberg on April 1, 2004, prohibits teachers from “exercis[ing] political, religious, ideological or similar manifestations,” particularly if the constitute “a demonstration against human dignity, non discrimination” However, the “exhibition of Christian and occidental educational and cultural values and traditions does not contradict” such prohibition.

Human Rights Watch interviewed officials from the Baden-Württemberg Ministry of Education, Youth and Sport. The officials confirmed that Christian clothing and display have been deliberately exempted by the legislature and that nun’s habits, the cross, and the kippa are permitted.⁷⁸ The law adopted in Saarland affirms that the “[s]chool has to teach and educate pupils on the basis of Christian educational and cultural values,” and that “the task of education has to be fulfilled in such a manner that neither the neutrality of the country towards pupils or parents nor the political, religious or ideological peace of the school are endangered or disturbed by political, ideological or

⁷⁷ For a collection of the cases in PDF format, see Universität Trier: Kopftuch, <http://www.uni-trier.de/index.php?id=24373> (last visited Jul. 7, 2009).

⁷⁸ HUM. RTS. WATCH, DISCRIMINATION IN THE NAME OF NEUTRALITY: HEADSCARF BANS FOR TEACHERS AND CIVIL SERVANTS IN GERMANY 26 (2009), available at http://www.iiv.nl/epublications//2009/Discrimination_in_the_Name_of_Neutrality.pdf.

similar manifestations.” The Hessian law is ever more explicit:

“Public servants . . . are not particularly allowed to wear or use any garments, symbols or other features that objectively may impair public confidence in their neutral tenure of office, or endanger the political, religious or ideological peace. On deciding if the requirement of sentence 1 and 2 are fulfilled the humanistically and in a Christian manner imbued occidental tradition of the *Land* of Hessen has to be taken into due account.”

In Bavaria:

[T]eachers are not allowed to wear outer symbols . . . that express a religious or ideological creed, in case students or parents understand these symbols . . . as an expression of an attitude, that is not compatible with fundamental constitutional values and educational objectives of the constitution, including Christian-occidental educational and cultural values⁷⁹

Nuns’ habits are allowed⁸⁰ because, as a Bavarian ministry official told Human Rights Watch, a nun’s habit is not a political symbol while a headscarf can be also a political symbol conflicting with the equality of women.⁸¹

The governing parties introducing the draft laws in the North Rhine-Westphalia parliament emphasized the importance of the “Christian Western and European tradition,” arguing that it is “not a breach of the neutrality requirement if a teacher commits to this tradition.”⁸² It follows that “the nun’s habit and Jewish kippa remain therefore permissible.”⁸³

All of these laws (with the exemption of the one enacted in Saarland) have been tested in courts, with the result that the ban over exotic but not Christian symbols has consistently been upheld. The Bavarian Law, for example, was challenged before the Bavarian Constitutional Court, which upheld it on January 15, 2007 with a decision that echoes the one on the crucifix in many respects.⁸⁴ The Court stated that references to Christianity do not coincide with the Christian faiths, but rather with the values that, albeit rooted in the

⁷⁹ Bayerischer Verwaltungsgerichtshof [BayVGH] [Bavarian Higher Administrative Court], Jan. 15, 2007, No. Vf. 11-VII-05, available at <http://www.bayern.verfassungsgerichtshof.de/>.

⁸⁰ HUM. RTS. WATCH, *supra* note 78, at 26 (citing the explanatory comments in the Bavarian government draft law, Gesetzesentwurf der Staatsregierung zur Änderung des Bayerischen Gesetzes über das Erziehungs—und Unterrichtswesen, Bavarian parliament, 15th election period, Drucksache 15/368, Feb. 18, 2004).

⁸¹ *Id.*

⁸² *Id.* at 28 (quoting the Gesetzesentwurf der Fraktion der CDU und der Fraktion der FDP: Erstes Gesetz zur Änderung des Schulgesetzes für das Land Nordrhein-Westfalen, Drucksache 14/569, 14th election period, Oct. 31, 2005).

⁸³ *Id.*

⁸⁴ Bayerischer Verwaltungsgerichtshof [BayVGH] [Bavarian Higher Administrative Court], Jan. 15, 2007, No. Vf. 11-VII-05, available at <http://www.bayern.verfassungsgerichtshof.de/>.

Christian tradition, have become part of the common inheritance of western civilization. Moreover, according to the Court, religious freedom can be limited in the name of the rights of others and of the “Constitutional values” that teachers must teach pupils. In the case at hand, the legislator gave prevalence over individual religious freedom to the need to protect the teaching objectives and the “credible transmission of fundamental values” from the “danger” provoked by the clothes that clearly mark a religious (*i.e.*, non-Christian) belonging. Said differently, Christian signs are admissible because they represent “western culture,” while non-Christian (Islamic) symbols are banned because they embody disvalues that can challenge the teaching and transmission of fundamental values. The notion of State neutrality is interpreted by the Bavarian Court as structurally rooted in the “Christian tradition.” According to the Court, the duty of the State to remain neutral does not mean the strict separation between Church and State. Rather, it orients the legislation towards the value system on which the Bavarian Constitution is based. The latter “refuses a State and social system without God and is based on the history of Bavaria, which is rooted in the Christian-Occidental tradition.”

With this judgment, the Bavarian court not only legitimized once more the privileged position of Christianity. It also suggested an “ethno-cultural” understanding of the polity in which the culture of the majority has an official status, while those of (at least certain) minorities are barely tolerated. By affirming that the peaceful wearing by teachers of Islamic clothes may represent a “danger” for the preservation of traditional values, the Court expressed a negative value judgment on the culture of a religious minority in terms that can only be defined as culturally racist.

Symbols do not have a univocal significance. Objects are neutral by nature and the significance that is attributed to them reflects the culture, the beliefs, the choices of those who see them. In the *Multani* case⁸⁵ the Canadian Court stated that the prohibition for a Sikh pupil to take his *kirpan* at school is based on the widely held—but ultimately wrong—assumption that this 20-centimeter long steel dagger is by nature a weapon, whereas for the Sikh it has a merely symbolic value. It follows that if we prohibit *kirpans* in the schools, we should also prohibit other objects that are not commonly perceived as weapons but can be used as weapons, such as scissors, paper knives and compasses. According to the Canadian Supreme Court, *only the believer is entitled to define the significance of a religious symbol*: “In order to demonstrate an infringement of his freedom of religion, Gurbaj Singh Multani does not have to establish that the *kirpan* is not a weapon. He need only

⁸⁵ *Multani v. Comm'n scolaire Marguerite-Bourgeoys*, [2006] S.C.R. 256, para 37 (Can.).

show that his personal and subjective belief in the religious significance of the *kirpan* is sincere.”⁸⁶

If we share this view, the wearing or display of religious symbols should not be prohibited as such. Limitation must be based on demonstrable *facts* and not on speculation or presumption. Said differently, it is not the religious symbol that should be interpreted as an act of pressure and therefore banned. Rather, only the *acts* of undue pressure should be punished. Symbols such as the *hijab* or the *jilbab* cannot, alone, cause any harm. A pupil or a teacher who wears them may infringe somebody else’s right, but it is such *infringement* that ought to be punished, not the fact of wearing a religious symbol. Like all religious freedoms, the right to wear religious symbols and clothes should be limited only by the fundamental rights and freedoms of others—that is, by a right that is fundamental and outweighs in significance the right being limited.

In virtually none of the female Islamic clothing cases has the prohibition of the symbol been the consequence of the infringement of fundamental rights and freedoms of others. What is it then about such clothing that makes them the focus of controversy, the sign of something intolerable? The answers offered by politicians and judges is that such symbols are an emblem of radical Islamist politics and the oppression of women. In other words, the symbols are prohibited on the basis that they offend the sensibilities of most individuals, who associate them with views and ideologies that are at odds with liberal values. The prohibition, in other words, takes place in the name of a prejudice. Such prejudice may have some rational basis, and it is true that the use of certain Islamic symbols in given circumstances may become the source of tension. However, as the ECHR has stated, the role of a pluralistic State is not that of removing the cause of tension by eliminating pluralism, but to ensure that the competing groups at least tolerate each other and respect each other’s rights.⁸⁷

D. *The Veil in the Jurisprudence of the European Courts of Human Rights*

The European Court of Human Rights (ECHR) has also dealt with the “Islamic veil issue.” In all cases, the Court has held that declaring the ban on the veil is consistent with the Convention. The main argument, in all cases has been that States are best placed for judging

⁸⁶ *Id.*

⁸⁷ *Serif v. Greece*, App. No. 38178/97, 31 Eur. H.R. Rep. 561, para. 53 (1999), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=696395&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

when the interference on religious freedom is necessary in a democratic society and therefore must be granted a wide margin of appreciation.

In the past, the ECHR has often legitimized the interference by States with certain rights (particularly free speech) in order to protect the cultural/religious sensitiveness of the (Christian) majority. In the *Handyside* case, the Court upheld measures against dissemination of a publication which was considered obscene by the English courts. While accepting that freedom of expression constitutes one of the essential foundations of a democratic society, and that it applies also to information or ideas that offend, shock, or disturb the state or any sector of the population, the Court noted that the Convention allows restriction of freedom of expression if necessary “for the protection of morals.” In *Müller and Others v. Switzerland*,⁸⁸ the Court upheld restrictive measures taken in reaction to the controversial nature of certain paintings displayed at an exhibition in Fribourg on the basis that the state can take necessary steps for the protection of morals, and those assessments cannot escape from local contexts. In *Otto-Preminger Institute v. Austria*,⁸⁹ the Court found that the seizure and subsequent forfeiture of the film *Das Liebeskonzil* had not violated Article 10 of the Convention. The Court stated that those who exercise the freedom of expression in the context of religious beliefs and opinions may have an obligation “to avoid as far as possible expressions that are gratuitously offensive to others, and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.”⁹⁰ Moreover:

[As] it is not possible to discern throughout Europe a uniform conception of the significance of religion in society . . . it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference.⁹¹

According to the Court, those assessments may sometimes be made upon purely local standards:

[The Austrian courts found the film] to be an abusive attack on the

⁸⁸ *Müller and Others v. Switzerland*, App. No. 10737/84, 133 Eur. H.R. Rep. (ser. A) 212 (1988), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695364&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

⁸⁹ *Otto-Preminger-Institut v. Austria*, App. No. 13470/87, 295-A Eur. H.R. Rep. (ser. A) 34 (1994), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695774&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

⁹⁰ *Id.* para. 49.

⁹¹ *Id.* para. 50.

Roman Catholic religion according to the conception of the Tyrolean public The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority on Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in the region [and did not] overstep[] their margin of appreciation⁹²

In *Wingrove v. United Kingdom*,⁹³ the Court upheld the refusal of the British authorities to grant a certificate for the video work, *Visions of Ecstasy*, based on the finding that it infringed a provision of the criminal law of blasphemy. Again, according to the Court, “[w]hat is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations.”⁹⁴

In all of these cases, the application of the doctrine of the margin of appreciation resulted in the protection of the collective religious and cultural freedom of the majority. Just as in the “Bavarian Crucifix Order,” the Court’s balancing resulted in an extra guarantee of protection of cultural homogeneity and in the interference with the individual rights of those who belong to ideological minorities.

The Court also relied on the doctrine of the margin of appreciation in the case *Dahlab v Switzerland*⁹⁵ and decided that the measure prohibiting the applicant from wearing a headscarf in her capacity as a teacher at a state school did not amount to interference with her right to freedom of religion. There had never been complaints from parents or pupils accusing the teacher of proselytising or even of talking to her pupils about her beliefs. However:

The wearing of a headscarf and loose-fitting clothes . . . indicates allegiance to a particular faith and a desire to behave in accordance with the precepts laid down by that faith. Such garments may even be said to constitute a ‘powerful’ religious symbol⁹⁶

In displaying a powerful religious attribute on the school premises . . . the appellant may have interfered with the religious beliefs of her pupils⁹⁷

According to the Court, “It must also be acknowledged that it is difficult to reconcile the wearing of a headscarf with the principle of

⁹² *Id.* para. 36. *But see id.* at 60 (Palm, Pekkanen, and Makarczyk, JJ., dissenting).

⁹³ *Wingrove v. United Kingdom*, App. No. 17419/90 (Eur. Ct. H.R. 1996), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695957&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

⁹⁴ *Id.* para 58.

⁹⁵ *Dahlab v Switzerland*, App. No. 42393/98 (Eur. Ct. H.R. 2001), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=670930&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

⁹⁶ *Id.* (quoting the Federal Court of Switzerland).

⁹⁷ *Id.* (quoting the Federal Court of Switzerland).

gender equality, which is a fundamental value of our society enshrined in a specific provision of the Federal Constitution and must be taken into account by schools.”⁹⁸ Moreover, the Court feared that the appellant’s attitude could provoke reactions and conflicts: “[A]llowing headscarves to be worn would result in the acceptance of garments that are powerful symbols of other faiths, such as soutanes or kippas”⁹⁹ On the other hand, the Court allowed for a clear double standard, as it did not question the fact that “the principle of proportionality has led the cantonal government to allow teachers to wear discreet religious symbols at school, such as small pieces of jewellery [sic]”¹⁰⁰ Said differently, a system where teachers can wear “discreet” crucifixes but not “conspicuous” veils is compatible with the Convention.

In two cases decided on December 4, 2008—*Dogru v. France*¹⁰¹ and *Kervanci c. France*¹⁰²—the ECHR decided that the expulsion of two veiled pupils did not violate the Convention. The Court noted that in France the principle of secularism is a fundamental one and that States must be granted a wide margin of appreciation in the field of the relationship between the State and religious denominations.

The margin of appreciation, however, has been applied by the Court in the Turkish veil case, *Sahin v. Turkey*,¹⁰³ in order to legitimize the interference with the religious freedom of the majority. The Court considered the Turkish notion of secularism—which is shaped as a militant democracy clause and meant to protect the Kemalist regime *from Islam*—

to be consistent with the values underpinning the Convention. [The Court] finds that upholding that principle, which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of Article 9 of the Convention.¹⁰⁴

Thus, the Court accepted that in protecting the principle of secularism, the state may impose certain limitations on individual rights.

⁹⁸ *Id.* (quoting the Federal Court of Switzerland (internal citations omitted)).

⁹⁹ *Id.* (quoting the Federal Court of Switzerland).

¹⁰⁰ *Id.* (quoting the Federal Court of Switzerland).

¹⁰¹ *Dogru v. France*, App. No. 27058/05 (Eur. Ct. H.R. 2008), available at <http://www.bailii.org/eu/cases/ECHR/2008/1579.html>.

¹⁰² *Kervanci v. France*, App. No. 31645/04 (Eur. Ct. H.R. 2008) (no English translation available, according to the European Court of Human Rights website).

¹⁰³ *Sahin v. Turkey*, App. No. 44774/98, 44 Eur. H.R. Rep. 5 (2005), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=789023&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

¹⁰⁴ *Id.* para. 114.

In other words, in the balancing process of individual rights and public interest, the recognition given to the principle of secularism is relevant for assessments of both “necessity” and “pressing social need.” The Court observed that “the principle of secularism . . . is the paramount consideration underlying the ban on the wearing of religious symbols in universities.”¹⁰⁵ The Court agreed that,

when examining the question of the Islamic scarf in the Turkish context, there must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need . . . especially since . . . this religious symbol has taken on political significance in Turkey in recent years.”¹⁰⁶

The Court also stressed that “democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position. Pluralism and democracy must be based on dialogue”¹⁰⁷ It led the Court to the conclusion that in imposing the scarf ban, Turkey did not overstep its margin of appreciation.¹⁰⁸ It is suspicious that the Court used the margin of appreciation doctrine in order to protect *minorities* for the first time when the majority belongs to the Islamic religion. If we read this together with the legitimization of Turkey’s militant anti-Islamic notion of secularism and with the statement in *Dahlab* that the veil cannot be reconciled with certain fundamental principles, the Court seems to suggest a certain degree of incompatibility between Islam and liberal democracy (something that is explicitly stated in the case of *Refah Partisi*).¹⁰⁹ On the other hand, all of the other cases in which the Court protected the privilege of mainstream Christianity (such as *Otto Preminger*) suggest that the latter is fully compatible with democracy

¹⁰⁵ *Id.* para. 116.

¹⁰⁶ *Id.* para. 115. In this context, the court recalled its statement from *Dahlab v. Switzerland* that wearing a headscarf represents a “powerful external symbol” and that it may be questioned whether it “might have some kind of proselytizing effect, seeing that it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality.” *Sahin*, 44 Eur. H.R. Rep. 5, para. 111.

¹⁰⁷ *Id.* para. 108.

¹⁰⁸ *Id.* para. 122. *But see id.* at 99 (Tulkens, J., dissenting).

¹⁰⁹ *Refah Partisi (The Welfare Party) & Others v. Turkey*, App. Nos. 41340/98, 41342/98, 41343/98, & 41344/98 (Eur. Ct. H.R. 2001), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=697494&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>. The 2001 *Refah Partisi* judgment was later referred to the Grand Chamber, which delivered a similar decision in 2003. For the Grand Chamber’s decision in *Refah Partisi*, see <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=698813&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

and with the values that underlie the European Convention. In sum, Christianity and Christian values can be defended even at the expenses of fundamental individual freedoms, because the ECHR perceives them as not conflicting with the core values of the Convention system. Islam, on the other hand, even when it is the religion of a State-party majority, can be restrictively regulated because it threatens the democratic basis of the state.

III. ISLAM IN THE PUBLIC SPACE: THE CONSTRUCTION OF THE “ENEMY”

It has been argued that the aftermath of September 11, 2001, and the subsequent terrorist attacks in Madrid and London have produced a time of stress. Times of stress differ from those of crisis primarily in terms of the severity, intensity, and duration of the respective threats involved. Unlike a military invasion, terrorist acts are likely to be sporadic and widespread causing a mainly psychological harm. The tension that is produced can easily lead to overreactions, undue suppression of fundamental rights or exacerbation of ethnic or racial prejudice.¹¹⁰

Muslims are increasingly the victims of such phenomena. As a consequence of 9/11—specifically in Europe—of the almost complete overlap between Islam and immigration, Islam has become the “other” par excellence. The 2004 GfK Custom Research survey indicates that over 50 percent of Western Europeans think that Muslims living in Europe today are viewed with suspicion. The 2005 Pew Survey presented a varied picture, with the majority of respondents stating that “Muslims want to remain distinct” and that “they have an increasing sense of Islamic identity.”¹¹¹ Many Europeans are worried about “Muslim fundamentalism.”¹¹² One of the key findings of this survey is that in a number of respects, Muslims are less inclined than Western Europeans to see a clash of civilizations and often associate positive attributes with Westerners—including tolerance, generosity, and respect for women.¹¹³

According to the report drafted in 2006 by the European

¹¹⁰ Michel Rosenfeld, *Judicial Balancing in Times of Stress: Comparing the American, British, and Israeli Approaches to the War on Terror*, 27 *CARDOZO L. REV.* 2079 (2006), available at http://cardozolawreview.com/content/27-5/ROSENFELD_TERRORISM.WEBSITE.pdf.

¹¹¹ EUROPEAN MONITORING CTR. ON RACISM & XENOPHOBIA, EUROPEAN UNION, MUSLIMS IN THE EUROPEAN UNION: DISCRIMINATION AND ISLAMOPHOBIA 10 (2006), available at http://fra.europa.eu/fraWebsite/attachments/Manifestations_EN.pdf.

¹¹² See generally *id.* at 31.

¹¹³ *Id.* at 10.

Monitoring Centre on Racism and Xenophobia (EUMC),¹¹⁴ Muslims experience various levels of discrimination and marginalization in all European countries—in employment, education and housing—and are also the victims of negative stereotyping by majority populations and the media. In addition, they are far more vulnerable than any other minority to manifestations of prejudice and hatred in the form of anything from verbal threats to physical attacks on people and property, including action by public officials.

Differences in wages, type of employment, and unemployment rates of Muslims indicate persistent exclusion, disadvantage and discrimination all across Europe.¹¹⁵ There is also a large body of non-official evidence that demonstrates the persistent scale of discrimination in employment derived from controlled experiments in employers' recruitment practices ("discrimination testing"), opinion surveys on discriminatory attitudes, and surveys of subjectively perceived discrimination against migrants. Muslim women face a "double" discrimination on account of both their gender and religion.

Muslims in Europe generally appear to suffer higher levels of residential segregation, high levels of homelessness, poorer quality housing conditions, poorer residential neighborhoods, and comparatively greater vulnerability and insecurity in their housing status. Muslims are also often the victims of exploitation in the real estate market, through higher comparative rents and purchase prices.

Young Muslims often have very limited opportunities for social advancement. In the United Kingdom and France, for example, it emerges from the Report that a name which is perceived as "Islamic" produces a vertical drop in the chances of being invited to a work interview. But the marginalization begins in the educational system. The Reports indicates that in virtually all European countries, pupils belonging to the Muslim communities experience more difficulties than other groups and obtain overall inferior results. The work of the American sociologist Tricia Keaton on the situation of Islamic girls in the Paris *banlieue* highlights how the educational system is totally unprepared to deal with the specific needs of this group.¹¹⁶ Said differently, the educational system, instead of offering opportunities for social advancement, perpetuates the structural disadvantage of the Muslim population. If one considers that the latter is considerably

¹¹⁴ *Id.*

¹¹⁵ In the United Kingdom in 2004, Muslims had the highest male unemployment rate at 13 percent and the highest female unemployment rate at 18 percent. Muslims aged 16 to 24 years had the highest overall unemployment rates. In Ireland, the 2002 census revealed that 44 percent of Muslims, in contrast to 53 percent of the total population, were in work, and 11 percent of Muslims were unemployed as opposed to a national average of 4 percent. *Id.* at 11-12.

¹¹⁶ TRICA DANIELLE KEATON, MUSLIM GIRLS AND THE OTHER FRANCE: RACE, IDENTITY POLITICS, & SOCIAL EXCLUSION (2006).

younger than the overall European population¹¹⁷, it is easy to understand how serious the consequences are of this vicious circle of social exclusion and discrimination.

The European Council Committee Against Intolerance and Racism has adopted various Recommendations aimed at combating discrimination against Muslims. One of these refers explicitly to the consequences of the state of stress post September 11, which has rendered the Muslim minority far more vulnerable to “negative general attitudes, discriminatory acts, violence and harassment.”¹¹⁸ In July 2008, Thomas Hammarberg, the Council of Europe Commissioner for Human Rights, pointed out that the number of hate crimes has increased dramatically in Europe in recent years, and that, alongside traditional victims (Jews, Roma, and sexual minorities), such crimes are increasingly directed towards Muslims: “A mixture of Islamophobia and racism is . . . directed against immigrant Muslims or their children. This tendency has increased considerably after 9/11 and government responses to such terrorist crimes. Muslims have been physically attacked and mosques vandalized or burnt in a number of countries.”¹¹⁹

The conclusion that one draws from these reports and surveys is totally paradoxical. On the one hand, after September 11, Muslims in Europe are increasingly characterized and perceived as a threatening, self-segregating group, which cannot be integrated because its values and conceptions are incompatible with those of a liberal democracy. In

¹¹⁷ For example, in the United Kingdom in 2001, one third of the Muslim population was less than 16 years old, as opposed to one fifth of the overall population. The average age of Muslims was 28—13 years younger than the overall British population. See OFFICE OF NAT'L STATISTICS (U.K.), FOCUS ON RELIGION 3 (2004), available at http://www.statistics.gov.uk/downloads/theme_compendia/for2004/FocusonReligion.pdf.

¹¹⁸ EUROPEAN COMM'N AGAINST RACISM & INTOLERANCE, COUNCIL OF EUR., ECRI GENERAL POLICY RECOMMENDATION NO. 8: ON COMBATING RACISM WHILE FIGHTING TERRORISM 4 (2004), available at http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N8/recommendation_N°_8_eng.pdf.

[A]s a result of the fight against terrorism engaged since the events of 11 September 2001, certain groups of persons, notably Arabs, Jews, Muslims, certain asylum seekers, refugees and immigrants, certain visible minorities and persons perceived as belonging to such groups, have become particularly vulnerable to racism and/or to racial discrimination across many fields of public life including education, employment, housing, access to goods and services, access to public places and freedom of movement

Id. The ECRI additionally recognizes that Muslim communities are subject to prejudice, which “may manifest itself in different guises, in particular through negative general attitudes but also, to varying degrees, through discriminatory acts and through violence and harassment” EUROPEAN COMM'N AGAINST RACISM AND INTOLERANCE, COUNCIL OF EUR., ECRI GENERAL POLICY RECOMMENDATION NO. 5: ON COMBATING INTOLERANCE AND DISCRIMINATION AGAINST MUSLIMS 3 (2000), available at http://www.coe.int/t/dghl/monitoring/ecri/activities/gpr/en/recommendation_n5/Rec5%20en21.pdf.

¹¹⁹ Thomas Hammarberg, *Hate Crimes—the Ugly Face of Racism, Anti-Semitism, Anti-Gypsyism, Islamophobia and Homophobia*, COUNCIL OF EUR. VIEWPOINTS, Jul. 21, 2008, available at http://www.coe.int/t/commissioner/Viewpoints/080721_en.asp.

Schmittian terms, Islam is characterized and perceived as an “enemy.” On the other hand, in the European reality this “enemy” is poor; lives in an unsafe neighborhood; has limited access to basic facilities; is often unemployed or underemployed, or exploited; and is particularly vulnerable to verbal and physical abuse. This “enemy” is also young; often it is a child who experiences exclusion and discrimination in the educational system and drops out from mainstream education.

In conclusion, this analysis demonstrates the sad irony behind the vehemently pursued suppression of Islamic religious symbols in Europe. Viewed closely, the targets of these policies are primarily poor, unprivileged persons who are subject to hatred and prejudice, and yet entirely disproportionate weapons are assembled to be used against them.

IV. SECULARISM AND RELIGION AS GUARANTORS OF CULTURAL HOMOGENEITY

Emerging from the comparative analysis of religious symbol-related conflicts is the observation that these are often characterized in terms of a sharp antagonism between Islam and the “West.” The primary argument for legitimizing the display of majority symbols is that they represent cultural values that are universally shared by the citizenry, despite the presence within it of individuals and groups who do not belong to the majority denomination. Upon a closer analysis, however, the imposition of majority symbols, such as the crucifix, in the public sphere is also structured by courts and legislators as a reaction against Islam cast as “the other.”

As far as the conflicts over minority symbols are concerned, when the contested symbol is the Islamic headscarf or other Islamic clothing, judges and legislators either restrict or ban their display on the basis that it is incompatible with certain core principles of a democratic system (frequently gender equality) or with democracy *tout court*. The Swiss Federal Court and the ECHR in the *Dahab* case explicitly state that the veil is “a powerful religious symbol” which cannot be reconciled with principles such as equal respect for all and equality between men and women. The House of Lords in the *Begum* case refers to the necessity to protect female pupils from the undue pressure by their families and communities, by forcing them not to wear clothes that are somehow “too obviously Islamic,” and it thus authorizes a school to choose which Islamic clothes are compatible with the school’s (democratic) mission and which are not.

The legislation of the most conservative German *Länder*, which ban Islamic but not Christian symbols, openly rely on the dichotomy

between Islam and Christianity and assume that, while the latter constitutes a structural element of democracy, the former is at odds with it. It follows that the manifestations of the Islamic religion and culture in the public sphere must be restrictively regulated.

The French case seems different at first glance, but upon closer scrutiny it falls within the same pattern. In France, it is not secularized Christianity, but militant secularism that is used to incorporate the forcibly shared, democratic values. Consistent with the tendency to blurring the line between religion and secularism, French secularism assumes all of the characteristics of a majority denomination. The French State does not confine itself to the role of ensuring the peaceful co-existence of different religions and conceptions but it becomes a party in the conflicts between them. The State identifies itself with one (the secular, majoritarian) conception and forcibly extends it to all groups and individuals: the secular republic requires a secular attitude from its citizens. As Joan Wallach Scott puts it:

Muslim head scarves were taken to be a violation of French secularism and, by implication, a sign of the inherent non-Frenchness of anyone who practiced Islam, in whatever form. To be acceptable, religion must be a private matter; it must not be displayed “conspicuously” in public places, especially in schools, the place where the inculcation of republican ideals begins. The ban on head scarves established the intention of legislators to keep France a unified nation: secular, individualist, and culturally homogeneous.¹²⁰

This ideological use of secularism seems to suggest the existence of a community of destiny, unified not by a common ethnic origin but by the will of the founding fathers, which finds its natural expression in a secular state culture. Secularism, however, corresponds to a Christian outlook, being the product of the historical process of separation between European States and Christian churches. Even in its French militant version, therefore, it ends up preferring the (secularized) Christian majority. The law of 2004 that bans conspicuous religious symbols in all State schools is the perfect example of this preference: Good Christians do not need to wear conspicuous symbols of their religion in the public sphere, whereas practicing Islamic women, orthodox Jews and Sikh do, as headscarves, kippas and turbans are by nature conspicuous.¹²¹

¹²⁰ Joan Wallach Scott, *Veiled Politics*, THE CHRON. REV., Nov. 23, 2007, at B10, available at <http://chronicle.com/free/v54/i13/13b01001.htm>.

¹²¹ Moreover, despite the December 9, 1905 French law on the separation of churches and the state, the level of cooperation between the State and the Catholic Church is much higher than with any other denomination, especially in the field of public subventions. As Francis Messner puts it: [E]n matière de subventionnements publics, de nombreuses dispositions légales dérogent à l'article 2 de la loi du 9 décembre 1905, qui pose le principe d'interdiction de subventionnement et de rémunération des cultes. Les collectivités territoriales

In sum, both “militant secularism” and “secularized religion” are used by public authorities in order to protect cultural and religious homogeneity. Where in the other cases secularism is watered down, in France the admission of Christian symbols in spite of secularism has the effect of diluting religion while preserving homogeneity. Both the imposition to learn “under the cross” and that to learn bareheaded indicate the existence of a homogeneous collective identity and of outsiders, who have the choice between accepting to share, even symbolically, the values of the majority, or to be excluded from the public sphere.

This construction is premised on various conceptual flaws.

In the first place, it has not been conclusively shown that Islam is inherently incompatible with democracy. One can argue that other monotheistic religions such as Christianity, with non-negotiable dogmas, are just as undemocratic as Islam. Under the pretense of removing an obstacle to democracy—the removal of the culture of Islam on the unproven assertion that it is undemocratic—homogeneity is artificially reinforced at the expense of genuine cultural diversity. If this proves true, it also signifies an unwarranted restriction of fundamental rights to a significant portion of the polity.

In the second place, this construction casts differences arising from religious culture as pathological; just as it has been the case with anti-Semitism, anti-Muslim cultural racism focuses on their adherence to religious law to construct Muslims as a threat to the nation.¹²²

Finally, this construction re-channels all cultural differences into religious ones. This ignores the heterogeneity of religious affiliation, as it is well known that within the major religions there is a multiplicity of approaches, interpretations and practices.¹²³ Moreover, it considers human beings on the basis on a single affiliation (the religious one), which denies the multiple nature of human affiliations and loyalties. As Amartya Sen points out, “[t]he same person can be, without any contradiction, an American citizen, of Caribbean origin, with African ancestry, a Christian, a liberal, a woman, a vegetarian . . . , a feminist, a heterosexual, a believer in gay and lesbian rights,” and “each of these

peuvent entretenir les édifices affectés aux cultes dont certaines institutions bénéficient d'importantes exonérations fiscales. Les aumôniers des établissements hospitaliers et pénitentiaires ainsi que les aumôniers des armées sont rémunérés sur des fonds publics. D'autres exemples puisés dans le droit de l'éducation et le droit du travail montrent à l'évidence qu'il existe une législation des cultes en France et que le principe constitutionnel de laïcité, qui est également le garant de la liberté de religion, n'implique pas une indifférence totale des pouvoirs publics en matière religieuse.

Francis Messner, *Le droit des religions en Europe*, in CARNETS DE LA MAISON DES SCIENCES DE L'HOMME DE STRASBOURG 1979-2000, at 82 (2000).

¹²² Maleiha Malik, Comment, *Muslims Are Now Getting the Same Treatment Jews Had a Century Ago*, THE GUARDIAN, Feb. 2, 2007, at 35.

¹²³ AMARTYA SEN, IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY xii (2006).

collectivities, to all of which this person simultaneously belongs, gives her a particular identity. None of them can be taken to be the person's only identity or singular membership category."¹²⁴ Not taking into account "their inescapably plural identities"¹²⁵ ends up by trapping human beings within monolithic, non-negotiable identities, anchored to their history and unsusceptible of transformation, and therefore structurally meant to clash, rather than to dialogue, with "other" identities. Most of the cases discussed in this article are structured as sterile monologues. Judges and legislators argue, interpret, judge, and impose, without ever listening to the "other": to the atheist parent who wishes to protect her child from the imposition of everybody else's religion, to the Muslim students and teachers who claim to study, to work and also to be veiled, to the wife with her *burqa* who wants to obey her husband but as a French citizen, or to the teenager who clings to her own irreducible identity by rejecting the "special" uniform that an English school generously concedes to all Islamic and other exotic minorities. If some room were left for dialogue, maybe these judges and legislators would be able to see that identities are fluid by definition, and the mere exposure to "other" identities, and the reaction that this triggers, inevitably produces some degree of change. A recent British case perfectly illustrates this point. A schoolgirl was excluded from class for refusing to remove the *kara*, a bracelet usually worn by Orthodox Sikhs. The Aberdare Girls' School in south Wales argued that the bracelet broke the uniform policy, which did not admit wearing jewelry. After winning her case at the High Court¹²⁶, the young woman declared to the press: "I just want to say that I am a proud Welsh and Punjabi Sikh girl."¹²⁷ It's difficult to better express how complex, unstatic, and many-sided identity can be in pluralistic societies, especially for individuals belonging to cultural and religious minorities. There is no necessary collision between the claim for religious and cultural rights and the will to integrate. It is not by chance that in the overwhelming majority of cases, the right to wear traditional Islamic clothing is claimed by students and teachers, *i.e.*, individuals who actively interact in the public sphere.

Conflicts over religious symbols in the public sphere question the model of citizenship that is offered to those belonging to cultural and religious minorities. This constitutes a major challenge for European states and for Europe as a whole. The tendency toward the

¹²⁴ *Id.* at xii-xiii.

¹²⁵ *Id.*

¹²⁶ *R ex rel. Watkins-Singh v. Governing Body of Aberdare Girls' High School*, [2008] EWHC (Admin) 1865, available at <http://www.bailii.org/ew/cases/EWHC/Admin/2008/1865.html>.

¹²⁷ *Sikh Girl Wins Bangle Law Battle*, BBC NEWS, July 29, 2008, http://news.bbc.co.uk/2/hi/uk_news/wales/7529694.stm.

marginalization of religious minorities and the hierarchization of cultures and religions that emerges from the managing of such conflicts is not a good sign. And this is certainly not compatible with the open, inclusive and participatory model of democracy that Europe pretends to pursue.