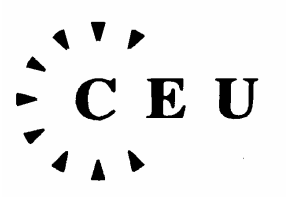

HEADCARVES IN PUBLIC SCHOOLS: Comparative Legal Analysis of the United Kingdom and France

by Jana Jasečková

LL.M. SHORT THESIS
COURSE: French Constitutional Law
PROFESSOR: Marie-Pierre Granger

Central European University
1051 Budapest, Nador utca 9.
Hungary

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ABSTRACT

In March 2004 France introduced a general ban on wearing religious symbols in public schools, and spread the debate on this issue to the most European countries. This thesis is a comparative analysis of legal framework and case studies of France and England. These two countries adopted completely opposite approaches to students' freedom to manifest religious beliefs. The French have a strict ban of all conspicuous religious symbols in public schools. Contrary to this, England's approach leaves decisions about students' uniforms to the schools. Furthermore, courts prefer to leave upcoming court cases to be worked out through discussion and compromise between schools and parents.

The aim of this thesis is to demonstrate that the English system is more appropriate, because it is less provocative and more respectful to the fundamental rights of minorities. Both countries are used as models for other states, thus the goal of this thesis is to show that the French model, with the general ban is not a good example and may lead to a breach of fundamental rights and freedoms.

INTRODUCTION

On February 9, 2008 the Turkish parliament overwhelmingly voted in favor of constitutional amendment sponsored by the Prime Minister Recep Tayyip Erdogan's government. The ban concerning women's headscarves at the universities had been revoked. Turkey introduced the ban in the late 1990s, in order to protect the secularism that was under threat by the growing number of covered women in colleges. Turkish society is now divided in the opinion on this issue: opponents to the amendment claim that not only secularism, but also women's right not to wear headscarves in such conservative society is going to be threatened and it is the step towards a repressive Islamic state. On the other hand stands the government claiming protection of freedom of expression and liberty to cover the heads[1].

In March 2004 France introduced a general ban for wearing religious symbols in public schools. This issue became very controversial and was debated in most European countries as it is now in Turkey; nevertheless France is the only country within the European Union with such a strict approach towards displaying religious attires in public schools[2]. Interesting is the fact that this issue was not brand new in France. The problem of one of the 'conspicuous' religious symbols – the headscarf – first time appeared in 1989, when three girls were expelled from the high school because of wearing it. The *Conseil d'Etat* in its opinion decided at that time that wearing the headscarf is compatible with the principle of *laïcité* unless it is used as oppression towards the other students. Since that time the *Conseil d'Etat* was solving these cases on case-by-case basis

[1]Sabrina Tavernise, *Turkey's Parliament Lifts Scarf Ban, in* The New York Times, February 10, 2008, available at: http://www.nytimes.com/2008/02/10/world/europe/10turkey.html?_r=1&oref=slogin; Aljazeera, *Turkey lifts campus headscarf ban*, available at: http://english.aljazeera.net/NR/exeres/0C761E51-4BDE-4FCF-AA9F-EF201F233BB5.htm

[2] Ahmet T. Kuru, *Muslims and the Secular State in France,* available at: http://kennedy.byu.edu/partners/CSE/islam/pdfs/Kuru-paper.pdf

and in fact from 1992 to 1999 overturned 41 of 49 of coming expulsions[3]. Looking on this was it really necessary to adopt the controversial statute? The existing situation in France until law of 2004 was the same, or at least comparable to one in England. Generally, there is much more tolerance to religious symbols in the schools in the England[4]. Decisions about students' uniforms are left to schools and upcoming cases are preferably solved by discussion and compromise between schools and parents[5].

Ambition of this thesis is to demonstrate that English system is more appropriate. There are at least two good reasons for it. First, there is no 'universal' ban for the wearing veils in the public schools, approach held in England is less provocative and more respectful to fundamental rights of minorities. It helps to preserve Muslims' cultural identity and it does not result in social tension[6] between majority and minorities as we can see in France. Second claim is that it is important to point on the better system, since both countries that I am dealing with are used as models for other states[7]. I believe that the France with the general ban is not a good example and may lead to breach of fundamental rights and freedoms. Simply, it is not necessary to go so far in interference with one's freedoms to protect the freedoms of others.

[3] Joel S. Fetzer, J. Christopher Soper, *Muslims and the state in Britain, France and Germany*, Cambridge University Press, 2005.
[4] In the United Kingdom there are 1 300 Muslim pupils in 120 schools, who are allowed to wear the headscarf. See: http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/education/6382247.stm (last seen: March 26, 2008)
[5] Dominic McGoldrick, *Human Rights and Religion: The islamic headscarf debate in Europe* (2006).
[6] In Fall 2005 almost for two weeks intense rioting spread across the country. The violence started in a Paris suburb and quickly spread to over 300 towns, forcing the government to declare the state of emergency and implement a curfew.
[7] „Because France is the European nation with the largest Muslim population, many other countries look to it as the model of how to deal with their minority and immigrant populations." in Christina A. Baker, *French Headscarves and the U.S. Constitution: Parents, Children, and Free Exercise of Religion,* 13 Cardozo J.L. & Gender 341

The headscarf affair has a broader scope than the educational field in respect to primary and secondary schools that is included in my research. There are a number of recent cases in the UK in the employment area[8]. In addition the statute on religious symbols covers also other 'conspicuous' symbols, for example turbans worn by Sikhs or *Kippah* by Jews. Because of this complexity this research narrowed down to headscarves worn in public schools, since it is the sphere closest to me and from 2004 according to me it is generally the most controversial. Moreover, my research was narrowed to England because of the various legal norms within the UK.

There has been a lot of literature written on secularism in France[9] and also about human rights in general[10] or more concrete freedom of religion or minorities rights. From the UK perspective there is literature about the relationship between the Church and State and a wide-ranging literature about multiculturalism and Muslims in Western Europe[11]. In 2006 a comparative book that deals particularly with headscarves problem was published, where author discuss "debates behind the debates" when examining headscarf issue considering questions of language, meaning

[8] Latest case is in UK, where a hairdresser from London is sued for refusing to employ women wearing headscarf. http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/england/london/7087346.stm (last seen: March 26, 2008)
[9] e.g. John Bell et.al.**,** *Principles of French law* (1998), Michel Troper, *French secularism, or laicite*, 21 Cardozo L. Rev. 1267, T. Jeremy Gunn, *French secularism as utopia and myth*, 42 Hous. L.Rev. 81
[10] Johan D. Van der Vyver and John Witte,Jr., *Religious Human Rights in Global Perspective* (1996)
[11] e.g. Tariq Modood, *Church, state, and religious minorities* (1997).
Tariq Modood, *Multicultural politics : racism, ethnicity, and Muslims in Britain* (c2005).

and symbolism[12]. And then there are also articles[13] written about the headscarves debate and among them we can find comparative ones[14].

My research shows that there are first articles or even books written about the headscarves issue. However, not all of them are comparative and most of the articles do not compare the existing approaches to show that one of them interferes with human rights more than others, which will be most important point of my work. The literature that exists does not give the recommendation to other states how to deal with this issue .The goal of this thesis is to show that the general ban is not the best solution and other countries should better follow different examples like e.g. the approach of adopted in the England.

I demonstrate my statement via answering a series of questions. These are divided into two main chapters. In the first one I deal with the comparative legal framework. It means there are answers to the questions about the relationship between the church and the state, freedom of religion, education and minority rights served in the comparative perspective. Accordingly, the chapter is divided into four subchapters. Following the setting of theoretical legal background, in the second chapter I bring together the main headscarf-cases in France and England with attention to who is deciding these cases and what the outcomes are in order to analyze which system guarantees better protection of the freedom of religion, minority rights, right to education and if it matters what is the relationship is between church and state on this issue.

[12] e.g. Dominic McGoldrick, *Human Rights and Religion: The islamic headscarf debate in Europe* (2006).

[13] e.g. Ellen Wiles, *Headscarves, Human Rights, and Harmonius Multicultural Society: Implications of the French Ban for interpretations of equality*, 41 Law & Soc'y Rev. 699.;
Elisa T. Beller, *The headscarf affair: The Consiel d'Etat on the role of religion and culture in French society,* 39 Tex. Int'l L.J. 581;Dominique Custos, *Secularism in French Public schools: Back to War? The French Statute of March 15, 2004*, 54 Am. J. Comp. L. 337

[14] e.g. Samantha Knights, *Religious symbols in the school: Freedom of religion, Minorities and Education,* 5 E.H.R.L.R. 499 (2005).

1. COMPARATIVE LEGAL FRAMEWORK

Before analyzing headscarf cases in the second chapter of this thesis, it is important to set the legal framework of the countries at stake. There are two distinctions that are essential for this comparative thesis. First, the different legal system in these countries. France has a civil law system and England common law. Secondly, France has a long tradition of written Constitutions, whereas England has an unwritten one. So when comparing countries from dissimilar systems, legal sources of protection may not be the same.

In the first part of this chapter I analyze the existing relationship between the Church and the State, which has to be discussed in order to find out if Church and State relationship matters in the headscarf issue. In the case of France and England it means to compare a secular State on the one side with the State with established religion on the other. In the remaining three parts I discuss freedom of religion, and then the right to education and minority rights from the freedom of religion perspective. The protection of these rights has been for a long time no more the question of only domestic protection. So the analysis starts with international norms, followed by the protection at the EU level and domestic constitutional and legal provisions.

1.1 Church and State relationship

The relationship between Church and State in France is governed by the principle of *laïcité*. A literal translation into English is not possible, however the expression 'secular' is the closest,

even it still does not convey the full force of the French expression[15]. Generally, secularism in Western societies is understood as:

> … the confessional neutrality of the State and public authority…the recognition of religious freedom (positive and negative, that is to say including the freedom of non-religion) … recognition of individual conscience autonomy (personal freedom of man or woman with regard to all religious and philosophic powers), and … critical reflexivity applied to all areas (religion, policy, science …).[16]

However, *laïcité* involves more than secularity - it is derived from an original struggle against clericalism[17] and basically involves two conditions: the non-denominational, non-sectarian nature of the State and the lack of jurisdiction of the State to regulate ecclesiastical matters[18]. *Laïcité* is based upon three values, freedom of thought, legal equality of all beliefs, and state neutrality.[19]

Unlike in France, there is no separation of Church and State in England[20]. There is an established Church of England with the Sovereign as the Supreme Governor that holds certain privileges that other churches do not. For example, it is exclusively entitled to organize national events such as coronations or state funerals, twenty-six Anglican Bishops sit as Lords Spirituals in the House of Lords free to debate and vote on all issues, and the Church is protected by the law of blasphemy[21].

[15] Michael Streeter, *France is a secular state. But what does it mean?*, available at: http://www.frenchentree.com/societe-francaise/DisplayArticle.asp?ID=20486, (last seen: March 26, 2008)
[16] J.-P. Willaime, *Laicite et religion en France* (1996) in James T. Richardson, *Regulating Religion: Case Studies from Around the Globe* (2004).
[17] Gerhard Robbers, *State and Church in the European Union* (1996).
[18] Dominique Custos, *Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004,* 54 Am. J. Comp. L. 337
[19] Cees Maris, *Laïcité in the Low Countries? On Headscarves in a Neutral State,* Jean Monnet Working Paper14/07
[20] Scotland, Wales, and Northern Ireland do not have "official" religions.
[21] Peter Cumper, *Religious Human Rights in the United Kingdom,* 10 Emory Int'l L. Rev. 115.

On the other hand, the Church is subject to 'external' control. Measures passed by the General Synod, the Church's law making body, have to be submitted to the Ecclesiastical Committee and approved by Parliament[22]. The same situation exists with the Church's Prayer Book, which was authorized in 1558 after Queen Mary I. succession to the throne, with changes in 1662 and 1872[23]. Moreover, the Crown appoints Archbishops and Bishops of the Church of England on the advice of the Prime Minister[24].

In order to understand the legal status of the *laïcité* and the established Church of England nowadays, it might be useful to trace the historical development. The whole concept of *laïcité* developed in two periods of French history- the French Revolution and the Third Republic[25]. During the first period a number of laws concerning the relationship between Church and State were adopted[26]. However, "[d]uring these formative periods, *laïcité* did not embody the high principles of tolerance, neutrality, and equality; rather it emerged from periods of conflict and hostility, most of which targeted the Roman Catholic Church.[27]"

The second period between 1879 and 1905 brought several important French laws that affected the relationship between church and state and that are understood as founding documents of

[22] Church of England Assembly (Powers) Act 1919, available at http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1919/cukpga_19190076_en_1, (last seen: March 26, 2008).
[23] Peter Cumper, *Religious Liberty in the United Kingdom*, in Johan D. van der Vyver and John Witte,Jr, *Religious Human Rights in Global Perspective* (1996).
[24] *Ibid.21*
[25] T. Jeremy Gunn, *Religious Freedom and Laicite: A Comparison of US and France*, 2 Brigham Young University Law Review 419.
[26] In November 2, 1789 the Constituent Assembly declared Catholic Church property as the disposal of the Nation, in February 13, 1790 it dissolved monastic vows by the Treihard decree. In the July same year the Civil Constitution of Clergy was adopted. In February 21, 1795 the Constituent Assembly adopted the law on separation of church and state.
[27] *Ibid. 25*

laïcité and the modern French state[28]. One of them in particular, the Law on Separation of Churches and the State of 1905, in spite of the fact that it does not contain explicit reference to such separation or *laïcité*, it announces the principle of freedom of conscience and the refusal by the state to recognize any religion and thus is considered as the beginning of true French secularism[29]. Since the French Constitution of 1946, the *laïcité* has constitutional protection that was reaffirmed in the 1958 Constitution which set "an indivisible, secular, democratic and social Republic[30]".

The history of the Church of England and State relationship is traced to Henry VIII and his transfer of papal supremacy over the English Church to the crown by the Act of Supremacy 1534[31]. After the restoration of Roman Catholicism by Mary I, the succession of Elizabeth I to the throne in 1558 brought re-restoration of a moderate Protestantism, codifying the Anglican faith in the Act of Uniformity, the Act of Supremacy, and the Thirty- Nine Articles[32]. In the 17th century, the tensions within the Church over theological and liturgical issues continued and led to the English Civil War[33], after which the Protestant Parliament offered in 1688 the Crown to William and Mary, the Protestant Prince and Princess of Orange from Holland[34].

[28] *Ibid.* 25
[29] Michel Troper, *French Secularism, or Laicite,* 21 Cardozo L. Rev. 1267.
[30] Article 1 of the 1958 French Constitution
[31] David Cody, *The Church of England (The Anglican Church),* available at: http://www.victorianweb.org/religion/denom1.html, (last seen: March 26, 2008).
[32] *Ibid.* 31
[33]The Archbishops' Council of the Church of England, *The History of the Church of England* (2004), available at: http://www.cofe.anglican.org/about/history, (last seen: March 26, 2008).
[34] Peter Cumper, Peter Edge, *First Amongst Equals: The English State and the Anglican Church in the 21st Century?* 83 U. Det. Mercy L. Rev. 601.

Ever since, the agreement of 1689 as part of the Bill of Rights has remained the basis of the constitutional position of the Church of England[35]. Cumper and Edge summarized these provisions as follows:

> Only the protestant Christian can inherit the Crown, and they must reaffirm this position at their Coronation. A protestant may not inherit the Crown if they are married to a Roman Catholic, and may be barred from ascending to the throne if they have been married to a Roman Catholic, even if the marriage is no longer in existence. A reigning Sovereign who converts to Roman Catholicism, or marries a Roman Catholic, loses the Crown, which passes to the next Protestant in the line by force of law[36].

Principally unlike France, England has no written constitution and when looking up the constitutional position of the Church of England, one has to look at the statutes starting from the 16th century.

However, how does Church-State relation appear in the daily life? Religious organizations are not required to register in France, but may do so to obtain the tax exempt status as *associations cultuelles* or gain official recognition as *associations culturelles*[37]. The state and local communities became owners of religious buildings after the revolution, thus the state did legislate on the conditions of religious worship despite the separation[38]. When it comes to registration it is the same also in England. Religious groups are not required to register with the Government and even when there is the established Church of England, no church or religious organization receives direct funding from the state. The State covers the capital costs of the

[35] *Ibid. 33*
[36] *Ibid.* 34
[37] *International Religious Freedom Report 2007, France*, available at: http://www.state.gov/g/drl/rls/irf/2007/90175.htm , (last visited: March 26, 2008).
[38] *Ibid.* 29

buildings and the whole of the running costs, including teacher's salaries within sectarian educational institutions[39]. As in France, a religious charitable status means tax relief[40].

1.2 Libertas Religionis

Both, France and England are parties to the European Convention of Human Rights (ECHR)[41], the International Covenant on Civil and Political Rights (ICCPR)[42] and to the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, when considering this international protection of fundamental rights, one has to keep in mind the relationship between national and international legal order and possible reservations[43] to some parts of treaties.

Article 55 of the 1958 Constitution sets the relationship between the national and international legal order in France: "Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject in regard to each agreement or treaty, to its application by the other party." Compared to French dualism there is monist approach in the UK; treaties can only become part of the domestic legal order if Parliament passed an enabling act[44].

France and England are also member states of the European Union. Founding treaties do not provide explicitly for protection of the freedom of religion, however, indirectly Article 13

[39] *International Religious Freedom Report 2007, United Kingdom*, available at: http://www.state.gov/g/drl/rls/irf/2007/90206.htm, (last visited: March 26, 2008).
[40] *Ibid. 21*
[41] Article 9 of ECHR
[42] Article 18 of the ICCPR
[43] France has 4 reservations to ECHR, England has 3 reservations; France has 8 declarations and reservations to ICCPR including non-applicability of Article 27, England has reservations and declarations under ICCPR
[44] e.g. Human Rights Act incorporated the ECHR

contains a provision against discrimination based on religion or belief.[45] Freedom as such was recognized by the ruling of the European Court of Justice in the case *Prais* 1976 and in fact it refers to the ECHR and Article 9. If the ratification of the Lisbon treaty is successful and it comes into force in 2009, the Charter of Fundamental Rights of the European Union ("Charter") as part of it, which is only a solemn proclamation now, will become legally binding. It provides for protection of freedom of religion in Article 10:

> Everyone has the right to freedom of thought, conscience and religion. This right includes the freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. The right to conscientious objection is recognized, in accordance with the national laws governing the exercise of this right.

The first two sentences correspond to Article 9 of the ECHR and, according to Article 52(3) of the Charter have the same meaning and scope. It also means that limitations are permissible with respect to Article 9(2) of the Convention:

> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Constitutional protection in France and England is more complicated, especially because of the different legal systems and character of the Constitutions. The French Constitution is composed of four elements and provisions concerning freedom of religion can be found in all of them[46]. First, the 1958 Constitution sets out the secular character of the state, second, the 1789 Declaration of Human Rights in Article 10 provides for protection of religious opinions[47], third

[45] Article 13 TEC: "*Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*"

[46] Alain Garay *et al.* , *The permissible scope of legal limitations on the freedom of religion or belief in France,* 19 Emory Int'l L. Rev. 785

[47] Article 10 states: "No one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with established Law and Order."

the Preamble of the 1946 Constitution provides for free, secular and public education at each level as the duty of the State[48] and lastly, the *Conseil Constitutionnel* affirmed that "freedom of conscience must be looked upon as one of the fundamental principles recognized by the laws of the Republic [49]."

Compared to France, England has no written constitution, nevertheless protection of freedom of religion could be found in the Acts of Parliament[50]. In 1998 the Parliament adopted the Human Rights Act that incorporated the ECHR into English law. Considered as an element of the unwritten constitution, the Act does not list the freedoms, but in section 1 provides for reference to the ECHR and thus guarantees freedom of religion and bans discrimination based on religion[51]. Another statute that protects freedom of religion is 'The Racial and Religious Hatred Act of 2006', which defines 'religious hatred' as "hatred against a group of persons defined by reference to religious belief or lack of religious belief."[52] The Equality Act of 2006 in the second part defines the religion and prohibits the discrimination on the grounds of religion or belief.[53]

1.3 Right to education and regulation of wearing headscarves in schools

"The right to education is a fundamental human right. Every individual, irrespective of race, gender, nationality, ethnic or social origin, religion or political preference, age or disability, is

[48] Subparagraph 13 of the Preamble of the 1946 Constitution
[49] DC decision No. 77-87 of November 23, 1977.
[50] For the development of religious freedom are important also acts lifting disabilities and containing positive conferral of rights, e.g. the Act for the Relief of Catholics of 1828 that permitted Roman Catholic schools and places of worship. In 1858 Jews were admitted to parliament and in 1888 atheist gain the same right. In Mark Hill, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United Kingdom*, 19 Emory Int'l L. Rev. 1129.
[51] Human Rights Act 1998, available at: http://www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1.
[52] The Racial and Religious Hatred Act 2006, available at: http://www.opsi.gov.uk/acts/acts2006/ukpga_20060001_en_1#l1g1.
[53] The Equality Act 2006, available at: http://www.opsi.gov.uk/acts/acts2006/ukpga_20060003_en_1.

entitled to a free elementary education.[54]" When it comes to the international level of protection, France and England are parties to a number of international treaties which expressly provide for the right to education[55].

In the European system of protection, both countries are parties to ECHR and the first protocol to the Convention[56]. France has no reservation related to the right to education, however England has two of them[57]. Protection within the European Union is granted in the Charter, which explicitly contains the right to education in Article 14 in the chapter "freedoms":

> Everyone has the right to education and to have access to vocational and continuing training. This right includes the possibility to receive free compulsory education. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

This Article is based on the common constitutional traditions of Member States and on Article 2 of the Protocol to the ECHR[58]. Moreover, Article 149 and 150 establish Community role in the development of quality education and implementation of vocational training policy and its aims in this field that inevitably help to improve the right to education within EU states.

[54] Human Rights Education Associates, *Right to education,* available at: http://www.hrea.org/index.php?base_id=144, (last visited: March 26, 2008).
[55] Universal Declaration of Human Rights 1948 (Article 26), International Covenant of Economic, Social and Cultural Rights 1966 (Article 13), the Convention on the Elimination of All Forms of Racial Discrimination 1986 (Article 5), the Convention on the Rights of the Child 1959 (Articles 28 and 29), and the Convention against Discrimination in Education 1960 (Articles 3, 4 and 5)
[56] Article 2 of the Protocol to ECHR: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." Available at: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf.
[57] Reservations made by England: „the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure; Reservations are made with regard to certain territories concerning the use by teachers of moderate and reasonable corporal punishment." Available at: http://www.right-to-education.org/content/rights_and_remedies/uk.html
[58] Charter of Fundamental Rights of the EU, available at: http://www.eucharter.org/home.php?page_id=17.

In France, the right to education is not protected in any of the constitutional texts. Neither the Declaration of the Rights of the Man and of the Citizen, nor the Preamble of the 1946 Constitution, nor the 1958 Constitution provide for it expressly. Indirectly, section 13 of the 1946 Preamble states: "The Nation guarantees equal access for children and adults to instruction, vocational training and culture. The provision of free, public and secular education at all levels is a duty of the State."

The source of the protection of freedom of education is *loi Debré* of 31 December 1959, which also contains the right to provide children with a general education compatible with religious beliefs[59]. Constitutional protection of the freedom of education granted the *Conseil Constitutionnel* by decision that it is a fundamental principle recognized by the laws of the Republic[60]. Later, the *Conseil Constitutionnel* reaffirmed the principle in a decision in relation to the *loi Joxe- Chevenement*[61]. France considers that to obtain a minimum amount of knowledge is directly connected with human dignity, so education is compulsory up to a certain age and it means not only state funding of education, but also providing for an integral service of primary, secondary, higher education, professional training and 'education for life'[62].

England with the adoption of the Human Rights Act provides for protection of the sixteen key rights of the ECHR. It "makes rights from the European Convention on Human Rights into a

[59] Law No. 59-1557, Article 1.2: „The State respects and proclaims freedom of education and guarantees the exercise regularly to private schools opened." Available at: http://209.85.135.104/translate_c?hl=en&sl=fr&u=http://www.assembleenationale.fr/histoire/loidebre/sommaire.asp&prev=/search%3Fq%3Dloi%2BDebr%25C3%25A9%2B%26hl%3Den%26rls%3Dcom.microsoft:*:IE-SearchBox%26rlz%3D1I7DMUS

[60] CC decision No. 77-87 DC of 23 November 1977.

[61] CC decision No. 84-185 DC of 18 January 1985.

[62] Walter Cairns, Robert McKeon, *Introduction to French Law* (1995).

form of higher law in the United Kingdom.[63]" The right to education possesses a constitutional level of protection. There are either 'maintained' – state schools or 'independent' – public schools[64]. Religious education is part of the basic curriculum and its syllabuses must not use a 'catechism or formulary which is distinctive of any particular religious denomination'[65]. The construction of local syllabuses is governed by the complex procedure introduced in the Education Act 1944 and revised in 1988 and 1996[66]. The state finances almost all costs of public religious schools.[67]

How is wearing of headscarves regulated in public schools in the case of France and in maintained schools in the case of England? France adopted a controversial statute on March 15, 2004[68] which states in one of its four articles: "In public elementary schools, junior high schools and high schools, students are prohibited from wearing symbols or clothing through which they conspicuously evince a religious affiliation." This law, with respect to its form as well as its substance, represents a reversal – as it replaces permission with prohibition.[69] Before 2004 after the headscarf affair in 1989[70], the *Conseil d'Etat* issued a non- binding opinion, where it declared that:

> … the principle of *laïcité* of public education [as] an element of the *laïcité* of the State and the neutrality of all public services, [which] requires that education be provided in accordance with this neutrality by the curriculum and by teachers, on the one hand, the freedom of conscience of

[63] John X Kelly, *JISC Legal Information Service, Human Rights- overview*, available at: http://www.jisclegal.ac.uk/humanrights/humanrights.htm, (last visited March 26, 2008).
[64] *Ibid.* 17
[65] *Ibid.* 17
[66] *Ibid.* 17
[67] Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (2006).
[68] Article L. 141 – 51 of the French Education Code, official title of the statute: " The statute regulating, as part of the implementation of the principle of laicite, the wearing of symbols or clothing that evince religious affiliation in public elementary schools, junior high schools and high schools."
[69] *Ibid.* 18
[70] At the beginning of the school year 1989/1990 the Islamic headscarf issue broke out in the department of Oise, in the Junior high school of Creil, and the dispute between the principal and girls wearing headscarves was very hugely covered in national media. The Minister of Education, Lionel Jospin referred the matter to the Conseil d'Etat.

> students, on the other hand. The freedom of conscience of students entails for them right to express and manifesting their religious beliefs within the educational institutions , in accordance with pluralism and freedom of others, and without undermining educational activities, curricula and obligation of regular attendance. [71]

Afterwards, the *Conseil d'Etat*, within its judicial capacity contrary to the approach of the Minister of Education[72], endorsed its advisory opinion and invalided a general prohibition of wearing headscarves in schools' internal guidelines. Between 1992 and 1999 the *Conseil d'Etat* reversed forty-one of forty-nine decisions of school officials against girls wearing headscarves[73].

Unlike France, England has no legislation that deals with school uniforms or any national guidelines on wearing Muslim headscarves in schools. The decision whether the school should have a uniform policy and what it should consist of is up to school governing bodies, and the headteacher is the one responsible for compliance of students with the agreed policy[74]. The State's expectations in the case of uniform policy are reduced to accommodating obligations under Sex Discrimination Act 1975, the Human Rights Act 1998, and the Race Relations Act 1976, in the sense that "schools must be sensitive to the needs of different cultural, racial and religious groups.[75]" In the abovementioned absence of legislation, the National Union of Teachers published their own guidelines, which "aims to provide schools with practical advice on how to implement the recognition of religious freedom in the context of a school uniform policy."[76] For example guidelines recommend using dress code rather than school uniform,

[71] *Ibid. 18.*
[72] After 1989, local officials as well as *circulaires* issued by the Minister of Education attempted the limit of wearing headscarf. In T. Jeremy Gunn, *Religious Freedom and Laicite: A Comparison of the United States and France*, 2 Brigham Young University Law Review 419.
[73] T. Jeremy Gunn, *French Secularism As Utopia and Myth*, 42 Hous. L. Rev. 81.
[74] *DCSF guidance to schools on school uniform and related policies*, available at: http://www.dcsf.gov.uk/consultations/conResults.cfm?consultationId=1468, (last visited March 26, 2008).
[75] *Ibid.* 74
[76] *The Muslim Faith and School Uniform*, available at: http://www.teachers.org.uk/story.php?id=3664, (last visited March 26, 2008).

because the latter can never be all- encompassing and it places limits on pupils' right to free expression[77].

1.4 Minority rights

According to Francesco Capotorti the 'minority' may be defined as:

> A group numerically smaller than the rest of the population of the State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language[78].

First of all, the protection of minorities implies prohibition of discrimination which affects the minorities in a negative manner- politically, socially, culturally or economically[79]. Discrimination on race, language, religion, national or social origin, and birth or other status has been prohibited based on the number of international and regional human rights instruments[80]. Besides non-discrimination clauses, minorities possess some special rights to "make it possible for minorities to preserve their identity, characteristics and traditions.[81]" International human rights instruments refer to these special rights for minorities, yet the provisions are still made for individuals belonging to the minority groups, not to the minority group as such.

[77] *Ibid.* 76
[78] Francesco Capotorti, *Study of the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities,* in Steven Wheatley, *Democracy, Minorities and International Law,* (2005).
[79] Office for the High Commissioner of the Human Rights, *Fact Sheet No.18 (Rev.1), Minority Rights*, available at: http://www.unhchr.ch/html/menu6/2/fs18.htm#*2,(last visited: March 26, 2008).
[80] the Universal Declaration of Human Rights of 1948 (art. 2) and the ICCPR and on ICESCR of 1966 (art. 2). ILO Convention concerning Discrimination in Respect of Employment and Occupation No. 111 of 1958 (art. 1); International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (art. 1); UNESCO Convention against Discrimination in Education of 1960 (art. 1); UNESCO Declaration on Race and Racial Prejudice of 1978 (arts. 1, 2 and 3); Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief of 1981 (art. 2); and the Convention on the Rights of the Child of 1989 (art. 2). Basic regional human rights documents: the ECHR, the European Social Charter and the Framework Convention for the Protection of National Minorities (Council of Europe).
[81] *Ibid.* 79

France and England are parties to most of the above mentioned international instruments. However, when it comes to the minority issue, the approach to this by individual countries is different. The French position towards minorities could be characterized by the declaration made to Article 27 of the ICCPR: "In the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable so far as the Republic is concerned.[82]" France also did not sign the Framework Convention for the Protection of National Minorities of 1995 and signed, but did not ratify the European Charter for Minority languages 1992. This basically means that if the State recognizes no minorities, there is no need for any conception of 'ethnic politics'[83]. This declaration was subject to criticism by the Human Rights Committee which does not think that the equality of all people before the law is efficient protection of minorities and that it in fact excludes the existence of minorities in the country and their entitlement to the enjoyment of their culture, the practice of their religion or the use of their language in community with other members of their group. "While France may be open to newcomers, its policy is to insist on the homogeneity of French culture, with assimilation as a condition of membership.[84]"

Compared to France, "the UK is a party to the Framework Convention on National Minorities, and proclaims an integration policy based on valuing and promoting cultural diversity.[85]" The protection of the minority rights could be found in a piecemeal anti-discrimination legislation.

[82] see Office of the High Commissioner for the Human Rights, ICCPR- declarations and reservations, available at: http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm, (last visited: March 26, 2008).
[83] *Ibid.* 67
[84] Miriam Feldblum, *Paradoxes of Ethnic Politics: The Case of Franco- Maghrebis in France*, Ethnic and Racial Studies, Vol. 16, No.1, 1993, p.55 in Laura Barnett, *Freedom of Religion and religious Symbols in the Public Sphere*, 2006 available at: http://www.parl.gc.ca/information/library/PRBpubs/prb0441-e.htm, (last visited: March 26, 2008).
[85] *United Kingdom*- country profiles, available at: http://www.euro-islam.info/pages/uk.html, (last visited: March 26, 2008).

There are four main pieces: The Equal Pay Act 1971, Sex Discrimination Act 1975, Race Relations Act 1976, Disability Discrimination Act 1995 and then there are more than 30 relevant Acts, 38 statutory instruments, 11 codes of practice and 12 EC directives and recommendations directly relevant to discrimination.

Both France and England have the same long tradition of protection of human rights, which could also be seen by the number of international treaties they signed and ratified. I started with the question whether the relationship between the Church and State matters in the headscarf debate. After analyzing the legal framework we can see it depends on the area in which this relationship matters. When it comes to support, financing and registration of religions, situation is not much different in the country with the established church and one with strict secularism. However, the existence of principle of *laïcité* as integral part of the constitutional tradition in France and as an underlying value of the freedom of religion, the right to education and also minority rights matters the most.

Until adoption of the Law of March 14, 2004 this principle could be interpreted in two ways. It could either grant the protection in the way that protected students' freedom of expression of religion beliefs; or it could be interpreted in the way that requires the neutrality not only from the state, but also from individuals. After the adoption of the Law, the scope of the interpretation narrowed to the latter one. On the other side, England with the established church seems to give more space to the freedom of religion than France does with the concept of *laïcité*. In both countries one's freedom of manifesting the religion has to be balanced with the legitimate aim

for the limitation-protection of others. However, the *laïcité* has been present as the state principle for a long time, so it is the way of its interpretation that matters the most.

Another issue in the headscarf debate is the approach of the countries when it comes to minority rights. France with its assimilation approach does not give existing minorities the same level of protection as England. From the country that does not recognize any minorities within its territory one can hardly expect willingness to adopt rules preserving their culture or guaranteeing them the right to express their religious affiliation in public.

The right to education in France is protected in the same extent as the freedom of religion. It means that the protection may be the same as in England when comparing the number of signed and ratified international treaties, however, it is underlined with the state principle of *laïcité* in the sense that, both the right to education and the freedom of religion are protected only to the point where the constitutional protection of *laïcité* begins.

2. CASE STUDIES

This chapter deals with major headscarf cases in France and England. In the case of France it starts with the opinion of the *Conseil d'Etat* followed by the very first case that appeared in 1989 and then other cases chosen in order to show how the *Conseil d'Etat* interpreted the principle of *laïcité* and neutrality in the French educational system, defined the freedom of expression of the students and rules of its possible limitations. Despite the fact that this chapter is devoted to case studies, it is essential to include the above mentioned non-binding opinion of 1989 as well as circulars issued by ministers of education in 1989 and 1994, to which I refer as the Jospin and Bayrou circular. The aim is to show how the *Conseil d'Etat* had been protecting the freedom of expression of religious beliefs by students of public schools against the mentioned ministerial circulars.

In the part devoted to England, I analyze a case of Shabina Begum that caused a nationwide debate on the issue of Islamic dress in the UK schools[86]and, in my opinion, is the best example of the English approach to minorities. It is interesting to follow the reasoning first of the High Court, then of the Court of Appeal as well as the opinion of the House of Lords. The final decision was not in favor of the girl willing to wear *jilbab*, however it is more important here to see how the school accommodated diversity and how it was protected.

[86] *Ibid.* 67

2.1 France

2.1.1 Break out of the headscarf affair, *Avis* of the *Conseil d'Etat* and the Jospin Circular

As the break out of the headscarf affair can be considered the dispute that appeared at the beginning of the school year 1989-1990 in the junior high school of Creil, when three Muslim girls insisted on wearing the headscarf in contravention of a school rule banning any overt expression of a religious belief in the school[87]. A compromise was reached after a meeting with the parents of the girls, the presidents of secular Tunisian, Moroccan and Algerian groups, a representative from Attadamoun Association[88], a member of the Proprietary Education Zone of Creil and the representatives of other students' parents. The students were allowed to wear their headscarves at school outside the classroom, but in the classroom they were required to lower their scarves to their shoulders[89]. Although this case did not end up in court, it obtained huge media attention. So the Minister of Education, Lionel Jospin, decided to solve the controversy by reference to the *Conseil d'Etat*[90].

The *Conseil d'Etat* issued its non-biding opinion on November, 27, 1989[91], answering three questions: first, whether religious symbols worn by pupils in schools are compatible with the principle of *laïcité*, second, if affirmative, under what conditions it is permissible and third, whether the refusal to follow such regulations may result in expulsion of the students from

[87] Laura Barnett, *Freedom of Religion and Religious Symbols*, 2006, available at: http://www.parl.gc.ca/information/library/PRBpubs/prb0441-e.htm.
[88] Attadamoun Association is a secular Moroccan organization.
[89] Luis Cardoso, *At the Heart of the "Affair" A Professor from Creil Provides Testimony*, available at: www.unc.edu/depts/europe/conferences/Veil2000/articles/translations/Cardoso.doc
[90] The Conseil d'Etat is the supreme court within the administrative hierarchy. It has three main roles - as a court of first instance , a court of appeal and a court of cassation (review on the point of law). See Walter Cairns and Robert McKeon, *Introduction to French Law* (1995).
[91] Conseil d'Etat Opinion No. 346.893 of 27 November 1989.

school.[92] Enumerating the provisions of the most important legal documents concerning the matter[93] and by providing a historical overview of the French laws[94], the *Conseil d'Etat* began by declaring the freedom of conscience to be "one of the fundamental principles recognized by the laws of the Republic [and] operative in the domain of education."[95] Schools were, according to the opinion, obliged to recognize religious and cultural differences and facilitate the tolerance of students from different cultural backgrounds.[96]

The *Conseil d'Etat* answered the questions in favor of the rights of the students. It stated that the principle of *laïcité* requires schools to respect the free expression of religion, and that wearing of the signs by which students want to demonstrate their affiliation to the religion is not by itself incompatible with the principle of *laïcité*, in so far as it constitutes the exercise of the freedom of expression and demonstration of a religious belief[97]. However, it must not constitute an act of pressure, provocation, proselytism or propaganda, and thus interfere with freedom of other student or undermine educational activities, curricula and the obligation of regular attendance[98]. And finally, the *Conseil d'Etat* stated on the third question that an expulsion of students wearing religious clothing is unacceptable.[99]

[92] Elisa T. Beller, *The Headscarf Affair: The Conseil d'Etat on the Role of Religion and Culture in French Society*, 39 Tex. Int'l L. J. 581.
[93] Declaration of the Rights of Man and of the Citizen, 1946 Preamble, the Constitution of 1958, and the ECHR of 1950.
[94] e.g. Jules Ferry Law of March, 28, 1882 that makes primary education in France free, laic and obligatory, Law of 1905 on Separation the Church and State and Law of August 2, 1989 on immigration.
[95] *Ibid.* 92
[96] *Ibid.* 92
[97] *Ibid.* 67
[98] *Ibid.* 67
[99] *Ibid.92*

On the other hand, Minister Jospin, having the jurisdiction over the education, subsequently issued the circular[100] based on the criteria of the opinion, which, as Custos points out, was for the benefit of school principals[101]. It advised school officials to engage in a dialogue in the case of conflict with a student and their parents, however, once the conflict arose the school was advised to insist on stopping to wear religious clothes unless there were reasons for an exception listed in the circular[102]. This more pragmatic approach of the circular is considered as a departure from the 'endorsement', set in the opinion, towards 'rejection'[103].

2.1.2 Case studies: 1989 – 1994

Despite the Jospin's circular, the *Conseil d'Etat* systematically reaffirmed its 1989 position, when in all discussed cases it stated that the principle of *laïcité* in public education on the one hand requires that teaching and all programs are provided in compliance with the principle of neutrality, however, on the other hand students' right to express and show their religious beliefs inside schools must be guaranteed.[104]

In the first case after the opinion, *Kherouaa et al* [105,], the *Conseil d'Etat* rejected the general prohibition of wearing "all distinctive symbols, clothing or otherwise, of a religious, political or philosophical character" as it was adopted in the internal regulations of the school.[106] The reason

[100] Circular of December 12, 1989
[101] *Ibid 18*
[102] *Ibid.92*
[103] *Ibid 18*
[104] Herman Salton, *Veiled Threats? Islam, Headscarves and Religious Freedom in America and France,* available at: http://researchspace.auckland.ac.nz/bitstream/2292/2317/14/02whole.pdf
[105] *Kherouaa et al,* Conseil d'Etat, 2 November 1992, No. 130394.
[106] *Ibid.67*

for the rejection was that the school with such internal regulations completely ignored freedom of expression in the context of the principle of neutrality and secularism in public education[107]. Also, the *Conseil d'Etat* reaffirmed that limitations to freedom of expression of religious affiliation are possible if it is an act of pressure, provocation, proselytism, or propaganda or endangers dignity, liberty, health and safety of students, or disturbs educational process[108]. As Beller stated, this case sends a message that "[t]he question of the headscarf's status remains open only on a case-by-case basis; particular instances of headscarf wearing may yet be forbidden, but headscarf-wearing as a general category of behavior may not."[109]

The position against the general ban was reaffirmed in all those cases, where no circumstances had been proved to justify limitation of the freedom of expression of students recognized by the neutrality and *laïcité* principles[110]. Moreover, the *Conseil d'Etat* added that the argument of limited applicability of the ban, e.g. when the ban was not applicable to corridors, playgrounds or offices, is illegal, too, because it covered the majority of the school premises[111].

However, the *Conseil d'Etat* did not uphold automatically all appeals against the expulsions and followed its opinion that contained the conditions for limitations of the rights to wear religious symbols by students. In 1995, the *Conseil d'Etat* agreed in a case *Aoukili* that a challenged expulsion was justified by security reasons, since the incompatibility of wearing headscarves in the physical education classes was proved[112]. Plus in the same case trouble caused by protests of

[107] *Ibid. 105*
[108] *Ibid.105*
[109] *Ibid.92*
[110] e.g. *Yilmaz,* Conseil d'Etat, 14 March 1994, No 145656.
[111] *Ibid.104*
[112] *Aoukili,* Conseil d'Etat, 10 March 1995, No. 159981.

girls' father were held as conflicting with reciprocal tolerance and appeared to the *Conseil d'Etat* as an act of proselytism and provocation[113]. As Beller summed up, "… the *Conseil d'Etat* concluded its triad of cases concerning the wearing of headscarves in public schools. The first had been opinion … requested specifically by Minister of Education, Lionel Jospin; the second an affirmation … of the principles of the first opinion; and the third, an implementation of one exception to the rules laid out in the first opinion."[114]

The *Conseil d'Etat* in this first period established the consistent interpretation of the *laïcité* and neutrality principles in the headscarf affair. Despite the fact that the Jospin Circular tried to restrict the impact of the *Conseil's* opinion of 1989, the *Conseil d'Etat* preserved the freedom of manifesting of the religion by students in public schools by its ruling, and I assume this ruling is an example of how not only the freedom of expression of beliefs, but also cultural diversity could be guaranteed in a state 'without minorities'.

2.1.3 The Bayrou Circular and the following case law: 1994 – 2003

The decision making process set up by the *Conseil d'Etat* was not final, without 'attacks' from the political and governmental sphere. The debate became the centre of public attention again in 1994, when the Minister for Education, Francois Bayrou, published a circular announcing that 'ostentatious' religious symbols should not be allowed in schools[115]:

> Students' wearing of inconspicuous symbols, indicating their personal attachments to a religious belief, is permitted within the school establishment. But conspicuous symbols, which in themselves constitute elements of proselytism or discrimination, are prohibited. Also prohibited are provocative attitudes, disregard for requirements of attendance and security, and behavior that is likely to put

[113] *Ibid.112*
[114] *Ibid.92*
[115] Jane Freedman, *Women, Islam and Rights in Europe: beyond a universalist/culturalist dichotomy,* available at: http://journals.cambridge.org/download.php?file=%2FRIS%2FRIS33_01%2FS0260210507007280a.pdf&code=24d596d7b44dc75bd563057d88374391.

> pressure on other students, interfere with teachers' activities, or disrupt order within the establishment[116].

The new circular had the direct impact on the situation concerning religious symbols in schools, but it did not discourage the *Conseil d'Etat* from its interpretation of the principle of neutrality in favor of students. Within four months after issuing the circular, the number of girls wearing headscarves dropped from 2,000 to 600 in December 1994, sixty-eight girls were suspended from school and the exclusionary neutrality in the service of public education was reasserted.[117] The *Conseil d'Etat* did not invalidate school prohibitions based on the Bayrou circular, but it interpreted it in the narrowest possible way – school may in theory prohibit ostentatious religious signs, but the 'conspicuousness' nature always needs to be assessed on a case-by-case basis, and so no religious sign—and least of all the headscarf—could be regarded as automatically ostentatious[118].

However, the fact that the *Conseil d'Etat* decided to resist the restrictive circular does not mean that it did not further elaborate on limits to the freedom of manifesting students' religion at school. Sustaining the case-by-case approach, it upheld expulsions in the cases, where the school did not adopt the general ban for ostentatious religious symbols and the internal regulation prohibited wearing only those that constituted the act of proselytism or discriminatory behavior[119], and where girls refused to attend compulsory physical education classes and sports activities without the evidence establishing their inability to do so[120].

[116] *Ibid.87*
[117] Meira Levinson, *Liberalism versus Democracy? Schooling Private Citizens in the Public Square*, 333 *B.J.Pol.S.* 27.
[118] *Ibid.104*
[119] e.g. *Wissaadane*, Conseil d'Etat, 27 November 1996, No. 170209.
[120] *Wissaadane*, Conseil d'Etat, 27 November 1996, No. 170209; *Ait Maskour*, Conseil d'Etat, 15. January 1997, No. 172937.

On the other hand, the *Conseil d'Etat* rejected the expulsion of a girl simply on the basis of incompatibility of her headscarf with the principle of *laïcité,* without any reference to her previous behavior, and without any evidence about activities that would possibly constitute the act of proselytism or pressure or trouble to the school's public order, as ruled in the case *Ali*[121]. In this case the *Conseil d'Etat* also referred to the wearing of a headscarf as not being a symbol of belonging to a community, but as an individual choice to express and manifest the personal belief[122].

Finally, we can summarize the characteristics of the *Conseil d'Etat* conduct of the rulings. This summary supports the view that the conduct was consistent and the way of solving the headscarf disputes was accurate, with the outcomes of the cases being more or less predictable, which makes the general ban in the form of a law unnecessary. The *Conseil d'Etat* emphasizes in the decisions that the principles of neutrality and *laïcité* have two dimensions according to which they apply. When concerning educational establishments, programs and teachers, the dimension of neutrality prevails, whereas with students, the freedom of expression of the religious affiliation must be preserved.

The *Conseil d'Etat* also gradually formulated possible limitations to wearing the ostentatious symbols in public schools and these are: first, a situation when the wearing of such a sign or symbol constitutes an act of pressure, provocation, proselytism or propaganda; second, when it is a threat to the dignity or freedoms of others; third, when it endangers health and safety of

[121] *Ali,* Conseil d'Etat, 20 May 1996, No. 170343; *Khalid,* Conseil d'Etat, 27 November 1996, No. 172787.
[122] *Ibid.104*

students; fourth, when it disturbs the educational process; fifth, when it causes chaos within school property or disrupts the normal functioning of the establishment; and last, when there are absences at classes with compulsory attendance[123]. All cases of expulsion where schools adopted the general ban on headscarves were struck down and the *Conseil d'Etat* required the case-by-case approach in every disciplinary proceeding against students. Without proving one of the above listed reasons, expulsions were held as not justified.

2.1.4 Law 228/2004: From case-by-case basis towards general ban

The main controversy in the headscarf affair in France was caused by the adoption of the Law of March 14, 2004, and a circular interpreting the broad term 'conspicuous religious symbols' addressed to all heads of schools and principals two months later:

> The signs and clothes that are prohibited are those that lead someone to be immediately recognized for his or her religious allegiance, such as the Islamic veil, whatever its name, the *kippa* or a cross of manifestly excessive dimension. The statute does not affect students' right to wear discreet religious signs [and] does not prohibit accessories and clothes that are commonly worn by students without any religious significance. On the other hand, the law forbids a student to take advantage of the religious character of that [symbol] in order to refuse to conform to the rules regulating students' attire at school[124].

New rules of dealing with religious symbols were prescribed by the law, denying schools the possibility to deal with these issues by introducing their own, supposedly more appropriate rules. The Minister made clear that after the adoption of the new legislation the previous jurisprudence of the *Conseil d'Etat* should be not followed, because the new law now replaced the case-by-case approach. Most schools thus adopted the suggested model: they prohibited conspicuous symbols indicating religious belief, followed the violation by a discussion with the student in question, parent, and possibly a third party, while the student received private tutoring and expulsion if the

[123] *Laïcité - Port de signe d'appartenance religieuse*, available at: http://www.cndp.fr/doc_administrative/laicite/lij44-p17.htm
[124] *Ibid.104*

ban had not been respected[125]. A small number of schools even opted for a complete ban of all religious symbols, whether conspicuous or not[126].

The new law had some effect soon after its adoption. A number of students causing disruptions dropped significantly, to only 101 by September 20, 2004; and in the school year 2004/2005, 639 students entered into discussions with school officials compared to 1,465 students in 2003[127]. By the end of June 2005, 44 Muslim girls and 3 Sikh boys had been expelled[128]. The first cases after the introduction of the new law concerned the wearing of the bandana[129] and Sikh turban[130].

As the ruling practice of the *Conseil d'Etat* before the adoption of the Law 14, 2004 was consistent and also formulated the possible reasons for limitations of the freedom to manifest a student's religion, I believe there was no need for the introduction of the general ban of the 'conspicuous' religious symbols in public schools, which, in my opinion, misinterpreted the principle of *laïcité* and allowed the unduly interference with one of the students' basic freedoms.

2.2 England

March 2006: the House of Lords issued the decision[131] that school dress code does not violate the right of Shabina Begum to manifest her religion under the Article 9 of the European Convention, and consequently the school developed a policy that respected Muslim beliefs in an inclusive and

[125] *Ibid.87*
[126] *Ibid.87*
[127] *Ibid.104*
[128] *Ibid.87*
[129] *Mlle X* , Conseil d'État, , 8 October 2004, 272926.
[130] *M. Singh*, Tribunal Administratif de Cergy-Pontoise, 21 October 2004, No. 0407980., *M. Singh*, Tribunal Administratif de Melun, 19 April 2005, No. 0507665, *Singh v Ministère de l'Education Nationale*, Cour Administrative d'Appel de Paris, 19 July 2005, 05PA01831.
[131] *R (on the application of Begum) v. Headteacher and Governors of Denbigh High School*, [2006] UKHL 15 of 22 March 2006.

proportionate manner. The House also emphasized the fact that the decision was about a particular pupil, place and time and was not supposed to be a rule on permitting Islamic dress or any feature of it in the schools. In this part I am going to analyze this case in all stages of the court proceedings to show that in spite of the fact that the final judgment of the House of Lords was not in favor of Shabina Begum, unlike in France, the whole school system is set up to accommodate the religious and ethnic diversity.

2.2.1 Shabina Begum case: The High Court

Denbigh High School is a maintained secondary establishment with diverse ethnic and religious groupings.[132] In 1993 the policy on wearing the uniform was revised[133] on the basis of diversity, and the students were offered three uniform options to choose from: skirt, trousers or shalwar kameeze[134]. The last of them was accepted and worn by some Muslim as well as Hindu and Sikh female students[135]. For two years before the exclusion Shabina was wearing shalwar kameeze as well as her sister did without any objection throughout her time at school[136].

In September 2002, Shabina Begum, a fourteen-year-old student of Denbigh High School, came to school wearing the *jilbab*[137]. Her brother, Shuweb Rahman, and another young man that came with her insisted on letting her attend classes in the garment she had on that day[138]. The reason

[132] *R (on the application of Shabina Begum) v. the Headteacher and Governors of Denbigh High School*, [2004] EWHC 1389 of 15 June 2004, s.38.
[133] To re-examine the dress code, the school appointed a working party and consulted parents, students, stuff and the religious leaders of the three local mosques. *Ibid.* 131, s 42.
[134] Shalwar Kameeze: a combination of the kameeze (a sleeveless dress) with a long sleeve white shirt beneath and a loose trousers, tapering at the ankles. *Ibid*. 125, s 41.
[135] *Ibid* 132, s.43.
[136] *Ibid.* 132, s.1.
[137] *Jilbab* is a long plain dress with sleeves which reaches the ankles; it effectively conceals the shape of woman's arms and legs. In Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (2006); *Ibid* 132, *s. 2.*
[138] *Ibid* 132. *2.*

why she wanted to wear it was the conforming to the Islamic requirements of dress for mature women who had reached the age of puberty[139]. The argument of her and her brother was that the shalwar kameeze was no longer appropriate, because the white shirt revealed too much of her arms, and the skirt did not reach the ankles[140].

The Assistant of the Headteacher sent Shabina home to change into uniform, however officially the school did not consider her as being expelled[141]. The school contacted the family because of Shabina's absence in classes and afterwards referred the matter to the Education Welfare Service ('EWS')[142]. Two mosques in Luton and the London Central Mosque Trust and the Islamic Cultural Centre held that the uniform does not offend the Islamic dress code[143]. The EWS offered Shabina a transfer to another school, and after she had applied to one that was full, she did not apply to another two that had been recommended to her[144].

Shabina Begum submitted her claim for judicial review on 13 February 2004 and challenged (i) the decision of the headteacher and governors not to admit her to the school wearing *jilbab*, (ii) the decision of Luton Borough Council ('LBC') not to provide her with education within the period of her absence in school in breach of the Article 3 Protocol 1 of the ECHR and s. 6(1) of the HRA 1998, (iii) the school and LBC interference with her rights under Article 9 of the ECHR

[139] *Ibid* 13232. 67.
[140] *Ibid* 139.
[141] *Ibid* 13232., s. 3.
[142] *Ibid* 13232., s. 12.
[143] On behalf of the London Central Mosque Trust and the Islamic Cultural Centre wrote opinion Dr. Abushady; *Ibid* 13232, s. 15, 16.
[144] *Ibid* 13232., *s.*33.

and s.6 (1) of the HRA 1998, (iv)a mandatory order to school and LBC concerning her return to school and finally (v) damages[145].

Shabina's position towards school uniform policy elicited various reactions from the school and public. A number of Muslim girls at the school said that they did not wish to wear *jilbab* and its presence at school would create pressure to wear it; an extremist Muslim group held the demonstration outside the school against education of Muslim students in secular schools[146]. The school, together with parents, feared that acceptation of *jilbab* in the school would lead to differentiation between Muslims according to the strictness of their views[147]. Finally, the uniform policy was there to promote inclusion and social cohesion and the headteacher feared that new variants would encourage the formation of groups and cliques identified by their clothing[148].

Shabina Begum lost the case in the High Court. Justice Bennett dismissed her claims because Shabina did not prove that she had been excluded from school. Reviewing the relevant legislation and internal norms, he pointed out that sending her home to change into the uniform cannot be considered as exclusion[149]. He also refused to accept the term 'constructive' or 'positive' exclusion claimed by Shabina, by which she meant that the request to wear school uniform she was not given any other choice than stay at home[150].

[145] *Ibid* 13232, *s.* 47.
[146] *Ibid* 131, s 18.
[147] *Ibid* 146.
[148] *Ibid* 146.
[149] *Ibid* 13232,*s.* 54 – 61.
[150] *Ibid* 149

Justice Bennett ruled that there was no breach of the Article 9 (1) of the ECHR. According to his reasoning Shabina Begum was aware of the uniform requirements before the school year started; and she used to wear it for two years before the conflict appeared[151]. Furthermore, when she decided that *jilbab* is the only dress code she can wear to comply with her religion, she could have opted for two other schools that were available and would have no problem with her clothing[152]. He also stated that Shabina was excluded because of her refusal to respect school policy: "[a]lthough her refusal was motivated by religious beliefs, she was excluded for her refusal to abide by the school uniform policy rather than her religious beliefs as such.[153]" This reasoning means that the Article 9(1) is not applicable here because, according to Justice Bennett, the freedom of religion and an interference with it were not an issue in the case.

Despite the previous findings that the Article 9(1) was not an issue in the case, Judge Bennett elaborated on the Article 9 (2) of the ECHR, which allows limitations to the freedom of religion, and on the reasons that would justify the ban on *jilbab* in the school[154]. Following the wording of the latter Article, Judge Bennett claimed that the condition that limitations have to be 'prescribed by law' is fulfilled by the school's uniform policy which had not been challenged by the Claimant years before[155]. The condition of the 'legitimate' limitation would be justified with the claim of the proper running of the multi-ethnic and multi-cultural school, and 'proportionate' limitation by the fact the uniform policy was set up on the special advice of the Muslim community, and finally Justice Bennett ruled interference would be 'necessary in democratic

[151] *Ibid* 13232. ,s. 73.
[152] *Ibid* 151
[153] *Ibid* 13232,s 74.
[154] *Ibid* 13232, s. 74, *last sentence.*
[155] *Ibid* 13232, *s.* 78.

society', because of the protection of the rights and freedom of others[156]. Since the Court ruled that Shabina's freedom of manifesting her religion was not breached, it ruled the same in the challenge of the Article 2, Protocol 1 of the ECHR concerning the right to education[157].

I understand the outcome of the first instance proceedings, but not the reasoning part. The part that is not persuasive in the reasoning of this case is, where Justice Bennett states that she was expelled because of her refusal to abide the school uniform policy, rather than due to her religious beliefs. Looking at the problem from his point of view, it's quite understandable that he came to conclusion that there was not breach of the freedom of expression of religious beliefs. Yet, in my opinion, there was a breach of her freedom of expression religious beliefs as protected by the Article 9(1), because at the initial stage of this dispute there was her attempt to follow the rules of her religion. I would agree with the justification of limitations imposed on her freedom, rather than simply maintain that there was no interference at all.

Already in this first judgment of this case we see how different the English approach to the headscarf issue and religious symbols in schools is compared to France. Denbigh High school did not try to protect the others by imposing a ban on religious symbols, but it tried to accommodate their religious needs. It went so far ,that when revising its uniform policy in 1993, it established the working group consisting of the representatives of parents, students, teaching staff and religious leaders of the three local mosques and their conduct is no exception in England.

[156] *Ibid* 13232, *s.* 81- 92.
[157] *Ibid* 13232, s. 94.

2.2.2 Shabina Begum case: The Court of Appeal

Shabina appealed against the judgment of the High Court and her application raised three questions: (i) whether she was excluded from the school, (2) if affirmative, whether it was because of the limitation of the Article 9(1), (3) again if yes, whether it was justifiable.[158] Furthermore, she claimed breach of her right to education under the Article 2 of the First Protocol to the ECHR[159].

The Court of Appeal came to a different conclusion about the exclusion of the claimant and said the school did exclude her by sending her home to change into uniform which she did not want to wear for religious reasons[160]. The school was supposed to start official proceedings concerning exclusion as education is mandatory and it would have lasted a shorter duration[161]. The Court of Appeal also stated that the authenticity of Shabina's belief in the correctness of the minority view was not at issue in the case and referred to the ruling of the ECHR in *Hasan and Chaush v Bulgaria*[162]:

> [The court] recalls that, but for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.[163]

As the answer to the second question was affirmative, it meant that, according to the Court of Appeal, there was an interference with her freedom to manifest her religion or belief in public and the school had to justify this interference.

[158] *R (on the application of Begum) v Headteacher andGovernors of Denbigh High School* , [2005] EWCA Civ 199 of 2 March 2005, s.17
[159] *Ibid* 158
[160] *Ibid* 158, s.24
[161] *Ibid* 158, s. 24
[162] *Hasan and Chaush v Bulgaria* ,26 October 2000, No. 30985/96.
[163] *Ibid* 158, *s.49*

Under the Article 9 of ECHR, freedom of religion is an absolute right; however, freedom of manifesting religious beliefs is not and so it can be restricted, but the restrictions have to be justified. Except that they have to be prescribed by law and be necessary in a democratic society, interference has to be justified with either the interests of public safety, or public morals, or the protection of rights and freedoms of others. In this case, the protection of the first two was not suggested as relevant since other schools were able to accept wearing the *jilbab* without any serious concern[164]. The school justified its decision by the protection of freedom and rights of others. The Assistant Headteacher claimed that other students fear students wearing the *jilbab*, associate them with extremist views, and it may lead to pressure for other Muslim girls who do not want to wear the *jilbab* to wear it[165].

Justice Brooke's reasoning is completely contrary to the one given by Justice Bennett of the High Court. Referring to the case law of the ECtHR related to countries like Switzerland[166] and Turkey[167], he refused to refer to cases from the employment sphere, as justice Bennett did in his judgment, because unlike voluntary agreements in employment area, education is compulsory[168]. Neither he assumed that the school should have feared that the policy of inclusiveness would be endangered[169]. He stated that position of the school had already been distinctive, since it permitted girls to wear headscarves that identify them as Muslims[170]. So the main issue was

[164] *Ibid* 158, *s. 50.*
[165] *Ibid* 158, *s.*51.
[166]*Dahlab v Switzerland,* 15 February 2001; No 42393/98.
[167] *Sahin v Turkey*,10 November 2005; No 44774/98; Justice Brooke distinguish this case on the basis of different relation between the Church and the State in the two countries, the character of the constitutions and the fact that religious education is the internal part of the basic curriculum; s.73 of the judgment.
[168] *Ibid*158, *s. 62.*
[169] *Ibid* 158, *s. 74.*
[170]*Ibid* 169.

whether it is really necessary for a democratic society to limit the rights of those Muslim girls who believe that when they reach the age of puberty they should wear *jilbab*[171].

To avoid the court proceedings in the future, Justice Brooke gave the guidance to schools how to approach these disputes[172]. He set out a number of questions that were to be answer if a similar problem occurs: (i) has the claimant established that she has a relevant ECHR right which qualifies for protection under Article 9(1)?; (ii) subject to any justification that is established under Article 9(2), has that ECHR right been violated?; (iii) was the interference with her ECHR right prescribed by law in the ECHR sense of that expression? (iv) did the interference have a legitimate arm?; (v) what are the considerations that need to be balanced against each other when determining whether the interference was necessary in a democratic society for the purpose of achieving that aim? (vi) was the interference justified under Article 9(2)[173]?

According to this approach, the choice adopted by the school was wrong, as it did not start with the premise that Shabina had the right protected by the English law, but with the premise that there is a uniform policy that has to be followed and if she did not like it, she could go to a different school. Therefore, as the school did not give Shabina's rights the weight they deserved, the Court of Appeal decided that Shabina Begum was unlawfully excluded from school, denied the right to manifest her religion and access to suitable and appropriate education[174].

[171] *Ibid* 169.
[172] *Ibid* 158, *s.75.*
[173] *Ibid* 158, *s. 75.*
[174] *Ibid* 158, s. 76.

2.2.3 Shabina Begum case: The House of Lords

The school appealed against the judgment of the Court of Appeal to the House of Lords and was successful, since the majority of lords held there was no interference with the Article 9(1) of the ECHR[175]. Lord Bingham in his reasoning reaffirmed that the right to manifest belief is a qualified right, which means it can be restricted by justified reasons[176]. Referring to domestic case law[177] and case law of the ECtHR[178], he emphasized the fact that in a particular manifestation of the beliefs the circumstances of the individual have to be taken into account[179]. Then he continued with a statement that the Strasbourg institutions are not keen to declare interference in the case where a person has voluntarily agreed to rules that he or she claims to interfere with the protected fundamental freedoms[180]. On this basis and circumstances described at the beginning of this subchapter, he held an opinion that in this case there was no interference with Shabina's right to manifest her belief in practice or observance[181].

Another two judges supported Lord Bingham in his position. Lord Hoffmann stated that there was no infringement of her rights because there was nothing to stop her going to school where she was allowed to wear *jilbab*: "[a]rticle 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing[182]. Lord Scott concluded that unlike expelled students, Shabina could return anytime she wanted, and since there was the

[175] *R (on the application of Begum) v. Headteacher and Governors of Denbigh High School*, 22 March 2006, [2006] UKHL 15 of 22 March 2006.
[176] *Ibid* 175, s.20, last sentence.
[177] *R (Williamson) v Secretary of State for Education and Employment*, [2005] UKHL 15, [2005] 2 AC 246.
[178] *Kalac v Turkey*, [1997] 27 EHRR 552.; Sahin v Turkey, No. 44774/1998 of 10 November 2005.
[179] *Ibid* 175, s.22.
[180] *Ibid* 175, s.23.
[181] *Ibid* 175, s.25.
[182] *Ibid* 175, s. 50, 55.

possibility of Shabina's transfer to another school, the school uniform rules could not be regarded as a breach of the Article 9 of the ECHR[183].

The other two judges were not so convinced about the non-interference with the Shabina's freedom. Lord Nicholls allowed appeal on the basis of objectively justified decision of the school[184], as did Baroness Hale, when she defended her position of the ability of an adolescent child to make their own decisions on the one side and a lack of the decisive power on the other[185].

Although three of the five judges claimed there was no breach of the Article 9, all of them addressed the question of a possible justification of the interference. Lord Bingham criticized the approach of the Court of Appeal to the procedural question for three reasons[186]. First, "[t]he unlawfulness prescribed by section 6(1) is acting in the way which is incompatible with Convention right, not relying on defective process of reasoning…[187]" Secondly, "… it is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adapted to judicial review in a domestic setting… The proportionality has to be judged objectively, by the court.[188]" Thirdly, the Court of Appeal's decision making prescription could serve as guidance to a lower court or legal tribunal, but cannot be required from the school

[183] *Ibid* 175, s. 89.
[184] *Ibid* 175, s. 41.
[185] *Ibid* 175, s. 36.
[186] *Ibid*175 s. 29.
[187] *Ibid* 175, s. 29.
[188] *Ibid* 175, s.30.

representatives. Plus, what matters in any case is the practical outcome, not the quality of the decision making process.[189]"

Lord Hoffmann's opinion concerning the procedure was the same:

> The fact that the decision-maker is allowed an area of judgment in imposing requirements which may have the effect of restricting the right does not entitle a court to say that a justifiable and proportionate restriction should be struck down because the decision-maker did not approach the question in the structured way in which a judge might have done. Head teachers and governors cannot be expected to make such decisions with textbooks on human rights law at their elbows. The most that can be said is that the way in which the school approached the problem may help to persuade a judge that its answer fell within the area of judgment accorded to it by the law[190].

When considering proportionality, Lord Bingham referred to the case *Sahin v Turkey* emphasizing

> the high importance of the rights protected by article 9; the need in some situations to restrict freedom to manifest religious belief; the value of religious harmony and tolerance between opposing or competing groups and of pluralism and broadmindedness; the need for compromise and balance; the role of the state in deciding what is necessary to protect the rights and freedoms of others; the variation of practice and tradition among member states; and the permissibility in some contexts of restricting the wearing of religious dress[191].

In Lord Bingham's opinion, the school policy respected Muslim beliefs in an inclusive, unthreatening and uncompetitive way that contribute to harmony and success[192].

The judges also addressed a possible interference with the right to education. It is clear they ruled that there was no breach of this right, because of the position they held towards the interference with the Article 9 of the ECHR. Lord Bingham and Lord Scott's opinion was that it was Shabina's unwillingness to comply with a rule that was said was lawful[193]. Lord Hoffmann

[189] *Ibid* 175, s. 31.
[190] *Ibid* 175, s. 68.
[191] *Ibid* 175, s. 32.
[192] *Ibid* 175, *s.*34.
[193] *Ibid* 175, s. 36, s. 90.

referred to a decision in Abdul *Hakim Ali v Head Teacher and Governors of Lord Grey School* [2006] UKHL 14:

> ... that article confers no right to go to any particular school. It is infringed only if the claimant is unable to obtain education from the system as a whole. In the present case, there is nothing to suggest that Shabina could not have found a suitable school if she had notified her requirements in good time to the local education authority[194].

The case of Shabina Begum opened the discussion within the UK about the religious symbols in the maintained schools. In three stages of proceedings we can see that judges did not come to the same conclusions, or when they did, their reasoning was different. However, for the purpose of this thesis it is more important to look not only at the courts, but more at the complex situation of the students from multi-ethnic and multi-religion background. In the case of Shabina, we see the girl that would like to wear a long gown called *jilbab* to satisfy the requirements of her religion. She was not allowed to do so and the final judgment stated that her rights were not infringed. Yet, it was emphasized that the decision was made according to particular circumstances, time, place and people. The outcome of the case might have been different, if the school would have ignored the diversity of its students, or there would have been no schools that would have accepted Shabina with *jilbab*.

[194] *Ibid* 175, s.69.

CONCLUSION

As I pointed out in the very first paragraph of this thesis, the headscarf issue is still being hotly debated in the European countries, namely in Turkey, the country aspiring for the membership in the European Union. Lack of a unified approach towards religious symbols in public life enabled this comparative analysis, although it encompassed several difficulties. As I have mentioned at the beginning of the Chapter I, there are some distinctions that make the comparison more complicated: different legal systems – common law compared to civil law system or England as the country without written constitution compared to France with long constitutional tradition. Except this, my research was complicated by the fact that my poor command of French limited my research of the French cases mainly to the secondary sources.

The aim of the thesis is to argue that the of England's approach to religious symbols in maintained schools is more respectful to the religious beliefs than the general ban adopted in 2004 in France. I started with the analysis of the legal framework of both countries to be able to analyze the case studies later. After the comparison of church and state relationship in France and England I came to the conclusion that the position of both states when regarding support and financing religions is the same. Both countries signed and ratified most of the main international documents in the area of protection of freedom of religion and education. Nevertheless, it seems that in France, every right and freedom of the individual enjoys protection from the state up to the point where the state starts to protect the constitutional principle of *laïcité*. It seems to constitute an underlying value of both the right to education and freedom of religion and it can be used in various interpretations as happened in the case of the general ban, as an excuse to restrict individual rights and freedoms. On the other hand, in England with no written

constitution, the state successfully accommodated its multi- ethnic and multi-religious population in schools. Adoption of internal rules is up to schools and state encourages them to adopt the rules that conform to the diversity of the establishments. This approach is clearly more respectful to students' religious beliefs.

Legal norms and statutes are interpreted by courts, and when they do not grant efficient protection, courts often interpret them in the manner that protects rights and freedoms of individuals. This was the case of ruling of the *Conseil d'Etat* until 2004. On the other hand, the ministerial circulars were promoting stricter approach or even the ban on wearing symbols of religious affiliation which was made into a law, and the role of the Conseil d'Etat was diminished in this respect.

My research leads me to propose that the example worthy of following by other countries when dealing with the issues stemming from the growing number of religious minorities in public schools or public life is the one of England, being more flexible and accommodating to personal freedoms, which I believe is very important for peaceful coexistence of different nationalities and religions in the multiethnic and multicultural societies of modern democracies.

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