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June Edmunds

Abstract

Innovative approaches to citizenship emerged in the 1990s. Post-national theory suggested that European minorities no longer needed national citizenship because supra-national political structures such as the European Court of Human Rights (ECtHR) offered them protections. Denationalized citizenship held that universal human rights were now available at the national level too as the Council of Europe’s member countries had to incorporate human rights principles within their own jurisdictions. New forms of claims-making among European Muslims were cited as evidence of this trend as religious claims, especially relating to the hijab, began to be made through human rights litigation. This paper demonstrates the limits of post-nationalism through a discussion of the outcomes of such claims. While European Muslims are indeed mobilizing around human rights, there is no evidence – at the level of litigation – that this has helped them to win recognition of their religious or cultural rights. This paper explores the reasons for this.

Keywords: Activism, Citizenship, Cosmopolitanism, Headscarf, Muslims, Europe

Introduction

On the 11th of April 2011 France’s new law banning the burqa in public came into effect. The ‘veil’ has become a political preoccupation for secular European governments who insist
that the secular neutrality of the public sphere is negated by religious dress or ‘conspicuous
religion signs’. The French government, under President Sarkozy, is ostensibly legislating
against wearing full-face covering in all public spaces on the grounds that it is ‘legislating for
the future’ to prevent a community ‘closing in on itself’ and rejecting French values. Muslim
women protesting against the ban on the day of its introduction claimed it was a
violation of their human rights. The ban thus captures, very neatly, the conflict between
growing mobilisation around human rights among European Muslims and the question of
how religious freedom, protected by the European Charter of Human Rights (ECHR), sits
with European secularism.

This conflict is a challenge to post-national theory, which emerged in the period
following the collapse of the Soviet Union when the end of history was declared as liberal
democracy that seemed to supersede other political frameworks. The optimism of this
period, in European social theory, was buoyed by the apparent creation of a new global order
based on political co-operation and universal principles seemed to be supported by a
succession of East European states ratifying the ECHR and the ostensible division between
economic based rights, associated with the Soviet bloc, and individual (political and civil
rights) associated with the west, appearing to dissolve as the language of human rights took
central stage in the global public sphere (Cohen, 1999: 245-68).

Some social theorists (Held, 1995; Kaldor, 2003) identify potential for a new
cosmopolitanism. Variously defined, indicators of cosmopolitanism include politics that
appeal to universal causes. In essence, it holds that it is possible to have a set of rules that
everyone can accept regardless of their social, cultural or religious backgrounds by virtue of
their shared humanity. The growth of humanitarian interventions, human rights institutions,
treaties and grass-roots activism were cited as such indicators (Douzinas, 2007, p. 141) as
well as united protests against the war in Bosnia-Herzegovina (Kaldor, 2003, p. 131).
Bosnia’s new constitution, set out in the 1995 Dayton accords, reflects the cosmopolitan optimism of the time: it created a central government along with elected governments for the Muslim-Croat Federation and the Serb Republic, which could only work if the cosmopolitan centre prevailed over the constituent ethnically-separated ‘entities’.

These developments have been understood as harbingers of ‘cosmopolitan law’ – abandoning state-centred international law for the universalism of the 1993 Vienna Declaration of Human Rights. Inaugurated by the Nuremberg trials, international accountability for war crimes and genocide culminated in the establishment of the International Criminal Court (ICC) in 2002. The war crime tribunals held to assess the culpability of the Serbian leadership for crimes against humanity in the Bosnian war seemed to show that national sovereignty was retreating under the weight of the international human rights regime. NATO’s 1999 intervention in Kosovo and the subsequent Anglo-American-led invasions of Afghanistan and Iraq further eroded the principle (traced to the 1648 Treaty of Westphalia) that governments were sovereign within their own borders. In this context ECHR law became increasingly central to the global human rights regime, illustrated by an ever-growing number of cases lodged with the ECtHR.

Rooted in one’s humanity rather than national status, human rights are universal by being held equally by everyone, at least in the abstract (Donnelly, 2007 p. 281). As human rights’ entitlement shifted from national institutions, through post-national and denationalising processes, supra-national institutions became the new mediators for equality, liberty and civic participation and a nominal ‘European citizenship’ conferred legal rights on all European citizens (Tambini, 2001, pp. 200-1). Europe sought to construct an image of itself as a uniquely progressive safe haven for those whose rights had been abused. While refusals to allow Turkey’s accession to the European Union (EU) are determined by vested
geopolitical interests, member countries have used Turkey’s human rights’ record as a way of maintaining a liberal and progressive self-image.

**From national citizenship to post-nationalism**

Citizenship in Europe has, historically, been based on a nationally segregated, communitarian interpretation of human rights. Formal citizenship depended on being a durable member of the community – speaking the language, sharing the culture, working, paying taxes and social insurance contributions and voting in elections. ‘Newcomers’, denied this participation, did not enjoy the same rights. This approach helped European nations build enlarged welfare states, combining contributory (national) insurance schemes and social and health services supplied according to need. But this received a double blow at the end of the Cold War with the disappearance of a common enemy to instil social solidarity between the system’s contributors and beneficiaries and an increasing economic reliance on migration and internal labour mobility. Governments came under pressure to disassemble citizenship’s solidaristic supports and formal citizenship had to change to adapt to the rise in collective claims from diverse communities (Turner, 2001, p. 46).

The nationalization of citizenship emerged out of 19th century warfare when state sovereignty became the foundation of the international system and national boundaries solidified just as human rights in France and the US were born. While the late 19th and early 20th centuries were characterized by exclusive, nationalistic citizenship, the late 20th century was thought to be marked by the ‘denationalizing’ or ‘thinning’ of citizenship. Global institutions such as the EU, IMF, World Bank and GATT/WTO began to modify national economic management. Their action as a block to warfare for the sake of economic integration was reinforced by the integration of national military machines in to collective security alliances (NATO and the Warsaw Pact). Warfare, which depends upon ‘thick’
loyalties, does not sit easily with the cool loyalties demanded by global markets – diluting national citizenship even within the state as national courts have been compelled to act as international instruments (Sassen, 2002, pp. 277-80).

Previously defined statically, citizenship began to be defined in a more active way with the emphasis on claims-making rather than national membership (Isin, 2008, p. 16) and two important paradigms emerged. The first, post-national citizenship (Soysal, 1997; 2000) suggested that citizenship was evolving through the growing trend of political actors operating across borders and appealing to supra-national institutions such as the United Nations (UN) and the European Court of Human Rights (ECtHR) and that political activism was increasingly centred around universal rights and politics with a ‘global dimension’ (Sassen, 2002, pp. 281-87). For Soysal (1997, pp. 513-24) even ‘state-less’ communities no longer depended on national citizenship because they could access supra-national organizations such as the UN or the Council of Europe for protection of their rights. For example, Turks in Germany without German citizenship could still benefit from de facto citizenship through associations that organize access to welfare and education as well as political activities hinging on human rights (Soysal, 2000, pp. 1-5).

While post-national citizenship appeals to institutions outside of the nation, denationalized citizenship refers to the ‘disruption’ of national citizenship caused by national institutions having to answer to international authorities and civil actors making appeals to universal human rights principles within national courts (Sassen, 2002). The ‘decoupling’ of traditional citizenship from national status has, it was suggested, had an impact on claims making in the public sphere, which, even when centred on particular identities, are mobilized in universal terms. A collapse in the public/private divide was evident, for example, in calls to take minority religious practices out of the private realm and into the public. This political change was attributed to changes to the ethnic and religious composition of Europe; the rise
of human rights; the emergence of cultural rights, the right to self-determination and the breakdown of national sovereignty (Soysal, 2000).

European integration is said to have eroded the ‘national monopoly on rights and practices of citizenship’ and paved the way for European citizenship through the transfer of rights across EU member countries. Europe has been forced by economic and geopolitical-security pressures to transcend its national borders by removing barriers to cross-border movement of people, capital, goods and services (Milward, 2000). ‘European citizenship’, while not having the same ‘depth’ as traditional national citizenship, nevertheless confers a set of legal rights to European citizens, which includes the granting of rights to culturally specific groups, such that the state’s duties have been stretched to include individuals as members of groups rather than just individuals (Tambini, 2001, p. 201), with specific implications for COE member countries.

European Muslims and human rights activism

New forms of claims making among European Muslims have been held as evidence for post-national theory (Soysal, 1997; 2000). Now that Muslims are an established part of European life rather than transitory ‘guests’, representative groups and associations have started to become more active in the public sphere – through mosque building for example. This new wave of activism differs from earlier forms by framing religious rights within universalistic principles of equality, freedom and individual rights – amounting to a ‘recasting of national citizenship rights as human rights facilitated by transnational connections’ (Soysal, 1997, pp. 515-7).

Post-national theorists regard the 1989 foulards controversy in France and the Rushdie affair in the UK as evidence of this trend (Joppke and Moravska, 2003, pp. 194-6) as well as protests against the 2004 French ban on wearing conspicuous religious signs in
schools because these campaigns mobilized their demands within a human rights framework. French protests depicted the ban on the *hijab* in schools as undermining core values, such as individual freedom, for which France itself stood and declared that *laïcité* was compatible with wearing religious signs in public. Thus, the political arguments around the right to ‘difference’ were based on human rights language - wearing the headscarf was claimed to be a ‘natural right’ of individuals to manifest their cultural identity in public (Soysal, 1997, pp. 512-8). This seemed to satisfy established (western) concepts of human rights, going back to Tom Paine and J.S. Mill, as individuals could exercise this natural right without infringing anyone else’s liberty or imposing any social costs.

Islamic organizations in Europe started to target their claims-making at national, regional and transnational public spheres. The European judicial process requires them to begin at the local level and move upwards if their grievance is not resolved. But because they are seeking to be judged by a universal rather than a local cultural standard, taking test cases to the supra-national level would appear to be the most appropriate forum. Thus, the *foulard* issue moved from the local education authorities to the ECtHR. Indeed, Muslim associations are increasingly operating at the European level, establishing umbrella organizations to coordinate their activities (Soysal, 1997, pp. 519-20) such as the Forum of European Muslim Youth and Student Organizations (FEMYSO) which is involved in human rights campaigns in Chechnya, Sudan and Palestine and forging alliances with Jewish groups.

Similar developments took place in the UK in the 1990s and 2000s as Muslim organizations protested against human rights abuses in Palestine, Chechnya and Bosnia, demonstrating a new, active citizenship (Werbner, 2000, p. 319-20). Organizations such as the Muslim Public Affairs Committee (MPAC) defended women’s right to choose to wear the headscarf as a human right, reflecting wider feeling among young British Muslims who prioritise human rights over other political causes (Edmunds, 2010). This organisation was
also prominent in the campaign against greater detention powers under the UK’s new anti-terror laws (Nash, 2009, p. 66). Muslim students and organizations condemned France’s and Turkey’s ban on the headscarf, arguing that it breached women’s right to personal autonomy. Politically diverse Muslim organizations such as the British Islamist organization Al-Muhajiroun, which was banned for glorifying terrorism and MPAC, have united around the language of human rights for political purposes.

Turkey also became the site of such protests as religious groups and human rights organizations joined together to challenge the country’s secular policies on the grounds that a rights based movement, including one recognizing religious rights, was compatible with secularism. In Turkey, the Islamic party in its various manifestations has further blurred the church/state distinction by running welfare systems that parallel and sometimes substitute those of the state, thus adopting a ‘western’ rights-based discourse which, because of their secular nature, were considered to be a powerful political weapon (Barras, 2009, pp. 1237-45).

There followed a rise in litigation concerning religious freedom, especially around the question of Islamic clothing in public spaces. In France, propelled by the 2004 law, the Collective Against Islamophobia in France (CCIF) began to litigate on issues relating to religious freedom and challenged the confinement of Islamic practices to the private sphere. It claimed that the state’s ostensible commitment to neutrality was breached by arbitrary discrimination over which religions were incompatible with laïcité without regard to public order. The CCIF saw the French law as departing from international law, and France’s commitment to human rights, by discriminating against Islam and thus abandoning the commitment to ‘Liberty and Justice’ (Barras, 2009, pp. 1237-45).

**Litigating for religious freedom**
The late 1990s and the early 2000s therefore saw a rise in cases of Muslims litigating for religious freedom (Article 9 ECHR) through claims in national courts and the ECtHR mainly concerning national bans on wearing Islamic dress, especially the *hijab*, in schools and higher education institutions. Out of sixteen religious freedom cases taken to Strasbourg, twelve related to the banning of Islamic headscarves in public education; six involving students and six involving teachers. Reflecting national politics, they have also been made mainly against Turkey and France, with only one case relating to the UK (X v. the United Kingdom) and one to Switzerland (Dahlab v. Switzerland). In contrast, five have been taken against France (Atkas v. France; Bayrak v. France; Ghazal v. France; Gemaleddyn v. France; Dogru v. France; Kervanci v. France) and nine against Turkey (Şahin v. Turkey; Köse and others v. Turkey; Kavakçı v. Turkey; Karaduman v. Turkey; Balut v. Turkey; Kurtulmus v. Turkey; Çaglayan v. Turkey; Yılmaz v. Turkey; Tandogan v. Turkey). Only three cases were considered on the basis of merit: Şahin v. Turkey; Dogru v. France and Kervanci v. France, with the others, including Dahlab, dealing only with admissibility. National cases include Begum v. the Headteacher and Governors of Denbigh High School in the UK and the Ludin case in Germany (see Rorive, 2003: 2676-8).

Şahin v. Turkey is a watershed case, brought by Leyla Şahin who, after defying Istanbul University’s 1999 prohibition on the headscarf, was prevented from enrolling on her degree. Şahin complained that her Article 8 right (to private life), Article 9 right (religious expression), Article 10 right (expression) and Article 14 right (non-discrimination) had been violated by the ban. Dahlab v. Switzerland was another landmark case concerning a primary school teacher who, having converted to Islam, started to wear a headscarf to school and lost her post after refusing to remove it after the intervention of the Directorate General for Primary Education in 1996. Dahlab alleged a violation of Article 9. The prohibition was upheld by the Geneva cantonal court, then the Federal Court and later by the ECtHR which
declared the case inadmissible as ‘manifestly ill-founded’ according to Article 35 (3) of the Convention (McGoldrick, 2006, pp. 121-30).

Dogru v. France and Kervanci v. France involved two school children, Belgin Dogru and Esma-Nur Kervanci, who were expelled from the school of Flers in l’Orne in 1999 for wearing headscarves during physical education lessons despite being a contravention of school regulations. The Caen Administrative Court in October 1999 and the Nantes Administrative Court of Appeal upheld the school’s decision. The application in the Dogru case was lodged with the European Court of Human Rights on 22 July 2005 and the Kervanci case on 22 July 2004. In both cases, the Court unanimously judged that there had been no violation of Article 9 (freedom of thought, conscience and religion) of the ECHR.⁴

In Germany, Fereshta Ludin, originally from Afghanistan, was refused a permanent post as a primary school teacher in the state of Baden-Württemberg for wearing the *hijab*, took her case to the German Federal Constitution Court in September 2003 claiming that the constitutional provisions concerning freedom of religion in Article 4 (1) and (2) of the Basic Law and equal eligibility of all German citizens for employment in the civil service Article 33 (3) of the Basic Law had been breached. Despite winning at Germany’s Constitutional Court, the Court concluded that the legislature of the *Länder* could choose to introduce such bans (McGoldrick, 2006, p. 294) a decision which was the Federal Administrative Court upheld in 2004 inducing Baden-Württemberg, Bavaria and several other *Länder* to introduce bans, undermining Ludin’s victory.⁵

In the UK, the Begum case involved a teenage schoolgirl who wanted to wear the *jilbab* at a school where only the *hijab* was permitted. After refusing to change her practice, Begum was excluded from the school and took her case to the High Court claiming a breach of Article 2 of Protocol 1 of the ECHR, section 6 (1) of the Human Rights Act 1998, Article 9 of the ECHR and Section 6 (1) of the HRA, 1998. Begum appealed through the Court of
Appeal and won a technical victory on the grounds that the school’s decision had not been reached through an assessment of the human rights principles - a ruling which was later overturned by the House of Lords, which concluded that there had been no interference and that the Court of Appeal’s decision had been based on procedure rather than substance (McGoldrick, 2006, pp. 180-204).

Thus, contrary to post-national thinking, the ECtHR judgements uniformly deferred to the national governments, an outcome facilitated by the exercise of a wide margin of appreciation - which refers to the latitude given to national authorities by the Court while satisfying its obligations under the ECHR. The judgements accepted that wearing the hijab in public institutions threatened the balance between protecting public interest and individual rights. In the Şahin case the ECtHR agreed that wearing the headscarf could threaten Turkey’s secular democracy (Westerfield, 2006, p. 654). This deference to national governments over such regulations was made clear in the summing up which stated that:

Where questions concerning the relationship between state and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision making body must be given special importance...This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions, especially, (as the comparative law materials illustrate) in view of the diversity of the approaches taken by national authorities on this issue⁶ (emphasis added).

The same deference to national decision making was evident in the admissibility decision of Dahlab v. Switzerland where the Court deferred to the denominational neutrality of the Swiss education system in its finding that the action was not a disproportionate
interference (Lewis, 2007, p. 406) when weighing of ‘the protection of the legitimate aim of ensuring the neutrality of the State education system against the freedom to manifest one’s religion’ was appropriate. Contending that ‘it may be necessary to place restrictions on this freedom in order to reconcile the interest of the various groups and ensure that everyone’s beliefs are respected’ the prohibition on wearing a headscarf while teaching was deemed ‘necessary in a democratic society’.

The judgement in Dogru reinforced the general regard to national governments, restating the right of the national state to determine regulations over religious practice in its conclusion that

> Having regard to the margin of appreciation which must be left to the member States with regard to the establishment of the delicate relations between the Churches and the State, religious freedom thus recognized and restricted by the requirement of secularism appears legitimate in the light of the values underpinning the Convention (emphasis added).

Thus, in all the cases taken to Strasbourg, a wide margin of appreciation was applied, giving considerable autonomy to the national states such that the Court failed to establish a European wide principle on this important matter.

Being directly linked to the subsidiarity principle, the margin of appreciation does not apply to national cases. However, it implicitly shaped domestic decision making as the Courts drew on comparisons between ECHR principles and national policy. The Begum case relied heavily on the authority of the court in Strasbourg because the Human Rights Act (HRA) 1998 calls for judgements to consider the necessity of interference in the right to religious expression (Gibson, 2007, p. 677). Because Britain is not a secular state, the
principle of secularism was not addressed, but the question of national identity was invoked as the House of Lords judgement based their arguments ‘relating to community versus democracy as part of the major principle of the “cohesive multicultural state”’ (McGoldrick, 2006, p. 144).

Both the ECtHR and the German Constitutional Court (in the Ludin case) delegated the final authority concerning the legalization of religious symbols to the respective ‘sub-units’ of each. In the case of the ECtHR to the contracting States and in the case of the Constitutional Court to the states or Länder. So, rather than developing a European perspective, the judgements upheld governmental control over religious practices (Skach, 2006, p. 194) and the House of Lords, in the Begum case, deferred to other national courts (Vakulenko, 2007, p. 722). This contrasts with the UN Human Rights Committee (which regulates state obligations in relation to the ICCPR) conclusion in the Hudoybergenova v. Uzbekistan case involving a student expelled from University for wearing the headscarf and argued a breach of the ICCPR, Article 18, concluded that ‘the freedom to manifest one’s religion encompasses the right to wear clothes or attired in public which is in conformity with the individual’s faith or religion’ (Barras, 2009, p. 2675) - although the Committee’s findings are not judgements in law in the way decisions originating in the ECHR are.

**Explaining the limits of post-nationalism**

These cases expose the limits to post-nationalism in this context, which can be explained by a number of factors. First, the tension between European judicial membership and national sovereignty, which is brought into sharp relief in cases involving qualified rights such as religious rights. Article 9 is based on a distinction between the internal dimension of the right to freedom of religious belief (*forum internum*) which is understood as an absolute right and the external dimension of this freedom (*forum externum*) which balances the absolute
right against public order and democracy (Rorive, 2003, pp. 2673-4). Thus, while the first
confers an absolute right to ‘freedom of thought, conscience and religion… either alone or in
community with others and in public or private, to manifest his religion or belief, in worship,
teaching, practice and observance’ the second qualifies this right, stating that this freedom
‘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, of for the protection of the rights and freedoms of others’.¹⁰

In determining the extent of margin, the Court balances the importance of the right in
question with the importance of the restriction and to consider the extent of European
consensus on the matter before the Court (Westerfield, 2006, pp. 673-4). In religious rights
claims, therefore, national authorities are given considerable autonomy because the Courts
need to demonstrate that interference was necessary for the effective functioning of a
democratic society. Interference has to be, first, an appropriate means for achieving the end;
second, the only way in which the legitimate aim could be achieved in the absence of less
restrictive alternatives and third the interference has to pass the strict proportionality test
which entails balancing the competing interests at stake (Rorive, 2003, pp. 2680-1). While
the judgements conceded that Article 9 (1) had been breached, the national bans were upheld
by appeal to Article 9 (2).

Despite this high bar of ‘necessity’ in finding that interference with the right is
justified, the judgements consistently accepted the national governments’ claims that banning
the wearing of Islamic dress in educational institutions was a justifiable interference with
Article 9 (2). This ‘collective interest’ argument establishes a high threshold in terms of the
wider destabilizing impact ascribed to one (or a few) individual’s actions, which meant that,
for example in the Şahin case, European supervision was absent in the over-reliance on the
margin of appreciation for a concern, religious freedom, which was not unique to Turkey, as
noted by the dissenting judge. This failure to establish a supranational position gave national governments more power to restrict religious expression through dress (Lewis, 2007, p. 396).

Second, European case law, in upholding national restrictions on the grounds that the hijab could threaten the public interest, implicitly drew on popular Islamophobia which has become embedded in post 9/11 Europe. Political debates in the context of the ‘war on terror’ have centred on an assumed relationship between Islam and terrorism and the potential for violent politics among Muslim minorities (Monshipouri, 2010, p. 47). The judgements appeared uncritically to accept Turkey’s and France’s position that wearing the hijab in these secular countries could be construed as a political statement or sign of religious extremism and therefore a threat to public order. The individual right to practice religion was subordinated to a generic principle of defeating Islamic fundamentalism and prohibiting proselytizing (McGoldrick, 2006, p. 145) in the absence of any actual evidence in the cases under consideration.

The Grand Chamber in the Şahin case associated wearing the headscarf with ‘extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts’. Thus the Court’s defence of secularism combined with deeply-rooted fears about Islamic practices meant that the specificities of the case were sidelined, undermining the commitment to pluralism and the principle that ‘freedom of thought, conscience and religion is one of the foundations of democratic society’ on supposed grounds of neutrality (Rorive, 2003, pp. 2683-4).

By failing carefully to examine the facts of the cases, the Strasbourg judgements did not, therefore, properly to address the test of necessity giving the national governments considerable scope to restrict the public practice of religion. The Court therefore failed
sufficiently to use the test of whether the action taken by the state to limit religious freedom was ‘necessary in a democratic society’ to uphold the bans on this basis (Evans, 2006, p. 52). This stance signals to Muslim citizens that their acceptance in these European countries depends upon their abandoning cultural and religious practices which are central to their identity (Monshipouri, 2010, p. 47).

Third, the bans were uniformly upheld by reference to gender equality such that the judgements drew, unreflectingly, on the popular assumption that western women were ‘liberated’ and Muslim women were ‘oppressed’ by their culture. All of the ECtHR cases accepted the argument that gender equality justified the bans, thereby accepting a conception of it as incompatible with gender equality and thus beyond the scope of ‘liberal toleration’. Similarly, the Begum case in the UK showed the readiness by which ideas about liberated secular women contrasted with women whose agency is suppressed by Islamic culture were accepted (Vakulenko, 2007, pp. 728-30).

Implicit was the popular image of the Muslim woman as both victim and aggressor: victims of an inherently misogynistic religion and in need of protection from it by the state but also aggressors in trying to impose Islam on others – both are imagined to threaten liberal egalitarianism (Evans, 2006). The unspoken assumption in the ECtHR, the UK and Germany was that of an unreflective dichotomy between progressive, liberated, western women and women oppressed by their cultures (Vakulenko, 2007, p. 728). ECtHR judgements are made without any reference to the implication of wearing the headscarf for an individual’s identity, which is protected by Article 8, which indicates that this jurisprudence appears to adhere to a conception of equality based on homogeneity rather than a form of equality based on recognition of differences among people, including cultural and religious practices and beliefs (Marshall, 2008, p. 189).
This assumption also meant that there was no full consideration of the facts of the specific cases and no attempt was made, in the Şahin and Dahlab cases, for example, to demonstrate an evidential link between their decision to wear the headscarf and their subordination as women. While the issue of the relationship between any religion - not just Islam - and gender is complex, the judgements failed to probe the circumstances of the women in question or find evidence of the women having been pressured to wear the headscarf (Hopkins and Yeginsu: 2008, pp. 29-34). Şahin’s testimony that she had not been pressurized was ignored and there was no evidence of pressure in the Dahlab case (Westerfield, 2006, p. 657; Rorive, 2003, p. 2680). In the UK, the House of Lords, by deferring to popular ideas, failed to critically reflect on whether banning girls’ dress was not itself an infringement of gender equality (Vakulenko, 2007, p. 724).

The cases were, then, judged entirely in the abstract, asking whether a generic individual’s scarf-wearing is compatible with harmony and full exercise of (generic) individual rights in the wider society. They did not pass judgement on – or even look into – the exercise of rights of the specific individual cited in the case. Indeed, the European and British judgements drew on national stereotypes: While the Şahin case equated wearing the headscarf with radical Islam, the Begum case assumed that such clothing was oppressive both in terms of child development and gender equality (McGoldrick, 2006, pp. 154-5).

Litigation has, therefore, provided the opportunity for disproportionate scrutiny of Muslim women as the popular press subjects the women concerned to intense scrutiny and moralizing, often through ‘expert’ commentaries, as well as potential for over-regulation of religion as the Court adjudicates over which acceptable and unacceptable aspects of religious manifestation. Such judgements could be exploited for political purposes and invite further regulation of how Muslim women choose to dress (Vakulenko, 2007, pp. 734-5). This level of scrutiny also has the potential to divide Muslim communities in Europe where individuals
such as Begum were judged, in the press, by other Muslims, some of whom were very critical (see Idriss, 2006) and negative press coverage of cases such as Aishah Azmi’s when she lodged a complaint with a UK employment tribunal after being dismissed as a teaching assistant for wearing the jilbab (Marshall, 2008, pp. 179).

Since activity in the public sphere is an important aspect of citizenship, the bans that governments are seeking to impose on European Muslim women upheld by the Courts have solidified a move to retract citizenship rights from these women - who, after failing in Europe, have no other forum to turn to for protection. In evoking the principles of defending national secular traditions and guarding against women’s oppression, the judicial process may have served to dismiss the claims of Muslim women without examining their individual complaints, and to dilute one of their key forms of access to citizenship, namely community building and participation in the public sphere. Legislation that sanctions the wearing of garments such as the niqab risks causing the further immobilization of Muslim women by compelling them to restrict themselves to the private sphere (Turner, 2007, p. 297). As Malik (2008) has argued, the growing numbers of Muslim women who are choosing to wear the hijab reflects a ‘complex’ axis of equality – by which she means the realignment of criteria such as gender, religion, culture and class – and thus facilitates the inclusion of Muslim women as equal citizens in the European public sphere.

The fourth explanation for the failure of post-nationalism in these claims was the ECtHR’s deference to the principle of secularism specifically laïcité (in France) and laîklik (in Turkey). Both countries’ defenses appealed to secularism as the custodian of equality between citizens and essential to public order and social cohesion. They claimed that wearing the hijab in public education institutions – secondary schools in France and institutions of higher education in Turkey - jeopardized the secular principles for which their countries stood. Thus, the governments responded with a generic statement on their view of human
rights and the contention that secularism and neutrality are perceived as promoting the public good by, for example, freeing the government and judiciary from the previous domination by one religion. The ECtHR accepted the French and Turkish governments’ restrictions on wearing the *hijab* in public education institutions on the grounds that they accorded with these two principles, adopting an unquestioning stance in relation to successive French governments’ contention that banning the *hijab* protects the neutrality of the public sphere and thus social cohesion (Barras, 2009, p. 1240) and fairly to consider the possibility of discrimination against particular religions.

In the Şahin case, the ECtHR Grand Chamber ruled that Turkey’s principle of secularism was ‘in harmony with the rule of law and respect for human rights’. Similarly, in Dogru and Kervanci v. France the Court’s judgement that there had been no violation of Article 9 (2) was based on previous case law arguments about secularism – Şahin, Dahlab and Köse and others - noting that ‘in France, as in Turkey or Switzerland, secularism is a constitutional principle and a founding principle of the Republic to which the entire population adheres and the protection of which appears to be of prime importance, particularly in schools’. And that ‘the State may limit the freedom to manifest a religion, for example by wearing an Islamic headscarf, if the exercise of that freedom clashes with the aim of protecting the rights and freedoms of others, public order and public safety’ (see Rorive, 2003, pp. 2685-6).

This suggests a pan-European trend towards increased privatization of religions according to a secular model. Europe’s attempt to ‘define itself in terms of the secular values of Liberalism, human rights, political democracy and multiculturalism’ is proving problematic in the face of increasingly politicization of European minorities. The solution, to date, seems to have been to seek to repress the manifestation of religious from the public sphere (Cavanaugh, 2007, pp. 10-1).
This brings us to a deeper reason – namely the ambiguous relationship between human rights - which are essentially secular - and religious freedom. The Court’s deference to national governments on this issue is, in part, rooted in the liberal, secular paradigm that underpins human rights. The implicit assumption is that human rights, which hinge on individual freedom of choice, are compromised by religious duty which, in essence, compels an individual giving up autonomy and thus limits the plurality of moral positions from which choices can be made. Moreover, closely linked with state neutrality, autonomy means that the state should not interfere with the choices people make from the plurality on offer or ally itself with beliefs that are thought to deny autonomy (Lewis, 2007, pp. 396-403).

Rights such as religious expression are understood as secondary to rights such as public expression because they are not seen as central to the effective operation of democracy. The level of discretion given to states varies such that the closer the issue at stake is to the core values of democracy, the narrower the margin of appreciation will be (Westerfield, 2006, p. 644). The Court’s treatment of religious freedom cases rests on a division between, first, individual rights versus protection of the rights and freedoms of others and second, the relationship between state regulation of religious and its obligation to protect religious communities and promote tolerance of religious diversity. To date, it has restricted religious practices under the principle of tolerance, pluralism and secularism defined in a way which has imposed ‘an unacknowledged cost to religious freedom’ (Langlaude, 2008, p. 944).

Conclusion

Decision-making has followed a common pattern despite the different national characteristics of the countries concerned in terms of church/state relations, federal versus centralized polities and the diverse demographic features of the Muslim populations. While Turkey is an
overwhelmingly Muslim country, France, Germany, Switzerland and the UK have minority Muslim populations with very different histories of immigration: ranging from the migration of North African Muslims after violent decolonization in France and the relatively peaceful economic migration from Pakistan and Bangladesh to post-war Britain. Moreover, the fact that the majority of the cases were directed against France and Turkey, and that in Switzerland the canton concerned – Geneva – is committed to a strict separation between religion and state, suggests the importance of this factor (McGoldrick, 2006, p. 120).

This article has shown that, even with these diverse national trajectories, there has been a convergence of policy. This can be explained by two, recent, developments. First, there has been a growing secularization across Europe and privatization of religions. As a result, the way the principle of subsidiarity has operated over the issue of religious freedom in Europe has not been around liberal pluralism, but rather ‘illiberal secularism expressed in illiberal restrictions on religion in the public sphere’ (Cavanaugh, 2007, p. 2), and what has been described as ‘fundamentalist secularism’, creating a climate of fear of Islam demanding its increasing confinement to the private sphere (Westerfield, 2006, p. 651).

Second, there has been a widespread trend towards the securitization of Islam in the post 9-11 era in Europe, where many countries have initiated new forms of surveillance of their Muslim minorities - through, for example, the tightening of immigration rules, the introduction of citizenship tests and, more specifically, the introduction of anti-terror legislation. Police monitoring and detention powers were strengthened through, for example, the UK’s Anti-Terrorism, Crime and Security Bill and France’s 2001 Law on Everyday Security (Cesari, 2010, p. 21).

These hard forms of securitization have been accompanied by softer forms – namely the surveillance of Muslim dress, especially among women, as a succession of countries including Belgium, Italy, the Netherlands and France have sought to outlaw the burqa
(Lewis, 2007, p. 395). Even in the UK, with its multiculturalist tradition, Jack Straw, the former Justice Minister, called for women to remove the face veil (*niqab*) in his constituency surgery and Harriet Harman described the *niqab* as essentially incompatible with equality (Motha, 2007, pp. 139-40, n.1). In May 2010 the German MEP Silvana Koch-Mechrin called for a Europe-wide ban on the *burqa* arguing that the full veil represents the antithesis of European values by symbolizing a ‘massive attack on the rights of women’ in being a ‘mobile prison’. Despite Europe’s self-image as progressive liberal democracy, there are developments that could be described as illiberal, but the court judgements have provided no redress against restrictive actions taken at national level.

These cases show the limitations of arguments about denationalized and post-national citizenship when applied to European Muslims, the primary litmus test (Soysal 1997; 2000). While European Muslims are increasingly using human rights as a vehicle for gaining religious rights, they have been ineffective because case history to date has delegated responsibility for decision-making to the national governments. The applicants’ rights were not protected by appealing to European courts because the subsidiarity principle gives greater autonomy over the imposition of restrictions on religious expression than on other rights to national authorities (Lewis, 2007, p. 396).

On the question of the ban, human rights institutions in Europe seem to be uniformly reinforcing national policy and national stereotypes, missing the opportunity to establish cosmopolitan law by ensuring that international law is applied to domestic constitutional law (Skach, 2006, p. 194). On this matter, universal principles of human rights continue to depend on the consent of nation-states for their enforcement, revealing a disjuncture between rights as a set of legal principles and their realization, which means that minority religious rights are not protected by appeals to supra-national human rights organizations (Basok, 2003, pp. 1-2). While the margin of appreciation does not operate in the national cases, as
mentioned earlier, there is a process of *double deference* in the judgements – first to the ECHR and then its reliance on national policy. Thus, the two national cases, Begum and Dahlab reveal the limits of denationalized citizenship.

The trend towards post-national or denationalizing of citizenship is, therefore, fragile and incomplete. In the context of instability or national crisis, the drawbridges are quickly drawn back in, showing that national allegiance continues to be a demand for Muslims who are also European citizens. Protests against the Iraq war are seen as disloyalty to the nation for Muslims but not for non-Muslim citizens. The paradox is that European Muslims, in seeking to use human rights mechanisms for dealing with their claims, are not adopting separatist strategies but acting according to a legal process rooted in ‘western’ traditions. Their actions signal an aspiration to be integral to European culture (Hellyer, 2007, pp. 34-5); and legal institutions’ reluctance to uphold those traditions, when national laws or attitudes depart from them, deals a potentially significant blow to those aspirations.

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Notes

1 For details of cases see http://cmiskp.echr.coe.int/tkp197/search.

2 [2006] UKHL 15.

3 Case No. 2BvR 143602 (Bundesverfassungsgericht) [BVerfG; Constitutional Court] 24 September 2003.


8 Dogru v. France, App. No. 27058/05 para. 63.


10 See http://www.hri.org/docs/ECHR50.html#C.Art9.


12 Updates From the Regional Human Rights Systems: ECtHR by Jan Kratochvil, p. 46.


14 Laïcité refers to separation between church and state whereas Laiklik refers to state control of religion.

15 Şahin v. Turkey, App. No. 44774/98.


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