United Kingdom

Banning the Jilbab: Reflections on Restricting Religious Clothing in the Light of the Court of Appeal in *SB* v. *Denbigh High School*. Decision of 2 March 2005.

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Introduction

A wave of bans and restrictions on religious clothing is sweeping Europe. Schoolchildren, judges, jurors, civil servants, and employees are among the groups whose freedom to wear clothing which indicates their religion has been questioned, as has the right of governments, employers or schools to impose restrictions. The resulting debate has led to new laws or legal judgments in, among other countries, France,[1] Germany,[2] Denmark[3] and the United Kingdom.

Each law and judgment takes place in a specific legal context. However, the underlying issues are the same throughout: religious freedom and equality come into contact with a fear of extremism and a desire to exclude religion from the

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[1] Law 2004-228 of 15 March 2004 '[Loi du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics]'. For full discussion and background *see* E.T.Beller 'The Headscarf Affair: The Conseil d'Etat on the Role of Religion and Culture in French Society', *Texas International Law Journal* (2004) p. 581; T. Jeremy Gunn 'Religious Freedom and Laïcité: A Comparison of the United States and France', *Brigham Young University Law Review* (2004) p. 419.

[2] Bundesverfassungsgericht, 2 BverfGE 1436/02 judgment of 24 Sept. 2003. For discussion *see* O. Gerstenberg 'Freedom of conscience in public schools', 3:1 *International Journal of Constitutional Law* (2005) p. 94-106; C. Langenfeld and S. Mohsen 'The teacher headscarf case', 3:1 *International Journal of Constitutional Law* (2005) p. 86-93; M. Mahlmann 'Religious tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case', 4:11 *German Law Journal* (2003), p. 1099.

[3] Sag 22/2004 Handels- og Kontorfunktionærernes Forbund i Danmark som mandatar for NN mod Føtex A/S (Case 22/2004, the Trade and Office Workers Union, on behalf of NN, v Fotex. I am grateful to Janne de Jong for the translation). Further information (in Danish) can be found at <www.hoejesteret.dk>.

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sphere of the state or workplace or school. Another common factor is that despite the framing of rules in neutral terms, the debate is all about Islam. The legislative, judicial and public focus is overwhelmingly on the clothes worn by Muslim women and girls.

The legal structure of the situations should also be similar. Whatever the details of national law all European states are signatories of the European Convention on Human Rights (ECHR), and all claim to respect a right to freedom of belief and religion. This means that national actions and rules need to fit within Article 9(2) of the ECHR, which sets out the permissible reasons for restrictions on religious freedom. As well as this, within the European Union many questions of religious discrimination are now regulated by Union law, which provides common rules for its member states. Hence it could be said that European law on religious freedom and equality is largely harmonised. However, it takes laws, challenge to those laws, and interpretative court judgments to make the extent and content of that harmonisation apparent.

It is against the background of these observations that this article looks at a recent English case – *SB* v. *Denbigh High School*.[4] As befits a case note it explains the facts and the judgment of the court. However, it also uses this judgment to provide a framework for analysis of the legal issues raised in the case, in order to show how questions of the legality of restrictions on religious clothing should be approached, not just in the United Kingdom, but throughout Europe (and perhaps beyond this, although the question of the true uniformity of the structure of human rights law is beyond the scope of this article). In this sense it goes slightly beyond a conventional case note. It looks at the particular case as an attempt to answer pressing Europe-wide questions, rather than purely as a phenomenon of English or British law.

The facts

SB was a student at Denbigh High School, a school in Luton, near London. It is a state school, and by all accounts a relatively good one, achieving good exam results. Students at the school are required by school rules to wear a uniform.

For girls the uniform code, at the time when SB was a student, allowed a choice between a skirt, trousers, or a shalwar kameeze. This is a form of clothing worn by many Muslim (and Hindu and Sikh) women consisting of loose trousers and a long tunic-like top. Girls were also allowed to wear headscarves, provided these complied with certain requirements to do with safety and colour.

[4] *The Queen on the application of SB* v. *Headteacher and Governors of Denbigh High School* [2005] EWCA Civ 199.

For her first two years at Denbigh High SB wore the uniform without objection. However at the age of around 14 she came to school wearing a jilbab. This is another form of clothing worn by many Muslim women, which consists of a gown and headscarf that are worn in a loose way intended to ensure that the shape of the body cannot be seen. It is considered by many Muslims to be more modest than the shalwar kameeze, which, while not revealing, is a more tailored garment. SB said that her religious beliefs required her to wear this jilbab. She understood the Koran to require that girls over the age of 13 wear such clothing.

The school refused to allow her to attend school in the jilbab and insisted that she must comply with the uniform code. No compromise was reached, and for a period of almost two years she did not attend school, after which she transferred to another school which allowed the jilbab.

SB's primary claim was that the school had violated her freedom of religion, contrary to Article 9 of the ECHR, which is implemented in the United Kingdom by the Human Rights Act 1998. She sought a judicial review of their refusal to allow her to come to school wearing a jilbab and a declaration that her freedom to manifest her religion had been unlawfully denied. The school responded that her freedom of religion had not been violated. They said that the uniform policy showed that it was a tolerant school, which allowed religious clothing, but within the limits of the policy, which limits SB was obliged to respect. They said that the clothing which the policy allowed was fully in conformity with the rules of Islam. Indeed the policy had been drawn up after consulting local mosques and leading Islamic authorities in the United Kingdom. These fully supported it and said that the shalwar kameeze complied with all Islamic requirements for female dress. Additional arguments made by the school were that the jilbab would impede sporting activity, cause health and safety risks, and might be interpreted by others as a form of fundamentalism, which could be oppressive for other pupils, especially other Muslim girls, who might feel pressured into similar clothes. The uniform policy was therefore partly to protect these students. Teachers had also said that they might feel uneasy if many pupils were wearing clothes which were associated with extreme religious views.

The judge at first instance found for the school. This note concerns the judgment of the Court of Appeal.

The judgment

The finding of the Court of Appeal was that there had indeed been a violation of SB's right to religious freedom. Her declaration was granted, and the judgment at first instance was overturned.

The essential error, according to the court, was this: the school had, in reacting to SB's complaints, not started from the premise that it was restricting the religious freedom of an individual (which it clearly was) and then sought to ascertain whether the restriction could be justified. Rather, it had started from the premise that the uniform policy was there to be obeyed.[5]

This was an unacceptable approach to a question involving fundamental rights. The court did not exclude the possibility that the uniform policy might be justifiable, but it had not been justified, because the school could not show that it had considered the right questions, in the right manner. SB's exclusion from school for non-compliance with the uniform policy, the restriction of her freedom to manifest her religion, and implicitly the uniform policy as such, were unlawful.

Were the school now to examine whether the restrictions on religious freedom which it imposed were truly necessary to achieve essential and legitimate goals perhaps it would discover that they were.[6] On a subsequent challenge to the policy it would then be able to show that it had behaved with due legal respect for its pupils' rights and the policy might survive. However, since the school had not, in this case, seriously considered SB's rights and therefore could not show that its rules were necessary and proportionate restrictions of these, the policy must fall.

Several aspects of this judgment deserve consideration in more detail. The court's choice for a highly procedural approach, the character of and evidential problems associated with the substantive arguments put forward by the school in its defence, and the notable absence of any discussion of equality are considered below.

The procedural approach

Three judgments were handed down, all in agreement. The major one was by Lord Justice Brooke, and the key words in it were probably these:

> The decision-making structure should therefore go along the following lines:
> 1) Has the claimant established that she has a relevant Convention right which qualifies for protection under Article 9(1)
> 2) Subject to any justification that is established under Article 9(2), has that Convention right been violated?
> 3) Was the interference with her Convention right prescribed by law in the Convention sense of that expression?
> 4) Did the interference have a legitimate aim?
> 5) 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?

[5] *See* paras. 75-76 of the judgment.
[6] *See* para. 81.

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> 6) Was the interference justified under Article 9(2)?
> The School did not approach the matter in this way at all. Nobody who considered the issues on its behalf started from the premise that the claimant had a right which is recognized by English law, and that the onus lay on the school to justify its interference with that right. Instead, it started from the premise that its uniform policy was there to be obeyed: if the claimant did not like it, she could go to a different school.[7]

There is a clear emphasis on procedure, which is of practical importance. It adds to Article 9 ECHR. That article merely demands that rules do not in fact restrict rights beyond what is necessary for important reasons.[8] Thus a bare application of Article 9, which is all that the Human Rights Act requires, would have entailed examining whether justifications existed for the treatment of SB. Instead, the court went beyond this and asked whether the school had been aware of such justifications; whether it had structured its reasoning at the time of the violation of rights in the legally most appropriate way. It implicitly found that the obligation on public authorities to respect human rights extends to an obligation to consider them in a legally correct way when they are making their decisions. This gives an extra weapon to individuals who think their rights have been violated. Even if the action they experienced could have been objectively justified, they can attempt to bring a challenge on the grounds that in fact the actor did not think properly about those justifications.

This may seem surprising. In many contexts a justifiable act done in ignorance of its justifications remains legal. One would expect that if the school's lawyers had been able to show during the case that there were adequate reasons for the restriction of rights, the question of whether these were fully understood by the school at the time of its action would have been moot. After all, as a general principle, looking into the reasoning processes of policy makers is neither a useful nor a salubrious activity. As has been said, the question is not what they were aiming at, but what they hit. One seeks to find objective ways to measure whether actions are acceptable, rather than asking whether the intentions of the party acting were ideal.

However, the procedural approach has enormous power. By forcing authorities to discipline their thinking at the time that they make and enforce their rules, instead of relying on lawyers to later put their arguments into the correct framework, it reduces the chance that violations will occur. Given that the character of

[7] Paras. 75-76.

[8] Art. 9(2) states '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 the protection of the rights and freedoms of others.'

human rights is such that the harm from violations cannot easily be undone, this is good news for rights. On the other hand, it juridifies the policy-making process considerably, requiring legal frameworks to be central. Given that rules may be made by all kinds of bodies – such as here, a school – one wonders whether the additional requirement that they make policy in the right way is fully realistic. Certainly, one may ask how this would work in the context of a law. Whose mental processes are key? The drafters' or the legislators'? An additional problem with the procedural approach is that it may result in reasonable rules being struck down – as the Court of Appeal seemed to think might quite possibly be the case here.[9]

A contrast may perhaps be made with the requirement that rules comply with the principle of proportionality. This is common in Europe. However, there is not necessarily an additional requirement that the authorities have considered whether the rule was proportionate at the time of making or enforcing it. They have a freedom to act for bad reasons, so long as they can find good ones for the court later.[10]

The origin of the procedural approach is administrative law. There it is quite common to require decision makers to take the right factors into account and make their decisions in the right way. It is not just what is done, but why, that determines legality. Since this was in fact a case for judicial review of a decision by the school, the court thus applied administrative law concepts to the human rights context. Although this is the first time that this has been done in the United Kingdom, and therefore of interest and importance, the administrative lawyer may reasonably consider that it is predictable and uncontroversial.

However, the court did seem to take a remarkably strict approach, indicating a structured approach to deciding human rights questions that is impeccable, but demanding. Of the laws, judgments, and scholarly articles concerning human rights, not many will display such rigour. On the other hand, it is probably the case that not every fault in reasoning structure renders the act illegal. The court laid great emphasis on the question whether the restrictions were 'necessary' and indicated that it was not satisfied that the school had considered this.[11] That is perhaps the most important part of the reasoning process concerning rights – since it is the part that usually bites the hardest – so maybe it is this failure in particular which rendered the decision unlawful.

It is also notable that a procedural approach is somewhat at odds with the philosophy of the European Court of Human Rights in Strasbourg. That court

[9] *See* paras. 81, 87 and 94.

[10] E.g., the position in European Community law; *see* C. Barnard, *The Substantive Law of the EU* (OUP 2004), p. 112-117.

[11] *See* paras. 61 and 74.

consistently maintains a studied disinterest in how signatories ensure rights are not violated, so long as they do in fact do this. Its view that there is no obligation to enact human rights, merely not to violate them,[12] is almost anti-procedural. It does not object to member states whose laws and policymaking are disastrously confused, so long as the end result of their actions is good. Moreover, this focus on substantive outcomes seems in the spirit of human rights – of all areas of law, should this one not focus on whether there are real justifications for actual human experiences?

The retreat to procedure is of course a way of avoiding difficult questions. As a reading of the newspapers will show, the seriousness of the threat posed by religious clothing and the necessity of restricting it are controversial and political matters. While these questions cannot be avoided forever, the court will have been pleased that it could avoid second-guessing the policy maker in this case. The question remaining is whether this substantive timidity indicates that policies made by bodies that did ask the right questions, but are nevertheless challenged, will be subject to no more than marginal review.

Procedure can also be seen as a way of compromising between the risks of over-intensive review of substance, which is perhaps good for rights, but undemocratic, and over-marginal review, which respects the division of powers but undermines rights. Forcing lawmakers and rule-makers to consider factors in the right way, explain themselves, and show evidence for specific claims makes it harder for them to disregard rights while minimising the transfer of substantive value judgments to the judiciary.

The rights and freedoms of others

Article 9(2) of the ECHR only allows restrictions on religious freedom that are prescribed by law and necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals or the protection of the rights and freedoms of others. The arguments made by the school in favour of its uniform policy fell largely in the last of these categories – the protection of the rights and freedoms of others.

The arguments were diverse, and not always clear from the judgment, but it appears that there were three distinct groups of persons whose interests were considered to be at stake. One of these groups was Muslim girls themselves. They might feel pressured into wearing the jilbab by the presence of other girls doing so, who could be implicitly understood as criticising those who chose 'less modest' dress. The claimant, SB, was reported as saying that she thought that Muslim

[12] *See* M. Janis, R. Kay and J. Bradley *European Human Rights Law*, 2nd edn. (OUP 2000), p. 468-472.

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girls who wore the jilbab were better Muslims. This pressure could also come via their parents and other family members, who might be unhappy with the perceptions that their daughters were less modest than those of their neighbours. Thus allowing the jilbab could cause Muslim girls to be pressured into wearing strict religious clothing against their wishes, and so infringe their religious freedom. Alternatively, if they resisted such pressure, they could feel intimidated or insecure in their less strict clothing as a result of the presence of jilbab-wearers and so also feel that they were unable to comfortably be themselves at school, and their religious freedom was once again restricted.[13]

Other pupils at the school might feel that Muslims were being favourably treated by being allowed two forms of religious uniform, while there was only one form of religious uniform allowed for Sikhs and Hindus (although there were two non-religious forms – a choice of trousers or skirt). Additionally, they might feel intimidated by the presence of jilbab wearers, since strict Muslim religious clothing was associated by many with extremism or fundamentalism. They might not feel secure or comfortable at school in the presence of what they perceived as powerful expressions of extreme belief, and so their freedom of religion would also be restricted. Increased religious clothing might also lead to divisions between groups of pupils and resulting conflict.[14]

Lastly, some teachers were reported to feel uncomfortable about allowing the jilbab. They strongly supported the school's secular philosophy. They felt that if significant numbers of pupils dressed in a way that indicated their faith this would give the impression that the school as an institution favoured that faith.[15]

It may be noted that these arguments above are universal. Almost all the religious clothing discussions in Europe reduce to the issues of whether the wearers do so of their free will, and what the effect of their clothing is on others who must interact with them. This is even the case in contexts where the debate appears to be centred on issues of principled secularity or the separation of church and state.[16] These are not in themselves legitimate reasons for a restriction of religious freedom according to Article 9(2).[17] This must also be correct; it would be circular to claim that religious freedom can be restricted simply because a particular state or institution is non-religious and therefore does not allow religious expression. Thus arguments from secularity are in fact shorthand for arguments about the threat which religious expression may pose to interests which are in Article 9(2), such as public order or safety, or the rights and freedoms of others. The argument is that secularity is necessary to prevent these threats.

[13] *See* paras. 51-59.
[14] Ibid.
[15] *See* para. 55.
[16] Such as in France: *See* Beller, Jeremy Gunn, *supra* n. 1.
[17] Although *see infra* n. 19.

A similar analysis can be made of arguments from neutrality. It is often claimed that the wearing of religious clothing by teachers, civil servants, judges or jurors undermines the neutrality of the state and so should be restricted.[18] However, neutrality, like secularity, is only a legitimate reason to restrict religious expression if it serves to protect some other Article 9(2) interest.[19] The argument made concerning officials is inevitably that citizens who interact with representatives of the state who are wearing religious clothing will feel that the state, as embodied in that individual, is not neutral between faiths but likely to favour individuals who share the wearer's belief. In particular, citizens may doubt whether the wearer truly represents and will respect the non-religious rules made by the state since he or she appears to be wearing clothing that indicates the contrary. This may make the citizen who does not share the wearer's beliefs uncomfortable and can be seen as threatening to his or her freedom of religion and belief. In undermining his or her faith in the state it may also be seen as undermining the state itself and its capacity to function; without trust there is often misbehaviour.

An important point is that the argument in such a case is all about perception, not about objective bias. Non-neutral actual behaviour by representatives of the state, actual decisions or acts favouring a particular religious view or persons of a particular religion, are of course prohibited, and there is no controversy about this. Nothing in Article 9 ECHR hinders the state from demanding that its officials act neutrally. The central question in arguments about public officials wearing religious clothing is whether they will *give the impression to others that they will be non-neutral*. Thus these arguments share a common core with the ones put forward by Denbigh High School; they are about the effects that religious clothing may have on those who interact with or perceive the wearer.

Whose belief?

A problem with most of the arguments outlined above is that they seem to judge the wearer of religious clothing not according to the meaning or importance that they attribute to it but according to that attributed by others. Whose belief is under discussion here?

[18] An argument central to German debate: *see* Gerstenberg, Langenfeld and Mohsen, Mahlmann, *supra* n. 2.

[19] The European Court of Human Rights has at times apparently included secularity and neutrality within the exceptions found in Art. 9(2), in a decision on admissibility in *Dahlab* v. *Switzerland* (15 Feb. 2001, Appln No. 42393/98) and the judgment in *Leyla Sahin* v. *Turkey* (29 June 2004, Appln No. 44774/98). However, both cases have special facts which were crucial – the first concerned a ban on all religious clothing in a primary school, and perhaps very young children are likely to be over-impressed by signs of religion generally, and the second concerned Turkey, which has special problems with militant Islamic groups. *See* Riley, *infra* n. 38; Decker, *infra* n. 31.

This issue arose initially when the school defended its policy on the grounds that it had consulted widely and appropriately with Muslim authorities when it constructed its uniform policy. They had assured it that the uniform complied with Muslim requirements for female dress. During the lawsuit these arguments were challenged by evidence from other Muslim authorities, to the effect that the shalwar kameeze was insufficiently modest to meet Islamic rules, and SB's religion did indeed require her to wear the jilbab.[20]

Such a debate is inevitably fruitless. It is even offensive. Islam is no more monolithic than other major religions, and attempting to find an 'objective' interpretation of its requirements is rather like asking Catholics about Christianity and then imposing this on Calvinists. It is hardly surprising that the court did not attempt to resolve the matter. It referred to the European Court of Human Right's statement 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'.[21] SB's claim of a religious belief that she was required to wear the jilbab had to be accepted.

A rather more difficult version of the same problem infects the other arguments. They all rely on an association of the jilbab with a form of Islam that many find frightening or unpalatable – the words extremism and fundamentalism are commonly used. Yet it was not actually claimed that the behaviour or views of SB herself, or even of most jilbab-wearing girls, conformed to this image. SB was not accused of individual behaviour that might threaten or intimidate others nor was it claimed that jilbab wearing girls would generally actively behave in such a way. In fact, reading between the lines, it seemed to be the brothers more than the girls who inspired fear.[22] In any case, were such behaviour to occur the school would clearly be entitled to take action to prevent it in the future, if necessary excluding the girls, just as it would with any other anti-social or intimidatory acts.

The arguments therefore seem not to be about the girls as individuals, but about what those around them would read into their clothes. They would feel uncomfortable because they would associate them with threatening views, independently of whether these were actually the views of the girls. This comes dangerously close to allowing individuals to be judged by the prejudices of others.

Clearly the law requires more discipline than this. A restriction of religious expression on the grounds that that expression is threatening to the interests of others must have some more objective grounds. This could be in the views of the individual; if they intend to frighten or intimidate, then it would seem unproblem-

[20] *See* paras. 31-48.
[21] Para. 49, citing from *Hasan and Chaush* v. *Bulgaria* (26 Oct. 2000, Appln No. 30985/96).
[22] *See* paras. 15, 54 and 56.

atic to deny them that right. However, it would be simple for a school or organisation simply to ask those wishing to wear religious clothing whether they are prepared to behave respectfully and tolerantly towards the views and expression of others who may disagree with them, and whether their religious belief will allow them to respect the rules of the institution, and, if they are a civil servant, to behave neutrally and fairly to those of all faiths. Providing that they say there is no conflict between what they mean by their clothing and the freedoms of others and the rules of the institution, it would seem that should presumptively be treated as true,[23] unless and until they behave in a way indicating the contrary, whereupon of course they may be disciplined. Any other approach amounts to attributing beliefs to an individual that they do not hold, which would not only be in conflict with the underlying philosophy of the relevant law, to protect and respect individual freedom of belief, but also with the proposition of the European Court of Human Rights that an individual must be treated as believing what they say that they believe.[24]

Of course the beliefs of jilbab wearers may be dramatically at odds with those of most other English people. However, the basis of restrictions on religious clothing is not that individuals have certain substantive views on women or God, nor that they express these. Otherwise, schools would have to monitor conversations and limit class discussion. Opinions are generally free, even if they extend to the sort of restrictive views that strict Catholics and Muslims hold and most others abhor. The legitimate demand is that holders of such views tolerate and respect the rights of those who disagree,[25] while the basis of restrictions on religious clothing is a claim that the implicit message is one of threat to those of other beliefs. Thus the objection to the clothing is based on a claim of intolerance, but even an individual of strict religious beliefs can both claim to be, and be, tolerant in behaviour, in which case the argument for restricting her religious freedom falls away.[26] The rights and freedoms of others are no longer under threat.

An exception to this may occur where an individual claims their clothes indicate views which do not correspond to the views of the vast majority of those who wear those clothes. If an individual comes to school sporting a swastika and claims that for him it is a symbol of friendship, or even that although it is a symbol of

[23] *See* Gerstenberg, *supra* n. 2, at p. 102-104.

[24] *See supra* n. 21. The *Bundesverfassungsgericht* found that the 'meaning' of a headscarf should be judged not by the subjective intention of its wearer, but by what an 'objective' observer would understand. The danger in this formulation is that 'objective' becomes conflated with 'typical', which allows prejudice to prevail. Nevertheless, the court did also find that 'the headscarf per se does not in principle impede the teaching of the values of the German constitution': Mahlmann, *supra* n. 2, at p. 1104.

[25] *See* Gerstenberg, *supra* n. 2, at p. 102-106.

[26] Mahlmann, *supra* n. 2, at p. 1116.

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admiration for Nazism that admiration extends only to the organisational aspects and not to the racial or political philosophy, a special situation arises. Of course, it may be that such a situation is exceptional enough to challenge whether this is the individual's true belief. However, even if that is not the case, if this is a genuinely anachronistic person, it may be reasonable to argue that whatever he may mean by his swastika all reasonable people around him will understand something else, and that something else will be inherently intolerant and threatening. In this case his freedom of expression may perhaps be restricted on the basis of views attributed to him, since there is some objective basis for this. Those reading a threatening extremism into the swastika and feeling intimidated by it are not holding cheap or ill-informed prejudices, but making a highly rational judgment.

The question is then whether such an argument could be made against a jilbab or headscarf wearer. It is suggested that the answer must in both cases be negative. Both are quite normal in some areas of the world, where they are not associated with a violent extremism but simply with being a Muslim woman. The argument that it is objectively justified and rational to assume that someone wearing such clothes is likely to be threatening or intolerant to those of different views would seem to be unsustainable. At the very least, given the degree of violence done to individual religious freedom by an attribution of intolerance, such a case would demand powerful empirical evidence. Once again, the starting point must be that measuring the views indicated by religious clothing on the yardstick of popular prejudice is entirely at odds with both reason and the law.

Proof

That SB's religious freedom was in fact restricted was treated by the court as almost self-evident, as indeed it is. This meant that the burden of proof moved to the school, as the party *prima facie* violating Article 9, to justify its behaviour.[27] One of the important questions is how exactly it should go about this.

The framework for the proof is provided by Article 9 itself, and the court drew on this. It noted that restrictions must not just serve legitimate aims, but they must be 'necessary' to achieve these. Only essential restrictions are permitted. A legitimate purpose is not an open licence to limit rights. A failure to show that its policy was in fact necessary for its aims, and went no further than that, was one of the key weaknesses in the school's case,[28] which concentrated far too much on legitimating the aims it wished to pursue.

This contrast can be seen in terms of forms of evidence. The school provided an abundance of qualitative arguments – reasons for the policy – but not enough

[27] *See* para. 76.
[28] *See* paras. 61 and 81.

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quantitative ones – empirical evidence that its assertions of fact, such as the effect of the jilbab on other pupils and the real risk of girls being forced to wear it – were in fact true. Without such evidence, how can necessity be proved?

This is at the heart of any assessment of a religious clothing ban.[29] If claims are made about the effects of allowing religious clothing, such as those put forward by the school, are they to be seen as essentially qualitative judgments, to be entrusted to irreducible judicial wisdom, or are they questions of fact to be proved according to the same standards and procedures that we would require in a court case concerning tortuous injury or other civil causation? Or, perhaps more realistically, what mix are they of the two?

This question has already arisen before the German courts, where the question was whether a headscarf-wearing teacher represented a 'danger' to the religious or intellectual freedom of the pupils in her class. Might she turn them Muslim, or stunt their religious growth, or intimidate them, by wearing this? The court in that case indicated that a 'concrete', not just an 'abstract', danger had to be shown. However,[30] it is still an open question, as in the United Kingdom, to what extent courts will expect religious experts and sociologists and psychologists and local experts to be brought in to give evidence on what such a headscarf actually indicates, and the actual effects that it may have on children, and so on.

It is suggested that a responsible court has little choice. While everyone in the pub may think he knows what Muslims believe and what happens when you allow religious clothing, he does not, and nor do judges. These are difficult factual questions in which, as the court in SB stated, 'context is all-important'[31] and expert evidence is required. One of the greatest threats to religious freedom will be if courts reject this and decide such issues as qualitative matters. It will always be the articulate head teachers and senior civil servants and government ministers, of the same age, style and caste as the judges, who are explaining why measures are necessary. If the person of a minority religion is to have any power to defend their rights against what may seem, and be, an accidental conspiracy of the unreflective majority, then they must be given the chance to bring discussion and the law back to what is provable and relatively objective.[32]

[29] *See* Jeremy Gunn, *supra* n. 1, at p. 465-479 for a condemnatory but convincing discussion of the amateurish and biased approach to evidential questions in the Stasi commission, which led to the formation of the French religious signs law.

[30] See *supra* n. 2.

[31] Para. 72. It was for this reason that the court rejected the relevance of ECHR cases where Turkish bans on headscarves had been accepted. Amongst other differences, they had little application to a country where the threat to the state from Muslim fundamentalism was significantly less. See on this D.C. Decker, 'Leyla Sahin v Turkey', 6 *European Human Rights Law Review* (2004), p. 672.

[32] *See supra* n. 29.

Hence we may hope and expect that the law of religious freedom will go in the direction of that concerning sex discrimination, where statistics and expert evidence have become important in recent years, partly as a way of countering prejudices inherent in the system and its operators. There are of course significant disadvantages in terms of cost and inconvenience and the transparency of the law, but such an empirical approach does at least achieve its aims; rights get teeth, and ill-founded prejudice is disarmed.

Equality

Any restriction of religious clothing will have a greater effect on some religious groups than others. Islam, Judaism and Sikhism require, according to many of their adherents, the wearing of certain items. Christianity does not require any particular dress. In reality, clothing bans in Europe hurt the minority or non-indigenous religions and leave the indigenous majority one untouched.

Such a disparate impact raises the possibility that bans should be seen as discrimination on grounds of religion. Certainly, it may be noted, a number of them, such as the French school one, and some of the rules being created in the German *Länder*, were intended by their supporters to be so. They were aimed at Muslims.

Where such an argument is made concerning a ban on employee's clothing, the matter is now regulated by Directive 2000/78, which requires the prohibition of religious discrimination in employment throughout the European Union. Where such a disparate impact is found the directive lays down rules for the burden of proof and acceptable justifications and so on, and regulates the matter fully and fairly intensively. Since it is certainly more intense than the ECHR on this point, it may be considered as the central legal framework for the issue, to which national laws must conform. National constitutional concepts of equality are now fairly redundant in employment law – insofar as they diverge from the directive they are generally unenforceable. However, where schoolchildren are concerned there is as yet no Union law. The matter falls under Article 14 of the ECHR, which prohibits discrimination in the area of religious freedom (and other rights) and national law.

In this case equality did not figure largely, no doubt because the school had a majority Muslim population which it allowed to wear clothing that was acceptable to most. The policy does not seem an example of discrimination against Muslims. Indeed, the school was more concerned that allowing the jilbab would amount to discrimination in their favour.[33] Nevertheless, a brief look at the case through an equality lens is worthwhile, because it influences the responses that one has to the case put by the school.

[33] *See* para. 59.

The essential structure of non-discrimination law is largely uniform across jurisdictions, and certainly in both Union law and the law of the ECHR. There are two stages; first, the establishment that a rule has a disparate impact, that it burdens one group more than another, and second, the examination of whether the rule can in fact be justified by objective factors. If so, the disparate impact must be taken to be bad luck. If not, the rule will be treated as indirect discrimination.[34]

Thus, if a clothing ban is concerned, it will be necessary to show that it serves some important aim and is proportionate to that aim, much as is necessary under Article 9. It might then be thought that a non-discrimination analysis adds little to one based entirely on religious freedom and Article 9. Certainly, the Court of Appeal seemed to think so in this case.

However there is an important difference. A discrimination analysis entails comparison, in this case with other religions or other clothing. It is not just absolute restriction that is relevant, but relative restriction. A relatively minor absolute restriction may look much worse when it becomes clear that only a select group is subject to it – the relative disadvantage is greater. If so, the weight of justification needed to save such a measure will be greater too. This is reasonable. The question of how much freedom an individual should have cannot only be assessed in isolation, but should also be assessed in the light of how much freedom is granted to others.

In this case the school allowed religious clothes, including dress acceptable to most Muslims. However, rather than diminishing the discriminatory force of the ban on the jilbab, this increases it. In some schools no one is allowed to indicate their religion. However, here almost all the pupils could do so and could wear the appropriate religious costume, apart from a particular group, a sub-set of Muslims. A claim by them that they are discriminated against would be eminently understandable, particularly since, in the view of the court, the school did not in fact succeed in justifying its rules. Given this, according to conventional discrimination law methodology, the claim would succeed.[35]

Another way in which equality adds to understanding of this case is in the consideration of the school's arguments on the secularity and neutrality of the institution, and on the effects of the jilbab on the school environment.

Many individuals have religious beliefs, and if they are serious about them then they do not leave these behind when they go to work. Citizens know this, and

[34] *See*, e.g., F. Jacobs and R. White, *European Convention on Human Rights,* 3rd edn. (OUP 2002), p. 355-357; G. Davies, *Nationality Discrimination in the European Internal Market* (Kluwer Law International 2003), p. 28-31.

[35] There is no legal difficulty with a claim of discrimination against a group which may also form part of a larger group. Discrimination against Catholics is possible. So is discrimination against a sub-group of Muslims. If that sub-group is religiously defined it will be religious discrimination. If it is racially defined, *see infra* n. 38.

must just hope that the judge or teacher does not hold beliefs that will impair his ability to act fairly in his work. There is no belief that because an individual sits before the class or court in non-religious clothes he has set aside his religion. We all know that this does not occur. If it was really the case that citizens must be able to believe that state representatives have no religious beliefs then presumably the judge or teacher would undermine his position by going to church on Sunday in a place where he could be seen.

The view that religious clothing violates the obligation to neutrality of the state official therefore relies on a view of those officials that nobody in fact holds, and which would be ridiculous. In that sense it is a dishonest view, and has very much to do with a simple distress at strangeness, at a teacher or judge whose dress does not conform to the norm.

Similarly, when considering the effect of religious clothing on the environment it is important to remember how much of the reaction is not because it is religious but because it is strange: the scandalous attempts to exempt nun's habits from clothing bans in some states in Germany highlight this,[36] as does the view that a discreet (but not invisible) crucifix does not violate French secularity, whereas a headscarf does.[37] Many Europeans are used to Christian costume, but not to Muslim, and it disturbs them.

It is also notable that the shalwar kameeze, traditionally worn by Muslims in India, Bangladesh and Pakistan, was not seen by the school as a threat to secularity, whereas the jilbab, more traditionally worn by Arab Muslims – although SB herself was from a Bengali family – was. The dominant, best-established and most-accepted Muslim community in the United Kingdom consists of Muslims of Indian, Bangladeshi and Pakistani origin. Arab Muslims are fewer in number, newer to the country, stranger, and less integrated. The court stated that seventy percent of the pupils, and some teachers, including the head teacher, at Denbigh High, were of Indian, Pakistani or Bangladeshi heritage.[38]

Finally, it is striking how little attention was given by either the court or the school to the fundamental religious reason for the jilbab; modesty. It often seems as if the desire of a woman to cover her hair or the shape of her body is not treated

[36] *See* Langenfeld and Mohsen, *supra* n. 2, at p. 91-92.

[37] *See* Riley, *infra* n. 38, at p. 4.

[38] This raises the question whether the case could have been understood as race discrimination against those of Arabic origin, which is prohibited by Directive 2001/43, which is implemented in the United Kingdom. This would require more origin on the details of the background of those who might wish to wear the jilbab than is available from the judgment alone. *See* A. Riley 'Headscarves, Skull Caps and Crosses: Is the Proposed French Ban Safe from European Legal Challenge?', Centre for European Policy Studies, Policy Brief No.49, available (free) from <www.ceps.be>; D.Schiek 'Just a Piece of Cloth? German Courts and Employees with Headscarves', 33 *Industrial Law Journal* (2004), p. 69 at p. 73.

as either serious or legitimate by western commentators.[39] Certainly, some attacked the court in SB for sacrificing schoolgirls to religious oppression, assuming that no woman or girl could ever genuinely want to cover herself so strictly.

Such reactions miss the obvious arbitrariness of standards of modesty. There is nothing inherently more liberating in demanding that a woman reveal her hair, or wear clothes which give some indication of the shape of her body, than there would be in demanding that all western girls and women go to school or work with uncovered breasts or in mini-skirts. Ironically, such a rule would be attacked by many of the same individuals who attack Muslim clothes. They would claim it humiliated the women and girls involved. It is as if there is one standard of modesty that is acceptable, and all deviations from this are morally wrong.

Respect for equality demands that we consider how a Muslim woman or girl feels if forced to wear more revealing clothes than she feels are appropriate, or is used to. Given the starting point that an individual has the beliefs that they say that they do, it would seem arguable that what is done to them in forcing them to dress immodestly is emotionally and legally equivalent to what would be done to western women or girls by forcing them to wear mini-skirts. The school, and the other authorities in Europe considering religious clothing restrictions, seem remarkably cavalier about the emotional violence inherent in their actions. They persist in the assumption, in the presence of convincing evidence to the contrary, that everyone feels the same way about their body as the majority do.

The argument about the oppressiveness of Muslim clothes leads to another point not considered in the judgment: that SB was a child. It is often claimed that this changes the position, by diminishing the case for respect for her religious views, and strengthening the case for protecting her from the views of her parents or others. This is of course true: the religious views of a six year old are not to be accorded the same legal respect as those of an adult. However, SB was a teenager when the problems began, an age at which individual beliefs may be taken more seriously. Certainly many churches do so.[40]

In any case, the equality argument is relevant to this. While it may be true that many Muslim girls are forced by their families to wear clothes they themselves would not choose, this is hardly a uniquely Muslim phenomenon. How many non-Muslim children have bitterly complained that they could not do the things they wanted to or wear the short skirts or fashionable clothes that they liked because of their parents' rules? How many Catholic parents have imposed a strict religious upbringing on their children, without regard for their children's views?

[39] On the different approaches taken to Muslim and non-Muslim women, *see* Schiek, *supra* n. 38, at p. 72.

[40] And some national laws: *see* Mahlmann, *supra* n. 2, at p. 1112.

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The problem here, if there is one, arises from the respect for parents and families accorded in society. They have the primary responsibility for and authority over their children and it is nothing exclusively Muslim that often they impose behaviour and limits that their children reject. It is difficult to see how this can be changed, but any argument about it should be made fairly, and not confined to Muslim families. It is not just Muslim girls who sometimes feel that their life would be freer without their parents' rules.

All of the above is probably the result of normal human reactions to the new. Still, comparing in this way, examining reactions for equality can be useful in exposing the extent to which those reactions are composed of irrational factors and instinctive conservatism which the law should not accept as legitimate reasons to impose a restriction on the freedom of others.

Conclusions

What is striking is how weak the legal arguments for restricting religious clothing are. If one accepts the disciplines of human rights law, it is very difficult to show that the wearing of particular clothes represents a threat to any important interests. The threat is from extreme or unfair behaviour, but proving that clothes entail behaviour is, however much it may have political currency, extremely difficult to do – perhaps because it is often not in fact the wearers themselves who are seen as the danger but their communities, and above all their menfolk, yet judging an individual by their group is a fundamental rejection of human rights.

This makes the case for restriction somewhat unsavory. Of all groups to select as threatening, schoolgirls from an ethnic and religious minority seem a particularly dishonorable choice. It is hard not to think that they are being made scapegoats for some other fear, however legitimate that other fear may be.

The problem is perhaps that Europe has tied itself to principles that it does not believe in, and its legal systems are now being strained by the resulting tensions. When countries signed the ECHR or wrote their constitutions and proclaimed a belief in religious freedom and equality, they were thinking of their own indigenous religions and imagining others as no more than minor, harmless and colourful decorations of society. Taken as more general principles, the proclamations do not and probably never have reflected the view of the population. It seems that Europeans, to a very large extent, are not prepared to accept Islam or its stricter adherents, and are not prepared to afford them the same respect that they would to milder or more familiar beliefs. They remind them too forcefully, perhaps, of views that this continent has itself barely left behind. In particular, the absolutism, and the strict views on women that some Muslims seem to have, are rejected by a majority of Europeans, who wish such views to disappear from their societies.

It may then be said that Article 9 ECHR and other religion-neutral guarantees of religious liberty do not in fact reflect what Europe wants or believes.

Nevertheless, human rights have a great symbolic power – particularly, ironically enough, when the West is contrasted with the Muslim world. Europe is therefore reluctant to openly refine or restrict its principles of religious liberty. As a result it is tending to engage in a somewhat dishonest campaign to indicate that expressions or indications of strict Islam are 'objectively' threatening to society.

This is obviously not true. Throughout Europe there are pockets of strict Catholics and Protestants whose views on metaphysics and on women and the family are remarkably similar to many Muslims. While most Europeans reject their views, they do not have any difficulty living alongside them. It would be quite possible to live alongside Muslims in the same way – so long as both parties respected the principle of tolerance.

It is this tolerance that decides whether restrictions on religious clothing are legitimate. However strict their views, if Muslims are prepared to behave in a way respecting those who do not share them, then there is no lawful basis for restriction. If the claim is that Muslims do not or will not behave in this way, and that limiting their clothing will in some sense reduce the threats, then that must be proved by reference to the individuals and the items involved. *SB* v. *Denbigh High School* provides a logical and fairly strict framework for such proof and in this sense gives some small hope. However, the quantity and quality of evidence that courts will accept still remain to be seen.

It also remains to be seen how much they will accept cases based on the reactions of others: religious clothing may cause 'conflict' or 'unease' or 'division' or exert a 'negative influence' on the environment. While such arguments can be given a superficial veneer of responsibility – the head teacher in this case suggested that it was her responsibility to maintain a peaceful and harmonious atmosphere, which might require limiting expression which could lead to division and conflict – they are essentially a concession to bigotry. They are analogous to the mayor who claims that he must keep black and white residents apart in order to maintain peace and public order in the town, or the employer or club who wishes to keep out women for the sake of preserving the pleasant atmosphere. It remains quite wrong to sacrifice the rights of a group to the prejudices or preferences of others. If some of the minority, or the majority, cannot behave acceptably, they must be disciplined. A desire to avoid this troublesome path, which often involves confronting widely accepted attitudes, is not a good enough reason to take away rights from those who do not themselves offend.

In the long-term, conceding to prejudice probably increases the social friction and division. If Muslims are generally better accepted in Britain than in most European countries it is because they have been there longer and the majority

have had contact with them and got used to them. Suppressing the expression of minority identity delays this habituation and puts off the difficult but necessary accommodation process which is likely to be the only route to a genuine tolerant social peace.

Postscript

Essentially it comes down to two clichés. One: the mere fact that we disagree with others, however strongly, is not a reason to deny them the right to live according to their beliefs. Two: they're only clothes.

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