

**RIGHT TO MANIFEST RELIGIOUS BELIEF THROUGH CLOTHING AND
SYMBOLS IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN
RIGHTS AND THE UNITED NATIONS HUMAN RIGHTS COMMITTEE:
APPLICATION OF THE SAME RIGHT WITHIN DIFFERENT
INTERPRETATIVE CONTEXTS**

by

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**A thesis submitted to the
Graduate School of Social Sciences and Humanities
for the degree of**

LL. M. in Public Law



**KOÇ
ÜNİVERSİTESİ**

2022

Abstract

Article 18 of the Universal Declaration on Human Rights (UDHR) is the common origin for Article 18 of the International Covenant on Civil and Political Rights (ICCPR) and Article 9 of the European Convention on Human Rights (ECHR). Both provisions, formulated with parallel wordings, protect the right to freedom of religion or belief. However, the monitoring bodies of the two conventions, respectively the United Nations Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR), have delivered contradictory decisions while interpreting the right. This contradiction is particularly visible with regards to the applications concerning wearing religious signs, symbols or clothing. Despite dealing with similar, or in some cases even identical complaints, the HRC is likely to find a violation on restrictions of religious signs justified by reference to public security, public order, or protection of the rights of the others whereas the ECtHR tends to decline these complaints relying on the margin of appreciation of the member states of the Council of Europe. This thesis provides a comparative analysis as to the interpretation of the right to manifest religion before the HRC and the ECtHR. The thesis has two specific aims. First, it identifies the main diverging points between the HRC and the ECtHR in their interpretation of the right to manifest religion. There, it surveys the relevant jurisprudence of the two bodies through a comparative lens, and shows three main points of divergence: interpretation of (i) safety and order (ii) barrier to equality or social interaction and (iii) duty of neutrality. Second, the thesis investigates the factors that could explain this divergence. There, the thesis identifies three factors: (i) different mandates, (ii) different methods and (iii) different interpretative contexts. The thesis argues that the difference of the interpretative contexts is the main factor creating this divergence. In conclusion, the study briefly examines the current and potential implications of this divergence on International Human Rights Law, on litigation strategies of the future applicants, and on implementation responsibilities of the states.

Keywords: Freedom of Religion, Right to Manifest Religion, European Court of Human Rights, United Nations Human Rights Committee

Özet

Birleşmiş Milletler Medeni ve Siyasal Haklar Sözleşmesi'nin (MSHS) 18. Maddesi ile Avrupa İnsan Hakları Sözleşmesi'nin (AİHS) 9. Maddesinde düzenlenen din ve vicdan özgürlüğü hakkı, kaynaklarını Evrensel İnsan Hakları Beyannamesinin (EİHB) 18. Maddesi'nden almaktadır. Din ve vicdan özgürlüğü hakkı, her iki sözleşmede de birbirine paralel şekilde formüle edilmiştir. Ancak sözleşmelerin denetleyici organları olan Birleşmiş Milletler İnsan Hakları Komitesi (İHK) ile Avrupa İnsan Hakları Mahkemesi (AİHM), bu hakkı yorumlarken birbirinden oldukça farklı sonuçlara ulaşmaktadır. Bu çelişki, özel olarak, dini simge ve kıyafetler bakımından gündeme gelmektedir. Benzer, hatta kimi zaman tamamen aynı iddialara dayanarak yapılan başvurular bakımından dahi bu ayrışma devam etmektedir. İnsan Hakları Komitesi; dini sembol ve kıyafetlere yönelik kararlarında, kamu güvenliği, kamu düzeni veya başkalarının hak ve özgürlükleri gerekçeleri gösterilerek yapılan sınırlandırmalar yönünden ihlal tespit etmeye daha yatkındır. Fakat AİHM, taraf devletlerin takdir payına atıf yaparak, söz konusu başvuruları reddetmeye daha eğilimlidir. Bu tez, aynı hakkı yorumlayan iki organ arasındaki farklılığa dair iki aşamalı bir analiz sunmaktadır. İlk analiz; İHK ile AİHM arasındaki ayrışmanın, içtihatlarda hangi bağlamlarda ve ne tür gerekçelere dayandırıldığına ilişkindir. Çalışma, iki organın yorumları arasındaki ayrışmanın (i) kamu düzeni ve güvenliği (ii) eşitlik ve sosyal etkileşim engeli ve (iii) devletlerin tarafsızlık yükümlülüğü alanlarında olduğunu tespit etmektedir. İkinci analiz ise, bu çelişkiyi açıklayabilecek olası nedenlere ilişkindir. Çalışma, iki organ arasındaki ayrışmaya ilişkin (i) farklı yetki alanları, (ii) farklı metodlar ve (iii) farklı yorumsal arkaplanlar olmak üzere üç ana sebep tespit etmekte ve farklı yorumsal arka planların, bu ayrışma bağlamında belirleyici hukuki sebep olduğunu savunmaktadır. Son olarak çalışma, bu ayrışmanın güncel ve olası etkilerini, uluslararası insan hakları hukuku bakımından, başvuruçuların dava stratejileri bakımından ve devletlerin kararları uygulama yükümlülükleri bakımından değerlendirmektedir.

Anahtar Kelimeler: Din ve Vicdan Özgürlüğü, Dini Görüşleri Açığa Vurma Hakkı, Avrupa İnsan Hakları Mahkemesi, Birleşmiş Milletler İnsan Hakları Komitesi

Acknowledgements

I am grateful to many people around me who supported and encouraged me throughout the process of this work.

First, I would like to thank my advisor Prof. Dr. Başak Çalı for her excellent teaching, great advice and genuine motivation, alongside her valuable supervision. I have built the necessary skills for conducting research in International Human Rights Law thanks to her academic guidance. I am also grateful to her for believing in me that I could finish this thesis, even though all the signs indicated the opposite for quite a long time. I would also like to thank Prof. Dr. Bertil Emrah Oder and Dr. Zeynep Oya Usal for all the insightful discussions, seminars and lectures that I greatly benefited throughout my studies. I have learned so much and been inspired by them.

I would like to acknowledge the genuine help and great administrative support of the Graduate School of Social Sciences and the Law School of Koç University. Specifically, I thank Tuğçe Şatana, Esra Özcan and Funda Mürekepçi for replying to all my questions with great patience. I sincerely appreciate their time.

I thank my brilliant classmates Betül Durmuş, Melike Yıldız and Irina Crivet for the stimulating discussions and all the fun we had during our classes, library hours and many times we spent together at the campus. I am also grateful to my friend Egemen Bezci who convinced and encouraged me during our many discussions back in Istanbul University to apply for a graduate programme. I am also thankful to my dear friends Esin Bozovalı and Alper Utaş for all their solidarity during the writing process.

Finally, I am grateful to my family. Many accomplishments in my life, including this one, would not have been possible without them. I thank my parents, Handan and Sefa Yıldız for supporting my curiosity with many books from a very early age. I feel lucky to be raised by them. I also thank my intelligent sister Pınar Yıldız for many years of thought-provoking discussions. I am sure our long talks on human rights will continue forever.

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List of Abbreviations and Acronyms

1981 Declaration	:	Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief
Art.	:	Article
CEDAW	:	The Convention on the Elimination of all Forms of Discrimination against Women
CETS	:	European Treaty Series (Council of Europe)
CHR	:	Commission on Human Rights
Dec.	:	Decision (Inadmissible)
ECHR	:	European Convention on Human Rights
ECtHR	:	European Court of Human Rights
EComHR	:	European Commission on Human Rights
ECOSOC	:	Economic and Social Council
GC	:	Grand Chamber
HRC	:	Human Rights Committee
HRW	:	Human Rights Watch
Ibid	:	In the same place
ICCPR	:	International Covenant on Civil and Political Rights
IHRL	:	International Human Rights Law
MoA	:	Margin of Appreciation
No.	:	Number
ODIHR	:	Office for Democratic Institutions and Human Rights
OP	:	Optional Protocol
OSCE	:	Organisation for Security and Co-operation in Europe
p.	:	Page
para.	:	Paragraph
Res.	:	Resolution
SP	:	Special Rapporteur
UDHR	:	Universal Declaration on Human Rights
UN	:	United Nations
UNGA	:	United Nations General Assembly

Introduction

International human rights bodies have been frequently asked to adjudicate cases in respect to restrictions on religious clothing, symbols or signs on the body. Many applicants from various countries have triggered international review mechanisms, complaining about the restrictions imposed on their headscarves, turbans, skullcaps, cross necklaces, or even on their beards. Particularly in Europe, these restrictions mostly concerned migrant communities with religious backgrounds differing from the majority. This inevitably attracted larger debates on religious diversity and pluralism in Europe.¹ However, there are also cases where the applicants belong to the majority's religion in a particular state, but challenged the strict policies of the governments concerning religious manifestation in the name of secularism.²

While the political debates on manifesting religion mainly concentrated on the concepts of pluralism and secularism, legal debates rather focused on determining the scope of protection and interpreting the legitimate restriction grounds of the right to the freedom of religion.³ Article 18 of the International Covenant on Civil and Political Rights (ICCPR)⁴ and Article 9 of the European Convention on Human

¹ On particular discussions of religious symbols and pluralism in Europe, see Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe*, (Oxford and Portland, Oregon: Hart Publishing, 2006), Malcolm Evans, 'Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions' in P. Cane, C. Evans Z. Robinson (Eds), *Law and Religion in Theoretical and Historical Context*, (Cambridge: Cambridge University Press, 2008), Isabelle Rorive, 'Religious Symbols in the Public Space: In Search of a European Answer' 30 *Cardozo Law Review* 2669, Anastasia Vakulenko 'Islamic Dress in Human Rights Jurisprudence: A Critique of Current Trends' (2007) 7 *Human Rights Law Review* 717 and Tom Lewis, 'What not to Wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56 *International and Comparative Law Quarterly* 395.

² On particular discussions of religious symbols and secularism, see Ronan McCrea, 'Secularism before the Strasbourg Court: Abstract Constitutional Principles as a Basis for Limiting Rights' 79(4) *The Modern Law Review* 678, Ian Leigh, & Rex Ahdar 'Post-Secularism and the European Court of Human Rights: Or How God Never Really Went Away' (2012) 75(6) *The Modern Law Review* 1064 and Julie Ringelheim 'State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach' (2017) 8(1) *Oxford Journal of Law and Religion* 24.

³ In this thesis, the terms "right to freedom of religion" or "religious freedom" will be used interchangeably, referring to "freedom of thought, conscience and religion". As 'religion' is considered the centre of the right both historically and conceptually, it is considered expressive. For a more extensive discussion of this, see Natan Lerner, *Religion, Belief and International Human Rights*, (Orbis, 2000) and Malcolm Evans, 'The Relationship of Religion and Human Rights' in Scott Sheeran and Sir N. Rodley (Eds), *Routledge Handbook of International Human Rights Law* (Abingdon: Routledge, 2013).

⁴ UNGA, International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966, entered into force on 23 March 1976 (ICCPR).

Rights (ECHR)⁵ are the two main provisions protecting the right to freedom of religion at the United Nations (UN) and Council of Europe (CoE) systems, deriving from a common origin, namely the Article 18 of the Universal Declaration on Human Rights (UDHR).⁶ The ICCPR and the ECHR are monitored by the UN Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR) respectively, and they have been the two main judicial fora to receive individual complaints relating the right to freedom of religion in international human rights law practice.

The ECtHR has started accepting individual complaints around two decades earlier than the HRC.⁷ Since the mid-1960's, the Court has dealt with a significant number of applications concerning the right to freedom of religion. Within the last fifteen years in particular, the ECtHR jurisprudence on the right to wear religious symbols have developed considerably.⁸ Following the escalating practice of restrictions on the religious clothing or symbols in educational or other public institutions, as well as the rising number of States banning full-face veils in public spaces in Europe,⁹ the ECtHR was compelled to engage with this issue more than it has ever done. The HRC, on the other hand, did not have the opportunity to develop its jurisprudence on the right to freedom of religion as comprehensively as the ECtHR. However, since the early 2010's, after many applications were turned down by the ECtHR, more litigators began to apply to the HRC as well.¹⁰ As of late 2010's, both of the bodies are frequently dealing with the issues concerning the right to wear religious symbols, and actively developing their jurisprudence.

⁵ CoE, Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No 0005, 4 November 1950, entered into force on 3 September 1953 (ECHR).

⁶ UNGA, Universal Declaration of Human Rights, Resolution 217 A, adopted on 10 December 1948 (UDHR).

⁷ Individual complaints mechanism is provided by the Article 34 of the ECHR, and it is effective since the Convention entered into force on 3 September 1953. As regards the ICCPR system, the mechanism was established by the First Optional Protocol to the ICCPR, which was adopted on 16 December 1966 and entered into force on 23 March 1976.

⁸ The first time the ECtHR considered merits in a case concerning religious clothing was the Chamber judgment of *Leyla Şahin v. Turkey* in 2004. Detailed information is provided at Chapter II below. For a complete list of cases by the ECtHR as regards wearing religious symbols and dresses, see Annex – I, List of cases before the ECtHR.

⁹ On escalating number of restrictions and bans through the Europe, see Amnesty International, *Choice and Prejudice: Discrimination against Muslims in Europe*. (London: Amnesty International, 2012) and Human Rights Watch, *Discrimination in the Name of Neutrality: Headscarf Bans for Teachers and Civil Servants in Germany*. (New York: Human Rights Watch, 2009)

¹⁰ See Annex – I, List of cases before the HRC.

By the end of 2019, 30 cases were dealt by the ECtHR and 11 by the HRC in which the applicants claimed that their rights to manifest religion through wearing religious symbols have been violated.¹¹ In most of the cases, the facts and claims presented by the applicants were similar. In some cases, the complaints were even purely identical, and engaged the same set of facts. Despite this similarity, most of the decisions delivered by the HRC and the ECtHR contradict with each other. 21 applications out of the 30 were declared manifestly ill-founded by the ECtHR. Among nine applications where the Court discussed the merits, only four were concluded with a violation of the right to manifest religious belief. Contrary to the ECtHR, the HRC discussed the merits in 10 applications out of 11, and found a violation of the right to freedom of religion in nine of them. Moreover, in five applications, the Committee also concluded a violation on the right to non-discrimination, which was never concluded by the ECtHR.

Besides the difference in the outcomes, the two bodies also employed different approaches while reaching their decisions. While interpreting the facts and claims of a case related to wearing of religious symbols, the ECtHR adopted a broader perspective, focusing more on the policies, principles and duties of the respondent States. The HRC, on the other hand, was relatively less interested with the politics surrounding the facts. The Committee was more focused on the situation of the applicant and the restriction at stake while examining the merits of the case. The two different tracks of interpretation, to a certain extent, are repeated in each of the 41 cases before the HRC and the ECtHR. This frequency suggests that the divergence between the two bodies is not occasional, but a continuous practice.

A certain level of divergence between the HRC and the ECtHR could be expected, as standards enshrined in the UDHR might be interpreted differently within the United Nations and European systems. To some experts, this difference is particularly visible in connection with the right to freedom of religion.¹² Different judicial systems and different legal cultures are also regarded as the primary obstacles that prevented development of a universal convention on the right to freedom of

¹¹ Besides the right to freedom of religion, the applicants also claimed breach of their non-discrimination rights in majority of the cases. Detailed analyses of the claims were discussed in the Chapter II below.

¹² Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice*, (Cambridge: Cambridge University Press, 2005), p. 8 – 20.

religion.¹³ Nevertheless, the inconsistency between the two bodies does not repeat on every aspect of the right to freedom of religion, but specifically on the issue of wearing religious symbols. This cannot be explained merely with the difference of the judicial systems. It calls for a detailed and comparative analysis of the development of standards within the UN and the CoE, as well as the development of reasoning structures of the HRC and the ECtHR.

The research seeks answers for two interconnected questions: (i) in which ways does the interpretation of the HRC and the ECtHR depart from each other? and (ii) which reasons could be put forward to explain this divergence? First, this thesis argues that the different interpretations between the two bodies reiterate on three grounds: interpretation of public safety and order, barriers to equality or social interaction, and the duty of neutrality. Second, the thesis evaluates three possible explanations that account for the divergence: different mandates, different methods and different interpretative contexts. The thesis argues that the difference of the interpretative contexts within the UN and CoE human rights law standards is the main legal reason to explain the divergence between the HRC and the ECtHR. While reaching a decision concerning wearing of religious symbols or clothing, the HRC acknowledges and employs the relevant principles that have developed within the General Comments, reports of the Special Rapporteur as well as the Resolutions of the General Assembly. In its decisions, the Committee further cites the UN standards on gender equality and right to non-discrimination frequently. The ECtHR, on the other hand, is primarily focused on the principles developed within its own jurisprudence while rendering a decision on the same category. The Court does not engage with the arguments developed within the HRC jurisprudence, and it rarely gives reference to the standards developed within the UN system.

After elaborating on these findings, the study briefly discusses the possible effects of this inconsistency on the universality of the international human rights law, on litigation strategies of the applicants, and on implementation duties of the states respectively.

¹³ Theo C. Van Boven, 'Religious Liberty in the Context of Human Rights' (1985) 37 *The Ecumenical Review* 345, p. 347.

Analysing the development of the jurisprudence regarding the right to manifest religious belief through religious symbols before the HRC and the ECtHR is an important and timely research agenda mainly for three reasons. First, given the textual similarities between the ICCPR and the ECHR on the right to freedom of religion, a comparative analysis is worth undertaking in order to test the application of similar standards in judicial practice. Second, as noted above, individual applications before both bodies are on the rise in recent years. In face of this rapidly growing case law, it is timely to create a framework of discussion on the developing reasoning structures of each forum. Lastly, this research is also of importance as regards to its implications concerning state duties and the possible future applicants. In the light of the contradicting outcomes, it is becoming more critical for the applicants to choose the right forum to bring their complaints. It is also becoming more important for the respondent states to decide how to implement multiple decisions that require contradictory general and individual measures.

A. Purpose and Scope of the Thesis

There is a wide literature focusing on religious freedom in international and European human rights law. As regards the development of the standards within the UN instruments, Tazhib¹⁴ and Lerner¹⁵ provide the most comprehensive surveys. With regards to the practice of the European Commission (EComHR) and the ECtHR, works of Malcolm Evans¹⁶, Carolyn Evans¹⁷ and Martínez-Torrón¹⁸ provide valuable insights. In his detailed book, Taylor¹⁹ also compares the evolution of standards between the United Nations and the European systems. There is also another track of literature focusing on the permissible limitations on religious symbols in European human rights law, where McGoldrick²⁰ particularly deals with

¹⁴ Bahiyyih G. Tazhib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection*, (The Hague/London: Martinus Nijhoff Publishers, 1996).

¹⁵ Natan Lerner, 'Religious Human Rights under the United Nations' in J. F. Johan David Van der Vyver, *Religious Human Rights in Global Perspective* (pp. 79 - 134) (Kluwer Law International, 1996) and *Religion, Beliefs and International Human Rights* (New York: Orbis, 2000).

¹⁶ Malcolm Evans, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997).

¹⁷ Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001).

¹⁸ Javier Martinez-Torrón 'The (Un) protection of Individual Religious Identity in the Strasbourg Case Law' (2012) 2 Oxford Journal of Law and Religion 363.

¹⁹ Taylor, *supra* note 12.

²⁰ Dominic McGoldrick, *supra* note 1.

headscarf issues and Howard²¹ focuses on educational contexts. Furthermore, there is also a growing literature where few scholars compared the jurisprudence of the HRC and the ECtHR as regards their approaches on the right to freedom of religion. Parker reviewed the necessity clauses of the ICCPR and ECHR and argued that secularism, as defined and applied particularly by the ECtHR, does not provide sufficient justification for restricting religious freedom.²² Barras compared the understandings of secularism between the HRC and the ECtHR, and argued that the transnational understandings of secularism create a significant unsteadiness for the application of the right to freedom of religion.²³ Berry examined the compatibility of the bodies' case law concerning the right to manifest religion with the 'good faith' principle enshrined in Vienna Convention on the Law of Treaties, and argued that the ECtHR has undermined this 'good faith' interpretation.²⁴

The present research draws on the three prongs of the recent literature discussed above: evaluation of the standards before the UN and European systems, placing right to wear religious symbols within the right to freedom of religion, and comparing the jurisprudence of the HRC and the ECtHR. It aims to add the existing literature on a certain number of grounds. First, most of the research on this area examines the difference of the outcomes rather than examining the role of the different trajectories that the HRC and the ECtHR have been following. Second, this study is not limited to a specific symbol (such as headscarf) or a specific area (such as education). It covers every symbol that is claimed to have a religious connotation by the applicants, including *keskis* or growing beards. It also covers every area in which the wearing of religious symbols is restricted, including courthouses, hospitals or other public institutions. Third, apart from describing the extent, ways and reasons of the different interpretations of the HRC and the ECtHR, the study further attempts to analyse the possible implications of this divergence.

²¹ Erica Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (New York: Routledge, 2012).

²² Todd Parker 'The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of the ICCPR and the ECHR' (2006) 17 *Duke Journal of Comparative and International Law* 91.

²³ Amelie Barras 'Transnational Understandings of Secularisms and Their Impact on the Right to Religious Freedom - Exploring Religious Symbols Cases at the UN and ECHR' (2012) 11 *Journal of Human Rights* 263.

²⁴ Stephanie Berry 'A good faith interpretation of the right to manifest religion? The diverging approaches of the European Court of Human Rights and the UN Human Rights Committee' (2017) 27 *Legal Studies* 672.

The focus of the study is the right to manifest religious belief through signs, symbols and clothing on the body as appeared in the jurisprudence of the HRC and the ECtHR by the end of December 2019. The study does not aim to examine other forms of manifestations, such as worshipping or teaching. The other forms of manifestations will however be briefly addressed within the first chapter, in connection with the evolution of the right to freedom of religion in UN and CoE instruments. The displays of religious symbols in public locations, such as classrooms, public squares, polling stations and courthouses, are also outside of the scope of this thesis.

B. Methodology

The study aims to fulfil two main purposes, namely identifying the paths and analysing the possible reasons of the divergence between the HRC and ECtHR in their approaches on manifesting religion on body. To fulfil these purposes, the study relies on three types of documents: (i) relevant provisions on the UDHR, ICCPR, and the ECHR, (ii) Declarations, General Comments, Concluding observations and reports of the UN and the CoE bodies, and (iii) case law of the HRC and the ECtHR.

To identify the paths of the divergence, the study begins with a survey of the textual provisions on religious freedom reflected on the relevant international and regional human rights law instruments, along with the commentary interpreting those texts. It compares the provisions within those instruments with a special focus on the right to wear religious symbols. Then, the study examines the relevant jurisprudence of the HRC and the ECtHR, and categorises the cases into five groups based on the characteristics of the restriction. Through a detailed examination of the arguments employed by the HRC and the ECtHR, the study detects the ways of explicit and implicit departures between the two bodies.

To analyse the possible reasons for the divergence, the study first assesses the role of structural and functional differences between the HRC and the ECtHR, relying on the provisions of their own treaties. Then, it evaluates the doctrinal differences between the two bodies, relying on the arguments used within their jurisprudence. Lastly, the study addresses the role of different trajectories of the UN and the CoE, relying on the references found within the reasoning structures of the two bodies.

While discussing the implications of the diverging interpretation in the last chapter, the study first looks to the cross-references between the HRC and the ECtHR either at the examination of the merits, or within the individual opinions of their case law, in light of the judicial borrowing literature in the international human rights law. While addressing the implications on the prospective applicants, the study mainly relies on the comparative analysis of the admissibility criteria of the ICCPR and the ECHR. While reviewing the implications on the respondent states, the study briefly looks at the binding natures and potential influences of the decisions issued by each body.

C. Thesis Structure

This study is divided into five main chapters. Part I of this study begins with exploring the developments of right to religious freedom within international human rights law in order to provide the politico-juridical background that shaped the instruments within the UN and the CoE systems in the first place. Then, the chapter offers a comparative exposition of the standards of the right to freedom of religion, with a particular focus on the right to wear religious symbols. This chapter also reviews the current protection and restriction regime, addressing the main principles developed by the HRC and the ECtHR.

Part II of the study categorises the selected 41 cases into five groups: temporary removals, educational institutions, public institutions, private workplace and public sphere. The facts of the case, the claims of the applicants as well as the arguments employed by the bodies are comparatively examined within each category.

Part III examines the main paths of the divergence between the HRC and the ECtHR. This part discusses how different levels of concern on public safety, barriers to gender equality or social interaction, and the duty of neutrality affect the reasoning structures of the two bodies dealing with the applications concerning wearing of the religious symbols.

Part IV of the study identifies the possible reasons leading to this divergence. The thesis reviews the role of different mandates, different methods and different interpretative contexts, and argues that the difference of the interpretative contexts in

which the HRC and the ECtHR produce their case law, is the main factor causing this divergence.

Part V assesses the implications of the divergence on the universality of the international human rights law, on litigation strategies of the applicants and on implementation duties of the states. The study examines the level of engagement and compliance between the two bodies and evaluates the concerns of the fragmentation of international law. It then reviews possible strategies of the applicants to pick a forum to bring their complaints to. Lastly, the study analyses the implementation duties of the states when they receive two contradictory rulings from the two bodies.

Conclusion presents the findings of the study by explaining the ways and reasons of the divergence between the HRC and the ECtHR in their case law on religious symbols and clothing. This part also discusses the potential for convergence between the two bodies' prospective jurisprudence.

I. Right to Wear Religious Symbols and Clothing within the United Nations and Council of Europe Human Rights Law Standards

Right to wear religious symbols is a fundamental human right that is acknowledged, elaborated on and discussed by numerous instruments and decisions within the United Nations and European human rights law. Although the limitations on wearing religious symbols also invite discussions on the right to non-discrimination, the right to wear religious symbols is primarily rooted and developed through the right to freedom of thought, conscience and religion within the international human rights law theory and practice. Therefore, before discussing the scope and restrictions on wearing religious symbols, the essential concepts on the evaluation, purpose and function of the right to freedom of religion need to be analysed.

The right to freedom of thought, conscience and religion, commonly referred as the right to freedom of religion²⁵ has been articulated in most of the foundational

²⁵ See *supra* note 3.

instruments of the international human rights law. In its current form, the basic building blocks of the right are Article 18 of the UDHR, Article 9 of the ECHR and Article 18 of the ICCPR respectively. Before reaching its current form, the right to freedom of religion has travelled through several constitutional documents and peace treaties for centuries, essentially aiming to protect religious autonomy of the minorities.²⁶ To some experts, those documents and treaties are considered as the beginnings of the modern international system.²⁷ Some authors even consider the freedom of religion as the source of many other human rights, such as freedom of expression, freedom of assembly and freedom of association.²⁸ Despite this widely acclaimed importance, the institutionalisation of the right to freedom of religion remained relatively less prominent on the international human rights law agenda for a long time.²⁹ Nevertheless, the last two decades saw a revival of interest both within the UN and the CoE in terms of reports, resolutions and other initiatives.

The present chapter engages with the development and institutionalisation of the right to freedom of religion, in the light of its shifting importance to the international human rights law. First, it briefly traces the foundations of the right before the establishment of the current international institutions. Then, the chapter describes the existing form of protection provided by the UN and CoE human rights systems. Last, it particularly examines the protection and restriction regime of the right to wear religious symbols within the right to religious freedom.

A. Early Developments

Supranational protection of the right to freedom of religion dates back to the sixteenth and seventeenth century. It commenced with provisions in bilateral treaties in the aftermath of the civil wars, where signatory states sought to protect religious

²⁶ Natan Lerner, 'The Nature and Minimum Standards of Freedom of Religion or Belief' in T. Lindholm, W. Durham, B. Tahzib-Lie, & E. Sewell, *Facilitating Freedom of Religion or Belief: A Deskbook* (Dordrecht, Springer: 2004), p. 65.

²⁷ Malcolm Evans, *see supra* note 16, p. 31.

²⁸ Heiner Bielefeldt, 'Freedom of Religion or Belief - A Human Right under Pressure', *Oxford Journal of Law and Religion*, (1) 2012 15, p. 21.

²⁹ John Noonan, a former judge at the United States Court of Appeal famously described the right as 'neglected stepchild' of the human rights movement. *See* April L. Bogle and Ginger Pyron, *When Law and Religion Meet: The Point of Convergence*, (Cambridge: Eerdmans Publishing, 2007), p. 37. Cole Durham, Jr later suggested that it has become rather 'neglected grandparent' in the present age. *See* W. Cole Durham, Jr, *Perspectives on Religious Liberty: A Comparative Framework*. J. Johan D. van der Vyver and John Witte, *Religious Human Rights in Global Perspective: Legal Perspectives* (The Hague: Martinus Nijhoff Publishers, 1996), p. 20.

minorities usually on the grounds of reciprocity.³⁰ The Peace Treaties and constitutional agreements such as The Augsburg in 1555, Union of Utrecht of 1579, the Edict of Nantes of 1598, and the Treaty of Westphalia of 1648 and Vienna in 1815 were able to secure religious peace within the state borders and they are regarded as the early codifications of the freedom of religion.³¹

In the aftermath of World War I, institutionalisation of religious freedom took a huge step. Article 22 of the Covenant of the League of Nations contained a provision that guarantees freedom of conscience and religion.³² Several minority treaties also protected the right between the two world wars. Moreover, numerous League-sponsored instruments as well as unilateral statements sought to ensure the protection of national, ethnic, religious and linguistic minorities.³³

After World War II and the establishment of the United Nations, the main emphasis on religious freedom provisions has shifted from ‘avoiding religious conflict’ or ‘protection of minorities’ to the protection of individuals.³⁴ Articles 1 and 13 of the Charter of the United Nations explicitly assures promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.³⁵ However, except for prohibiting religious discrimination, the 1945 UN Charter does not proclaim the right to freedom of religion as a stand-alone right. The recognition of a stand-alone right to freedom of religion was achieved 3 years later, with the adoption of the UDHR in 1948.

B. The United Nations System

There are three primary sources that protect the right to freedom of religion within the United Nations human rights law system: Article 18 of the UDHR, Article 18 of the ICCPR and the Declaration on the Elimination of All Forms of Intolerance and of

³⁰ See Natan Lerner, *supra* note 26, p. 67.

³¹ Malcolm Evans, *see supra* note 16, p. 42-59.

³² The Covenant of the League of Nations, 28 July 1919, reprinted by the Avalon Project of Yale Law School, available at https://avalon.law.yale.edu/20th_century/leagcov.asp (accessed 24 June 2019).

³³ See Natan Lerner, *see supra* note 15, p. 85-86.

³⁴ On particular discussions regarding the general shift from minority rights to individual rights within the international human rights law see Warwick McKean, *Equality and Discrimination under International Law* (Oxford: Clarendon Press, 1983) and Patrick Thornberry, *International Law and Rights of Minorities* (New York: Oxford University Press, 1991).

³⁵ Full text of the Charter of the United Nations is available at: <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> (accessed 27 June 2019).

Discrimination Based on Religion or Belief (the 1981 Declaration)³⁶. These texts provide the fundamental standards of the right, through which the views of the HRC are based.

There are also several secondary sources within the UN system in which the basic provisions above are interpreted.³⁷ First set of these sources are the General Comments and Concluding Observations of the Human Rights Committee. Pursuant to Article 40 (1) of the ICCPR, the state parties have a mandatory obligation to submit reports on their progress of realisation of the rights enshrined within the ICCPR.³⁸ The HRC is duly charged to examine these reports. Pursuant to Article 40 (4) of the ICCPR, the HRC is also entrusted to study these reports and provide General Comments where appropriate.³⁹ The General Comments represent the accumulated experience of the HRC on a particular article and they perform a key function of giving some substantive context to the article concerned.⁴⁰ Among these, the General Comment No: 22⁴¹ is the most authoritative one to deal with the Article 18 of the ICCPR.

Another set of secondary sources could be regarded as the works of the Special Rapporteur on Right to Freedom of Religion. The Commission on Human Rights established the Special Rapporteurship in 1986 with a special mandate to ‘examine the incidents and governmental actions that are inconsistent with the provisions of

³⁶ UNGA, Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted on 25 November 1981, UN. Doc. A/36/51 (1981 Declaration).

³⁷ Besides the sources listed below, the UN Human Rights Council also issues resolutions that are relevant to wearing religious clothing and symbols. For matters of simplicity, these are not discussed within this study. For the role of the UN Human Rights Council on religious freedom, see Theo van Boven, ‘The United Nations Commission on Human Rights and Freedom of Religion or Belief’ in T. Lindholm, W. Durham, B. Tahzib-Lie, & E. Sewell, *Facilitating Freedom of Religion or Belief: A Deskbook* (Dordrecht, Springer: 2004), p. 173 – 188.

³⁸ Article 40 (1) of the ICCPR states: “The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned; (b) Thereafter whenever the Committee so requests.”

³⁹ Article 40 (4) of the ICCPR states: “The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.”

⁴⁰ Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, (Oxford: Clarendon Press, 1994), p. 471.

⁴¹ HRC, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, UN. Doc: CCPR/C/21/Rev.1/Add.4.

the 1981 Declaration and to recommend remedial measures for such situations.’⁴² Since then, appointed Special Rapporteurs are entrusted to undertake country visits, receive information and complaints, transmit communications with governments and report them to the UNGA and Human Rights Council.⁴³ The HRC uses all the reports and information that the Special Rapporteur produces. Apart from the work of the Special Rapporteurs, the 1960 Krishnaswami Study of the UN still constitutes a significant source of interpretation on the right to freedom of religion.⁴⁴

Despite being on the agenda for several years,⁴⁵ the UN system did not produce a universal treaty focusing on the right to freedom of religion. In the absence of such a treaty, monitoring the implementation of those rights becomes particularly important. This section covers all the instruments and their contribution to standard setting as to the right to freedom of religion in general, and the right to wear religious symbols in particular, in a chronological order.

1. The UDHR

The first international instrument to address religious rights outside the scope of the rights of the minorities is the 1948 Universal Declaration on Human Rights.⁴⁶ Article 18 of the UDHR sets forth the right to freedom of religion with a one-paragraph clause:

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

⁴² CHR, Resolution No: 1986/20, UN. Doc. E/CN.4/1986/65.

⁴³ The whole collection of the annual reports of the Special Rapporteur on Right to Freedom of Religion is available at: <http://www.ohchr.org/EN/Issues/FreedomReligion/Pages/Annual.aspx> (accessed on 1 July 2019).

⁴⁴ Arcot Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, (New York: United Nations, 1960), UN Doc. E/CN.4/Sub.2/200/Rev. 1.

⁴⁵ UNGA Res.1781 (XVII), adopted on 7 December 1962. Also, see Natan Lerner, ‘Toward a Draft Declaration against Religious Intolerance and Discrimination’ (1982) 11 *Israel Yearbook on Human Rights* 82, p. 84-86.

⁴⁶ In this respect, see Martin Scheinin, ‘Article 18 in The Universal Declaration of Human Rights: A Commentary’ in A. Aide & T. Swinehart, *The Universal Declaration of Human Rights: A Commentary* (Oxford: Oxford University Press, 1992), p.262 – 266.

Although the final wording of the Article 18 was agreed with largely diverse positions⁴⁷ and adopted as a consequence of long debates.⁴⁸ The text is considered to be the reflection of a common standard of achievement.⁴⁹ As it was taken as a model for many international and regional treaties, the Article 18 of the UDHR is considered to be the most influential statement of religious rights within the international human rights law.⁵⁰

Article 18 of the UDHR is composed of two main parts. The first part sets out the right and guarantees the freedom of each individual to choose to believe in a particular religion, or to believe none. This part, described as the *forum internum*⁵¹, embraces a broad category. With the term ‘belief’, the *forum internum* includes the right to profess atheistic or non-religious convictions.⁵² With the explicit reference to ‘freedom to change his religion or belief’, the *forum internum* also addresses conversion, which will be more difficult during the drafting processes of the 1966 Covenants and the 1981 Declaration.⁵³

The second part of the Article deals with the manifestation of religious freedom, commonly referred as *forum externum*. Article 18 of the UDHR enumerates the *forum externum* as ‘teaching, practice, worship and observance’. These areas are not listed as exhaustive and they were later discussed and developed by other instruments within the UN system.⁵⁴ Unlike other international and regional

⁴⁷ See Nazila Ghanea – Hercock, *Human Rights, the UN and the Baha'is in Iran* (The Hague/London/New York: Kluwer Law International, 2002) p. 71-72.

⁴⁸ The text of the Article 18 was adopted by 38 votes to three, with three abstentions. See UNGA Resolution 217A (III) of 10 December 1948.

⁴⁹ Malcolm Evans, *supra* note 16, p. 191 – 193.

⁵⁰ Natan Lerner, *Religion, Secular Beliefs and Human Rights: 25 Years After the 1981 Declaration*. (Leiden & Boston: Martinus Nijhoff Publishers, 2006)

⁵¹ For a classic commentary on the two parts of the right to freedom of religion in the Article 18 of the UDHR, see Nehemiah Robinson, *Universal Declaration of Human Rights: Its Origin, Significance, Application and Interpretation* (New York: Institute of Jewish Affairs, 1958), p. 128.

⁵² The term ‘belief’ was incorporated into the text with the pressure of the Soviet countries. See Malcolm Evans, *supra* note 16, p. 183 – 186. However, it should be interpreted solely in connection with the term religion, as it does not refer to political, cultural or scientific beliefs. See Natan Lerner, *supra* note 50, p. 14.

⁵³ The adoption of the phrase ‘freedom to change his religion’ also raised heavy conflicts during the drafting process of the UDHR. Representatives of the Muslim Countries fought to omit the phrase, and the phrase itself was put to the vote by call. However, it was finally adopted by 27 votes in favour, five against and 12 abstentions. In particular discussion on the adoption of this phrase, see Paul M. Taylor, *supra* note 12, p. 28 – 36.

⁵⁴ The forms of manifestation were largely elaborated in the 1981 Declaration. See Chapter I.B.4 below.

instruments, Article 18 of the UDHR does not contain any provisions as regards limitation of the *forum externum*. However, Article 29 (2) of the UDHR allows limitations in the exercise of all rights listed within the Declaration.⁵⁵

The Article 2 of the UDHR⁵⁶ also contains a right to non-discrimination guaranteeing the enjoyment of rights proclaimed within the Declaration without distinction. Besides, Article 16 (1) of the UDHR⁵⁷ guarantees the rights of men and women to marry and to found a family, regardless of their religion. Lastly, Article 26 (3)⁵⁸ of the UDHR recognizes the liberty of parents to choose the kind of education to be given to their children, implying in accordance with their religion or beliefs.

2. The Krishnaswami Study

The study of Arcot Krishaswami in 1959 can be considered as the second major step of the United Nations towards the institutionalisation of the right to freedom of religion. In 1956, the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided to undertake a research on religious discrimination.⁵⁹ Mr. Arcot Krishaswami was appointed as a Special Rapporteur for this task. The research, titled as “Study of Discrimination in the Matter of Religious Rights and Practices (Krishnaswami Study)”⁶⁰ was submitted in 1959 and published in 1960 by the UN. The research went far beyond focusing solely on religious discrimination, and provided a detailed identification and classification on the aspects and scope of freedom of religion.

Krishnaswami Study is also of importance for explicitly addressing the right to wear of religious signs and symbols for the first time in the international legal context. The

⁵⁵ Limitation and restriction regime is further discussed at Chapter I.D.2 below.

⁵⁶ The Article 2 of the UDHR reads as: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”

⁵⁷ Article 16 (1) of the UDHR reads as: “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and as its dissolution.”

⁵⁸ Article 26 (3) of the UDHR reads as: “Parents have a prior right to choose the kind of education that shall be given to their children.”

⁵⁹ For the whole process of the appointment, See Malcolm Evans, *supra* note 16, p. 227.

⁶⁰ Krishnaswami Study, see *supra* note 44.

study discusses the specific types of the freedom to manifest religion or belief⁶¹ and includes the ‘equipment and symbols’ as a separate subtitle. Krishnaswami states “wearing of certain apparel, the use of bells or musical accompaniments, or the display of symbols associated with a religion or belief” can constitute ‘observance’ or ‘practice’ components of the *forum externum*.⁶²

As for the determination of the legitimate restrictions of those religious apparel and symbols, the Krishnaswami Study does not provide precise tools. On the one hand, the study supported the need to avoid religious clothing in certain public institutions: “A prohibition of wearing of religious apparel in certain institutions, such as public schools, may be motivated by the desire to preserve the non-denominational character of these institutions.”⁶³ On the other hand, it states: “It is desirable that persons whose faith prescribes such apparel should not be unreasonably prevented from wearing it.”⁶⁴ Nonetheless, many of the Krishnaswami principles as regards permissible limitations on religious rights had a considerable influence on the future documents within the UN system.⁶⁵

3. The ICCPR

Seven years after the Krishnaswami study, the protection of the right to freedom of religion took a major step within the UN system with the adoption of the 1966 International Covenant on Civil and Political Rights.

There are several articles dealing with religious freedom within the ICCPR, Article 18 being the seminal. It proclaims the right to freedom of religion with a four-paragraph clause. The first paragraph sets forth the components of the right to freedom of religion as:

“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in

⁶¹ The catalogue of types of manifestations within the Study include worship, processions, pilgrimages, equipment and symbols, funeral practices, holidays and rest, dietary practices, marriage and divorce, teaching and training of personnel. Krishnaswami Study, p. 29 – 45.

⁶² *Ibid*, p. 33.

⁶³ *Ibid*.

⁶⁴ *Ibid*.

⁶⁵ Natan Lerner, *supra* note 26, p. 68.

community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”

Article 18 (1) of the ICCPR generally follows the formulation of the Article 18 of UDHR. However, a few minor differences between the Covenant and the Declaration are observed. First, unlike the UDHR, the ICCPR does not specifically mention the right to change one’s religion or belief. It rather refers to ‘freedom to have or adopt’ a religion or belief, which, to many experts, is a milder language which causes problems later.⁶⁶ Second, 18 (1) of the ICCPR lists the types of manifestations as worship, observance, practice and teaching; unlike the order in the UDHR (teaching, practice, worship and observance) for no apparent reason.

Article 18 (2) of the ICCPR adds on the concept of the *forum internum* and prohibits coercion that would impair an individual’s choice to have or adopt a religion or belief by stating: “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.” The notion of coercion was not defined by the Covenant, but it was later elaborated more by the 1981 Declaration.

Article 18 (3) of the ICCPR deals with the permissible limitations of the right. It only permits limitations on the freedom to manifest one’s religion or belief, as long as they are prescribed by law and necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.⁶⁷

Article 18 (4) of the ICCPR deals with the sensitive area of parental rights in the field of education. Deriving its origin from Article 26 (3) of the UDHR, Article 18 (4) of the ICCPR uses a clearer language while obliging the States Parties “to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions”.

Besides Article 18, certain other Articles within the ICCPR also provide effective protection of the right to freedom of religion. First, there are three discrimination clauses provided by the Covenant. Article 2 of the ICCPR, being the equivalent of

⁶⁶ *Ibid*, p. 70.

⁶⁷ Limitation and restriction regime is further discussed at Chapter I. D. 2 below.

the Article 2 of the UDHR, guarantees individuals' equal enjoyment of the rights recognized in the ICCPR "without distinction of race, colour, sex, language, religion, political or other opinion (...)." Article 26 of the ICCPR further provides a self-standing right to non-discrimination guaranteeing all persons equal and effective protection against discrimination.⁶⁸ It includes equality before the law, equal protection of the law as well as duty to protect from discrimination. Therefore, Article 26 of the ICCPR does not only impose negative duties, but also obliges States to take the necessary measures to guarantee the right to equality. Moreover, Article 3 of the ICCPR obliges the States Parties to "undertake to ensure equal rights of men and women to the enjoyment of all civil and political rights" set forth in the Covenant.⁶⁹

Second, two other Articles of the Covenant address the prohibition of religious hatred and protection of religious minorities. Article 20 (2)⁷⁰ of the ICCPR obliges states to prohibit advocacies of religious hatred which could constitute incitement to discrimination, hostility or violence. Article 27 of the ICCPR⁷¹ requires states to protect religious minorities "to enjoy their own culture, to profess and practice their own religion, or to use their own language" in community with the other members of their group.

4. The 1981 Declaration

The 'Draft Principles on Freedom and Non-Discrimination in the Matter of Religious Rights and Freedoms' that is extracted from the Krishnaswami Study, remained on the agenda of the Commission on Human Rights (CHR) for nearly two decades, with

⁶⁸ Article 26 of the ICCPR states: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

⁶⁹ This provision is of particular importance as regards the wearing of headscarves and full face veils (burqas) discussed in case law section in Chapter II below. Also, see Chapter III.B below.

⁷⁰ Article 20 (2) of the ICCPR reads as: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

⁷¹ Article 27 of the ICCPR states: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

the intent of two separate documents: a Declaration and later, a Convention.⁷² However, in 1972, the General Assembly decided to prioritise the Declaration before considering an International Convention, as the attention was shifted towards preparation of the ICCPR.⁷³ The CHR discussed the draft at each of its annual sessions from 1974 until 1981, and the final text of the Declaration was proclaimed by the General Assembly on 25 November 1981.

The United Nations Declaration on the Elimination of all Forms of Intolerance and of Discrimination became a turning point in the development of legal standards of freedom of religion, as it is the first legal instrument within the international law solely dedicated to the right to freedom of religion. Strongly influenced by the Krishnaswami Study, the 1981 Declaration took a clear stand as regards explaining the scope of the right and defining the key terms therein. The first five Articles of the Declaration reiterates the standards enshrined in Articles 18 of the UDHR and the ICCPR, while expanding the notions on religious intolerance and religious discrimination.

Article 6 of the 1981 Declaration is of particular importance on identifying the recognized forms of manifesting religious belief. The Article offers a detailed list of various forms of manifestation that goes beyond the “teaching, worship, practice, and observance” formula that is repeated by the UDHR, ICCPR and later by the ECHR.⁷⁴ The term ‘practice’ is absent within the text, which is regarded as an unexpected step back by the experts.⁷⁵ However, as a general safeguard clause, Article 8 of the 1981 Declaration states “Nothing in the Declaration can be construed as restricting or derogating from any right defined in the UDHR or the ICCPR”.

⁷² In 1962, the General Assembly requested from the Human Rights Commission to work on a draft Declaration and a draft Convention addressing religious intolerance. See UNGA Res.1781 (XVII), adopted on 7 December 1962. For the history of discussions between 1962 and 1981, see Natan Lerner, ‘Toward a Draft Declaration against Religious Intolerance and Discrimination’, p. 85-88.

⁷³ Malcolm Evans, *Religious Liberty and International Law in Europe*, p. 227 – 231.

⁷⁴ The catalogue of types of manifestations within the Article 6 of the 1981 Declaration include to worship or assemble in connection with a religion or belief, to establish and maintain places for these purposes, to make, acquire and use necessary articles and materials, to write, issue and disseminate relevant publications, to teach religion or belief, to train, appoint and elect religious leaders, to observe days of rest and celebrate holidays, to establish and maintain communications with individuals and communities in matters of religion or belief at the national and international levels.

⁷⁵ Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice*, p. 208 – 211 and Natan Lerner, *The Nature and Minimum Standards of Freedom of Religion or Belief*, p. 78.

While enumerating the types of manifestations, Article 6 of the 1981 Declaration clearly addresses the right to wear religious symbols and clothing. The paragraph (c) of the Article 6 states that the right to freedom of religion includes “to make, acquire, and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion and belief.” This is the second appearance of the right to wear religious symbols within an international legal text after the Krishnaswami study.

Although the 1981 Declaration does not have binding force, its adoption by consensus in the UN General Assembly reflects a broad common understanding. Moreover, the fundamental aspects of the right to freedom of religion featured in the Declaration are now considered to constitute customary international law.⁷⁶ Therefore, even for the states that have not ratified the ICCPR, the ECHR or any key international instrument affirming this right, they are still bound to respect the fundamental aspects of the right to religious freedom by the 1981 Declaration.

5. General Comments and Concluding Observations of the HRC

Under Article 40 of the ICCPR, the HRC has the authority to issue general comments and concluding observations, as discussed above. The most authoritative text of the HRC on the right to freedom of religion is the General Comment No: 22 adopted in 1993. The general comment sheds light on many aspects of the right to freedom of religion in general, and manifesting religious belief in particular.⁷⁷

The General Comment No: 22 (GC 22) provides an excellent resource as to the types of manifestation. In paragraph 4, the GC 22 states:

“The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places

⁷⁶ See Derek Davis, ‘The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief’ (2002) *BYU Law Review* 217, p. 230 and Bahiyyih G. Tazhib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Boston: Martinus Nijhoff, 1996), p. 184-85 arguing that the 1981 Declaration is customary law.

⁷⁷ For detailed critics of the General Comment No:22, See Martin Scheinin, ‘The Human Rights Committee and Freedom of Religion or Belief’ in T. Lindholm, W. Durham, B. Tahzib-Lie, & E. Sewell, *Facilitating Freedom of Religion or Belief: A Deskbook* (Dordrecht, Springer: 2004), p. 193 – 195.

of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group.”⁷⁸

Despite the Krishnaswami Study or the 1981 Declaration, the GC22 explicitly mentions ‘the wearing of distinctive clothing’ and even ‘headcoverings’ while listing the permissible acts of religious manifestation. By stating these, it clears the vagueness of the terms ‘certain apparel’ or ‘necessary materials’ used in the previous instruments.

Besides the GC 22, the General Comment No: 28 on Equality of Rights between Men and Women adopted on 29 March 2000 also addresses the wearing of religious clothing by women.⁷⁹ Paragraph 13 of the GC 28 explicitly states that States parties should provide information on any specific regulation of clothing worn by women in public. It also underlines that restrictions on clothing worn by women in public may give rise to certain number of violations, including the right to non-discrimination, liberty of movement, right to privacy, right to self-expression and right to culture.⁸⁰

Besides the General Comments, the Concluding Observations of the HRC also engages with the manifestation of religion in general, and wearing of religious symbols and clothing in particular. Despite the wider significance of the General Comments, the Concluding Observations of the Committee still have considerable value in standard setting within the UN. As Taylor observes, much of the content of the General Comments is drawn from experience gained in the examination of State reports from diverse cultures.⁸¹ Most explicit reference to the limitations on religious symbols and clothing is found in the 2009 Concluding Observations to France. The Committee stated its concerns on bans of religious clothing in public schools in France, and stated that *laïcité* (the French concept of the principle of separation) not

⁷⁸ HRC, *the General Comment No: 22*, see *supra* note 41, para 4.

⁷⁹ HRC, *CCPR General Comment No: 28: Article 3 (The Equality of Rights between Men and Women)*, 29 March 2000, UN. Doc: CCPR/C/21/Rev.1/Add.10.

⁸⁰ *Ibid*, para 13.

⁸¹ Paul M. Taylor, *supra* note 12, p. 14.

necessarily require forbidding the wearing of religious symbols as a skullcap (kippah), a headscarf (hijab) or a turban.⁸²

Both the General Comments and Concluding observations are considered as a particularly important tool within the UN system as they demonstrate the clear examples of the developing understanding of the HRC and consolidate the views of the Committee in individual complaints mechanism as well.⁸³

6. Special Rapporteur on Freedom of Religion

In 1986, the UN Human Rights Commission instituted the ‘Special Rapporteur on Religious Intolerance’ in order to monitor the implementation of the 1981 Declaration.⁸⁴ Later in 2001, on the occasion of the 20th anniversary of the 1981 Declaration, the title of the mandate was changed into ‘Special Rapporteur on Freedom of Religion or Belief’.⁸⁵ The mandate holders were given the authority to issue annual reports, conduct country visits and also receive individual complaints. From 1987 until now, five Special Rapporteurs were appointed to the mandate and they submitted more than 30 annual reports to the General Assembly.⁸⁶

As regards the right to wear religious clothing and symbols in particular, the works of the two Special Rapporteurs are of significant importance: The Special Rapporteur between 1993 to 2004, Mr. Abdelfattah Amor (Tunisia) and his successor from 2004 to 2010, Ms. Asma Jahangir (Pakistan). In his reports, Mr. Abdelfattah Amor focused particularly on the obligation to wear religious dress in public in certain countries. He stated “women are among those who suffer most because of severe restrictions on their education and employment, and the obligation to wear what is described as

⁸² HRC, Concluding Observations, France, UN. Doc. A/63/40. Vol.1 (2009), para 82 (23).

⁸³ Martin Scheinin, ‘The Human Rights Committee and Freedom of Religion or Belief’, *see supra note* 74, p. 192.

⁸⁴ *See supra note* 42.

⁸⁵ For detailed information on the history of the mandate, *See* Christian Walter, ‘The Protection of Freedom of Religion Within the Institutional System of the United Nations’ in M.A. Glendon, H.F. Zacher, *Universal Rights in a World of Diversity: The Case of Religious Freedom* (Vatican City: The Pontifical Academy of Social Sciences, 2012), p. 588 – 603.

⁸⁶ Current Special Rapporteur Mr. Ahmed Shaheed was appointed on 1 November 2016. Former Special Rapporteurs are: Mr. Heiner Bielefeldt (August 2010 – October 2016), Ms. Asma Jahangir (August 2004 – July 2010), Mr. Abdelfattah Amor (April 1993 – July 2004) and Mr. Angelo d’Almeida Ribeiro (March 1986 – March 1993)

Islamic dress”.⁸⁷ The report also underlined that female members of the religious groups tend to be prone to become victims of threats and violence.⁸⁸

The works of Asma Jahangir are ground-breaking in the area of wearing religious symbols and clothing. She extensively dealt with the prohibitions on wearing religious signs and symbols, and provided useful comments in her reports.⁸⁹ In her report published on 9 January 2006,⁹⁰ Jahangir developed a set of general criteria in order to balance the competing human rights on wearing religious symbols. She categorised the restrictions into two groups. The “aggravating indicators” represent the legislative and administrative actions that are typically incompatible with the international standards on right to freedom of religion, whereas the “neutral indicators” do not contravene these standards by themselves.⁹¹

The six out of the seven ‘aggravating indicators’ listed by Jahangir focuses on blanket-bans or discriminatory policies on restricting religious symbols and clothing:

- “The limitation amounts to the nullification of the individual’s freedom to manifest his or her religion or belief,
- The restriction is intended to or leads to either overt discrimination or camouflaged differentiation depending on the religion or belief involved,
- Limitations on the freedom to manifest a religion or belief for the purpose of protecting morals are based on principles depriving exclusively from a single tradition,
- Exceptions to the prohibition of wearing religious symbols are, either expressly or tacitly, tailored to the predominant or incumbent religion or belief

⁸⁷ UN ECOSOC, Report of the Special Rapporteur on Freedom of Religion or Belief, Abdelfattah Amor, UN Doc. E/CN.4/1998/6, para 60.

⁸⁸ UNGA, Report of the Special Rapporteur on Freedom of Religion or Belief, Abdelfattah Amor, UN Doc. A/51/542/Add.2, para 51.

⁸⁹ Besides her annual reports, Asma Jahangir also published a report following her country visit to France that contains her concerns and opinions on prohibition of religious symbols within the public-school system. See paras. 98 – 104 of the UN Doc. E/CN.4/2006/5/Add.4.

⁹⁰ UN ECOSOC, Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, UN.Doc. E/CN.4/2006/5.

⁹¹ *Ibid*, paras 51 – 60.

- In practice, State agencies apply an imposed restriction in a discriminatory manner or with a discriminatory purpose, e.g. by arbitrarily targeting certain communities or groups, such as women,
- No due account is taken of specific features of religions or beliefs, e.g. a religion which prescribes wearing religious dress seems to be more deeply affected by a wholesale ban than a different religion or belief which places no particular emphasis on this issue”⁹²

The last “aggravating indicator” spelled out by Jahangir refers to the negative freedom of individuals who do not wish to wear or display a religious symbol but coerced into it:

- “Use of coercive methods and sanctions applied to individuals who do not wish to wear a religious dress or a specific symbol seen as sanctioned by religion. This would include legal provisions or State policies allowing individuals, including parents, to use undue pressure, threats or violence to abide by such rules”⁹³

The five “neutral indicators” listed by Jahangir are composed of policies that are consistent and non-discriminatory:

- “The language of the restriction or prohibition clause is worded in a neutral and all-embracing way,
- The application of the ban does not reveal inconsistencies or biases vis-à-vis certain religions or other minorities or vulnerable groups,
- As photographs on ID cards require by definition that the wearer might properly be identified, proportionate restrictions on permitted headgear for ID photographs appear to be legitimate, if reasonable accommodation of the individual’s religious manifestation are foreseen by the State,
- The interference is crucial to protect the rights of women, religious minorities or vulnerable groups,
- Accommodating different situations according to the perceived vulnerability of the persons involved might in certain situations also be considered legitimate, e.g. in order to protect underage schoolchildren and the liberty of

⁹² *Ibid*, para 55.

⁹³ *Ibid*.

the parents or legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”⁹⁴

In her next report published on 29 July 2010⁹⁵, amidst the ongoing bans on burqa and headscarves across Europe, Asma Jahangir noted that she is closely following the discussions on domestic laws or bills with regard to the display in public places of the full head-to-toe Islamic veil.⁹⁶ Moreover, she stated that these restrictions are not limited to Western States, but also occur in other regions, such as Bangladesh, India and Kuwait.⁹⁷ “Jahangir also further clarified her position on the situations where the individuals are forced to wear religious dresses, rather than choosing to do so:

“(…) the fundamental objective should be to safeguard both the positive freedom of religion or belief, as manifested by voluntary displaying religious symbols, and also the negative freedom from being forced to display religious symbols. Special attention should be paid to the protection of women’s rights, in particular in the context of wearing the full head-to-toe veil.”⁹⁸

Although the role of the Special Rapporteur is considered as a ‘soft’ mechanism within the UN system, in the sense that it does not have the possibility to issue binding documents or render judgments, the contribution of these reports to the standard setting to the right to freedom of religion is of utmost importance. As the Special Rapporteurs collect first-hand information from fact-finding missions and receive complaints directly from individuals or NGO’s, they provide valuable sources to the UN human rights law system. The information they collect and the criteria they develop is frequently cited within the case law of the HRC.

C. The Council of Europe System

The principal legal achievement of the Council of Europe system is the European Convention on Human Rights. The Convention, amended by several protocols, include three main provisions directly dealing with the right to freedom of religion. Article 9 of the ECHR recognizes the freedom of thought, conscience and religion,

⁹⁴ *Ibid.*

⁹⁵ UNGA, Interim Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, 29.07.2010, UN. Doc. A/65/207.

⁹⁶ *Ibid.*, para 34.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

Article 14 of the ECHR prohibits discrimination based on religion, and Article 2 of the First Protocol guarantees the rights of parents to choose the orientation of their children's education in conformity with their own convictions. Besides the ECHR, several resolutions and recommendations adopted by the Parliamentary Assembly of the Council of Europe also deal with discussions related to religious freedom.⁹⁹ This chapter briefly analyses the standards on religious freedom and traces the references on the right to wear religious symbols and clothing within the CoE system.

1. The ECHR

First paragraph of the Article 9 of the ECHR sets forth the right, based on the exact formulation of the UDHR:

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.”

As the ECHR was drawn directly from the UDHR, without being affected by the concerns that led shaping the ICCPR, the text explicitly mentions the right to change one's religion or belief.¹⁰⁰ Also, for the same reason, Article 9 of the ECHR does not include a provision that corresponds to Article 18 (2) of the ICCPR. On the other hand, while exemplifying the possible forms of manifestation, the text adopts the order of the ICCPR (worship, teaching, practice and observance) rather than the UDHR.

As regards the restriction scheme, the second paragraph of the Article 9 qualifies the right with the same formulation as the 18 (3) of the ICCPR.

⁹⁹ Martínez-Torrón and Navarro-Valls observe the increasing interest within the Parliamentary Assembly of the CoE as regards religious freedom is particularly on the rise since the mid – 1960's. See Javier Martínez-Torrón and R. Navarro-Valls, 'The Protection of Religious Freedom in the System of the Council of Europe' in T. Lindholm, W.C. Durham, B.G Tahzib-Lie, E.A Sewell & L. Larsen (Eds), *Facilitating Freedom of Religion or Belief: A Deskbook*. (Dordrecht: Springer, 2004), p. 208 – 215.

¹⁰⁰ See Paul M. Taylor, *supra* note 12, p. 26.

However, the overall restriction regime of the rights within the ICCPR and the ECHR is not the same.¹⁰¹

Article 2 of the First Protocol of the ECHR could be regarded as the equivalent for Article 18 (4) of the ICCPR. It guarantees the right of parents to ensure the education of their children in conformity with their own religious convictions, with a slightly different wording than the ICCPR. Unlike the ICCPR, Article 2 of the Protocol No. 1 of the ECHR speaks of ‘religious and philosophical’ rather than ‘religious and moral’:

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

Besides these provisions, the applicants can also claim breaches of discrimination on the basis of religious convictions in conjunction with the Article 14 of the ECHR¹⁰², which could be regarded as the equivalent of Article 2 of the ICCPR. Besides the Article 14, the Protocol No. 12 of the ECHR also provides for a general prohibition on discrimination, regardless of the association with the rights guaranteed within the ECHR.¹⁰³ However, unlike the Article 26 of the ICCPR, the Protocol No 12 of the ECHR does not address positive obligations of States parties.¹⁰⁴

2. Initiatives of the Parliamentary Assembly of the CoE

There are several initiatives of the Parliamentary Assembly of the CoE that focus on certain aspects related to the right to freedom of religion. These initiatives typically consist of resolutions and recommendations, which request the Committee of

¹⁰¹ Comparative analyses of the restriction regimes between the ICCPR and the ECHR is discussed below at Chapter I.D.2.

¹⁰² Article 14 of the ECHR reads as: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

¹⁰³ Protocol No. 12 of the ECHR reads as: “The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

No one shall be discriminated against by any public authority on any ground such as those mentioned above.”

¹⁰⁴ See *supra* note 68.

Ministers to take certain measures or invite the governments to adopt provisions within their national laws.¹⁰⁵ The most important initiatives of the CoE as regards the wearing of religious clothing and symbols are focused on the negative freedom of individuals (especially women) from being forced to wear Islamic dresses.

On 4 October 2005, Parliamentary Assembly of the CoE adopted a resolution titled “Women and Religion in Europe”¹⁰⁶ where the Member States were called to “ensure that freedom of religion and respect for culture and tradition are not accepted as pretexts to justify violations of women’s rights, including when underage girls are forced to submit to religious codes (including dress codes).”¹⁰⁷

On 23 June 2010, Parliamentary Assembly of the Council of Europe adopted both a resolution and a recommendation titled “Islam, Islamism and Islamophobia in Europe”, where wearing burqa, niqab and headscarf were discussed. In Resolution No. 1743¹⁰⁸, the Parliamentary Assembly stressed that “neither the full veiling of women, nor even the headscarf, are recognised by all Muslims as a religious obligation of Islam, but they are seen by many as a social and cultural tradition.”¹⁰⁹ The Assembly also considered this tradition as a serious threat to women’s dignity and freedom, and called for protective measures: “Any act of oppression, sequestration or violence constitutes a crime that must be punished by law. Women victims of these crimes, whatever their status, must be protected by member states and benefit from support and rehabilitation measures.”¹¹⁰ On the legitimate grounds of restriction of these dresses, the Assembly puts its focus on ‘security purposes’ and ‘duty of neutrality’:

“Legal restrictions to this freedom may be justified where necessary in a democratic society, in particular for security purposes or where public or

¹⁰⁵ Javier Martínez-Torrón and R. Navarro-Valls, ‘The Protection of Religious Freedom in the System of the Council of Europe’, see *supra* note 99, p. 211.

¹⁰⁶ Parliamentary Assembly of the Council of Europe, Resolution No. 1464, adopted on 4 October 2005.

¹⁰⁷ *Ibid*, para. 7.4.

¹⁰⁸ Parliamentary Assembly of the Council of Europe, Resolution No: 1743, adopted on 23 June 2010.

¹⁰⁹ *Ibid*, para 15.

¹¹⁰ *Ibid*.

professional functions of individuals require their religious neutrality or that their face can be seen.”¹¹¹

On the other hand, both the resolution and the recommendation concluded that a general prohibition of wearing the burqa and niqab would deny women’s right to freedom of religion. In Recommendation No. 1927, the Assembly again focused on protective measures to be introduced:

“ (The Assembly) calls on member states not to establish a general ban on full veiling or other religious or special clothing, but to protect women from all physical and psychological duress as well as to protect their free choice to wear religious or special clothing and ensure equal opportunities for Muslim women to participate in public life and pursue education and professional activities; legal restrictions on this freedom may be justified where necessary in a democratic society, in particular for security purposes or where public or professional functions of individuals require their religious neutrality or that their face can be seen.”¹¹²

With its Resolution No.2976 of 2015, the Parliamentary Assembly slightly shifted its focus from the necessary to protect the women from being coercion, towards the need to protect pluralism and diversity:

“Certain religious practices remain controversial within national communities. Albeit in different ways, the wearing of full-face veils, circumcision of young boys and ritual slaughter are divisive issues and the Assembly is aware of the fact that there is no consensus among Council of Europe member States on these matters. (...) In this context, while it is aware that States Parties to the European Convention on Human Rights have a wide margin of discretion in this field, the Assembly Invites States to seek “reasonable accommodations” with a view to guaranteeing equality that is effective, and not merely formal, in the right to freedom of religion. States

¹¹¹ *Ibid*, para 16.

¹¹² Parliamentary Assembly of the Council of Europe, Recommendation No: 1927, adopted on 23 June 2010, para 3.13.

should ensure that their neutrality remains inclusive and diversity-friendly”.¹¹³

Although these recommendations and resolutions do not have a binding force by themselves, they represent an influential state of opinion within the CoE system. The opinions as well as the guidelines presented in these documents are frequently followed by the member states of the Council of Europe.

D. Protection and Restriction Regime

This part aims to comparatively analyse the protection and restriction regime of the right to wear religious symbols within the right to manifest religious belief (or the *forum externum*) as offered by the standards discussed above. First, the *subject* and the *object* of the right will be examined in order to delineate the scope of the protection. Second, permissible grounds of limitation are analysed, in order to delineate the grounds of restriction.

1. Scope of Protection

a. Protected Right-Holders

The subject of the right to freedom of religion and belief is primarily the individuals.¹¹⁴ Hence, the right to freedom of religion and belief does not protect religions or beliefs *per se*. As Bielefeldt expresses, “it protects believers rather than beliefs, through the claims put forward by human beings.”¹¹⁵ Special Rapporteurs also stressed that the right to freedom of religion does not include the right to have a religion that is free from criticism or ridicule and the fight against ‘defamation of religions’ is outside the scope of freedom of religion.¹¹⁶ However, there are also criticisms alleging that the right to freedom of religion privileges religious over non-

¹¹³ Parliamentary Assembly of the Council of Europe, Resolution No. 2076, adopted on 30 September 2015, para 8.

¹¹⁴ The individuals can enjoy their right to manifest religious belief also ‘in community with others’. In this case, the right holders can also be communities.

¹¹⁵ Heiner Bielefeldt, ‘Privileging the ‘Homo Religious’? Towards a Clear Conceptualization of Freedom of Religion or Belief’ in M. D. Evans, P. Petkoff & J. Rivers (Eds), *The Changing Nature of Religious Rights under International Law*, (Oxford: Oxford University Press, 2015), p.13.

¹¹⁶ UNGA, Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diene, further to Human Rights Council Decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance, A/HRC/2/3, 20 September 2006, para 36.

religious, therefore it protects *homo religiosus* rather than every individual.¹¹⁷ This criticism is inevitably valid as regards the right to wear religious symbols and clothing.

b. Protected Beliefs and Symbols

As pointed out above, the term “belief” has a particular meaning within the UDHR, ICCPR and the ECHR to protect non-religious convictions such as atheism and agnosticism.¹¹⁸ The GC22 explicitly clarifies this:

“Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly constructed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.”¹¹⁹

However, the term belief is considered to be strictly connected to the term religion, and it does not refer to beliefs of another character such as political, cultural, scientific or any other.¹²⁰ Indeed, the Preamble of the 1981 Declaration states: ‘religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life’.¹²¹ This clearly suggests that the right offers protection only to those who have a deep sense of attachment to a particular religion or belief that shapes their identity and way of life. Similarly, the ECtHR also developed a line of reasoning that states in order to fall within the ambit of the right to freedom of religion or belief, the individual’s position must display ‘a certain level of cogency, seriousness, cohesion and importance’¹²²

Most of the experts also share this view. To Evans, provisions of right to freedom of religion should be regarded as the *lex specialis* of the right to freedom of expression,

¹¹⁷ Heiner Bielefeldt, ‘Privileging the ‘Homo Religiosus’? Towards a Clear Conceptualization of Freedom of Religion or Belief’, p. 14.

¹¹⁸ See *supra* note 52.

¹¹⁹ General Comment No: 22, at para 2.

¹²⁰ Natan Lerner, *Religion, Secular Beliefs and Human Rights: 25 Years After the 1981 Declaration*, p. 14.

¹²¹ Preamble of the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

¹²² *Campbell and Cosans v. the United Kingdom*, Apps. Nos. 7511/76 and 7743/76 (ECtHR, 25 February 1982), para 36.

since the right protects beliefs, which is a special form of ideas and opinions.¹²³ Bielefeldt concludes that religions and beliefs ‘create a deep sense of attachment and group loyalty based on shared world-views, symbols, ethical norms and practices.’¹²⁴ He moreover states that the inclusion of non-theistic or atheistic beliefs should not result in trivialization of the right, such as the mock-worship of the Pastafarians claiming the right to be photographed for official documents with noodle sieves on their heads.¹²⁵ Gereluk points out that symbolic clothing is not a ‘mere preference’ but an expression of ‘identity’:

“Symbolic clothing is a piece of clothing that signifies a part of an individual’s identity. The clothing must have a clear, communicable intent that goes beyond merely making a fashion statement or a specific preference in taste or style. The concept of symbolic clothing is most commonly connected with religious items of dress that form part of a person’s identity. The symbol may have varying levels of significance to an individual. It may simply be an outward expression of what one believes, or it may be more like an essential part of one’s identity.”¹²⁶

On the other hand, many experts also underline that what constitutes a religion or manifestation of it should be decided by the individuals themselves. In her 2006 report, Asma Jahangir quotes the statements of the former HRC member Rosalind Higgins during the elaboration of the GC22: “it was not the Committee’s responsibility to decide what should constitute a manifestation of religion. (...) The contents of a religion should be defined by the worshippers themselves.”¹²⁷ Jahangir also shares this approach and declared that “a certain appearance or exhibition of a symbol may or may not be linked to any religious sentiment or belief. It would therefore be most inappropriate for the States to determine whether the symbol in question was indeed a manifestation of religious belief.”¹²⁸

¹²³ Malcolm Evans, *Religious Liberty and International Law in Europe*, p. 285.

¹²⁴ Heiner Bielefeldt, ‘Privileging the ‘Homo Religious’? Towards a Clear Conceptualization of Freedom of Religion or Belief’, p. 20.

¹²⁵ *Ibid.*

¹²⁶ Dianne Gereluk, *Symbolic Clothing in Schools: What Should be Worn and Why*, (London/New York: Continuum, 2008), p. xi-xii.

¹²⁷ Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, *see supra note* 91, para 41.

¹²⁸ *Ibid.*

Lastly, religious signs and symbols are not only worn as an obligation of one's religion or belief. The protection also covers symbols that are linked with or inspired by a religion, even if there is no obligation to wear such clothing or symbols.¹²⁹ This approach is particularly valid when it comes to beards or cross necklaces.

It can be concluded that the right to manifest religious belief also protects symbols or clothes that might not be linked to traditional religions, or proclaimed as an obligation by those. However, the individual in question should have a strong sense of attachment to those symbols or clothes as a part of her/his identity.

c. Protected forms of Manifestation

As shown in the previous two sections, both the United Nations and the European system consider the wearing of religious symbols as a part of manifesting religious belief (*forum externum*) rather than being a part of internal conviction (*forum internum*), which is not subject to limitation.

As to the Kippenberg, the term 'manifestation' cannot be considered merely as a "particular form of freedom of expression", as what involves here is a communal right.¹³⁰ Also, unlike the term 'expression', 'manifestation' refers to an acknowledged form of praxis.¹³¹ Therefore, it may be concluded that if wearing of a particular symbol or clothing was not considered as a 'manifestation' under the provisions of the right to freedom of religion, it might be considered as an 'expression' and seek protection under the provisions of the right to freedom of expression.

The instruments did not attempt to distinguish between the four categories of manifestation (teaching, practice, worship and observance). Therefore, it is not clear that the wearing of religious signs and symbols might fall under. According to Cornelis de Jong, the term *observance* refers to 'prescriptions that are inevitably connected with a religion or belief and protects both the right to perform certain acts and the right to refrain from certain things', while the term *practice* refers to manifestations that are "not prescribed, but only authorised by a religion or

¹²⁹ Erica Howard, *supra* note 21, p. 27.

¹³⁰ Hans Kippenberg, 'Manifesting Religion in Public: A Universal Human Right – An International Law – National Restrictions' in B. Mersmann, & H. G. Kippenberg (Eds), *The Humanities Between Global Integration and Cultural Diversity*, (Berlin: De Gruyter, 2016), p. 242.

¹³¹ *Ibid*, p. 250.

belief”.¹³² Asma Jahangir is of the opinion that it is better to deal with the wearing of religious symbols under the headings of “practice and observance” together.¹³³

It should also be noted that these four categories are not considered to circumscribe the right, and other types of manifestations are also possible. In his report, Krishnaswami clearly suggests that the intention behind the UDHR to come up with these four categories is to embrace all possible manifestations of religion or belief, as the forms of manifestation vary considerably from one religion or belief to another, and the crafters of the UDHR wanted to bring all of them together.¹³⁴ Delineating the limits of ‘*manifestation*’ was also discussed by the European Commission on Human Rights in *Arrowsmith v. United Kingdom*¹³⁵ case. The case concerned a claim of an acknowledged pacifist, who was convicted for distributing leaflets that encouraged the British soldiers in Northern Ireland to avoid serving in the army. The applicant claimed that distribution of those leaflets was a manifestation of her pacifist beliefs. Although the Commission accepted pacifism as a belief, it concluded that distribution of it cannot be regarded as a form of manifestation, as the action of the individual does not actually express the belief concerned.¹³⁶ Although the decision is now three-decades old, the ECtHR still regularly cites this passage, which is now referred to as the *Arrowsmith test*.

2. Scope of Restriction

Key principles of the limitation regime of the right to freedom of religion are provided by Article 9 (2) of the ECHR, Article 18 (3) of the ICCPR, Article 29 (2) of the UDHR and Article 1 (3) of the 1981 Declaration and the paragraph 2 of the GC22.

UDHR does not provide a limitation regime within Article 18 itself. However, it does provide a general restriction regime on the exercise of rights and freedoms at Article 29 (2). The Article states:

¹³² Cornelis de Jong, *The Freedom of Thought, Conscience and Religion or Belief in the United Nations (1946 – 1992)*, (Antwerpen/Groningen/Oxford: Intersentia, 2000), p 105.

¹³³ Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, *see supra note* 91, p. 41.

¹³⁴ Krishnaswami Study, p. 17.

¹³⁵ *Arrowsmith v. UK*, App No. 7050/75 (ECommHR, 16 May 1978).

¹³⁶ *Ibid*, paras. 71 – 75.

“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

Article 29 (2) of the UDHR applies to the entire Declaration.

Within the ICCPR system, rather than using a general clause, the Covenant qualifies each right in a separate paragraph of each article. Restriction regime is provided for right to freedom of religion in paragraph 3 of the Article 18:

“Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.”

Article 18 is exempt from the provisions set forth in Article 4 of the ICCPR¹³⁷, which permits derogation from the Covenant in times of ‘public emergency threatening the life of the nation’. Although ‘national security’ was mentioned as a ground for limitation for certain other rights provided by the ICCPR, Article 18 (3) does not choose to include it. It should also be noted that freedom of religion is listed among the non-derogable rights under Article 4 (2) of the ICCPR. Therefore, even in the time of public emergency or war, the ICCPR does not permit derogation from the right to freedom of religion. Thus, unlike the UDHR or the ECHR system, the right to freedom of religion cannot be derogated under the ICCPR.

¹³⁷ Article 4 of the ICCPR states:

“1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.”

The GC.22 cleared and explained the permissible restriction grounds laid down by the Article 18 (3) of the ICCPR.¹³⁸ Paragraph 8 declared a number of principles that a permissible restriction should comply:¹³⁹

- i. The interpretation of the permissible limitations listed in the Article 18 (3) of the ICCPR should be done while considering the right to equality and non-discrimination grounds specified in Articles 2, 3 and 26 of the ICCPR.
- ii. Article 18 (3) of the ICCPR is to be strictly interpreted, and it is impossible to restrict the right on the grounds that is not specified there, such as national security.
- iii. The limitations must be directly related and proportionate to the specific need, on which they are predicated.
- iv. The restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.
- v. The limitations on the freedom to manifest religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition, as the concept of morals derives from many social, philosophical and religious traditions.

¹³⁸ See *supra* note 41 and section B.5 of this chapter.

¹³⁹ The 8th paragraph of the General Comment No. 22 reads as follows:

“Article 18.3 permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. The freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted. In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint. States parties' reports should provide information on the full scope and effects of limitations under article 18.3, both as a matter of law and of their application in specific circumstances.”

- vi. Prisoners continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint.

As for the CoE system, Article 9 (2) of the ECHR uses the same language as the ICCPR 18 (3), with minor differences:

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

The grounds of limitation are the same within the ICCPR and the ECHR. The measure must be ‘prescribed by law’¹⁴⁰, and must be ‘necessary’¹⁴¹. Both the Article 18 (3) of the ICCPR and Article 9 (2) of the ECHR sets out four legitimate grounds¹⁴² in which the right to manifest a religion or belief could be limited. These are the protection of (i) public safety, (ii) public order¹⁴³ (iii) health or morals and (iv) the fundamental rights and freedoms of others. Unlike the second paragraphs of the Articles 8, 10 and 11; Article 9 (2) does not cover all the rights mentioned in the first paragraph. It only refers only to “freedom to manifest one’s religion or belief”, as *forum internum* is not subject to limitation.¹⁴⁴

However, unlike the ICCPR system, Article 9 of the ECHR could also be subject to restrictions in accordance with Article 15 of the ECHR, which allows States to derogate from their obligations under certain circumstances.¹⁴⁵ Article 15 does not state an exemption as to Article 9; therefore, it is possible to derogate from the right

¹⁴⁰ The UDHR uses the phrase: ‘determined by law’.

¹⁴¹ The ECHR further states ‘necessary in a democratic society’.

¹⁴² Compared to other qualified rights such as freedom of expression, freedom of assembly or right to respect for private and family life, the right to freedom of religion includes a smaller list of restrictions. This could be attributable This could be attributed to the enumeration of the right to religious manifestation in acts of worship, teaching, practice and observance.

¹⁴³ Articles 8, 10 and 11 of the ECHR states ‘prevention of disorder’ instead of ‘protecting public order’. This could be a deliberate choice in order to restrict religious symbols or clothing even if they do not cause a disorder.

¹⁴⁴ Krishnaswami noted that restrictions on *forum internum* is not only prohibited, but also an impossible task: “Freedom to maintain or to change religion or belief falls primarily within the domain of the inner faith and conscience of an individual. Viewed from this angle, one would assume that any intervention from outside is not only illegitimate but impossible.” Krishnaswami Study, see *supra* note 44, para 231.

¹⁴⁵ Article 15 of the ECHR reads as: “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”

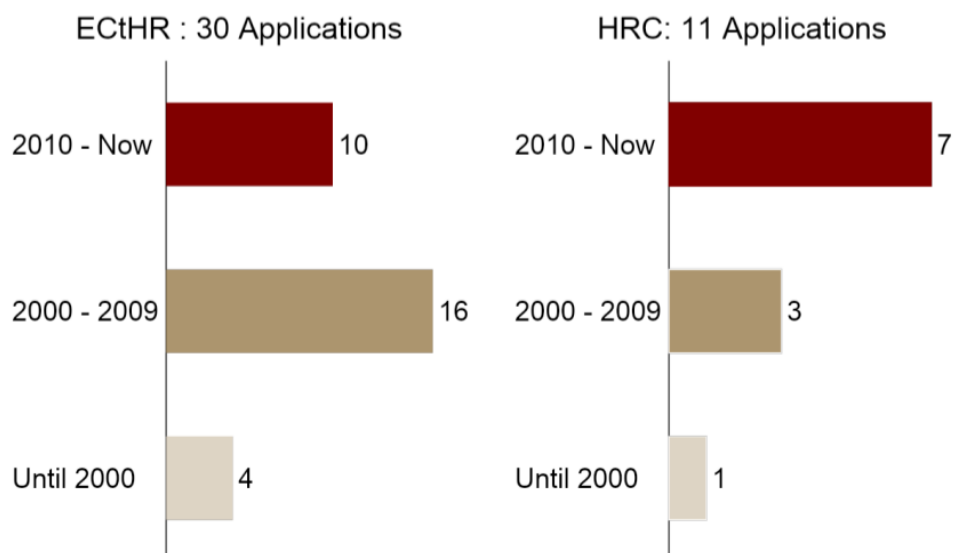
to freedom of religion along with other rights within the ECHR system. On the other hand, Article 53 of the ECHR requires the European Convention should be interpreted in line with other international human rights treaties.¹⁴⁶ Thus, if the ECHR would be read in line with the ICCPR, derogation of the right to freedom of religion would not be possible, even in the times of war or emergency.

II. Wearing Religious Symbols in in the Practice of the HRC and the ECtHR

By the end of December 2019, 41 cases were examined by the HRC and the ECtHR that concern restrictions on wearing religious symbols and clothing. This research analyses those cases under five categories: temporary removals, public educational institutions, other public institutions, private workplace and public sphere. Temporary removals indicate short-term requirements of a public authority to remove one's clothing or symbol for a security check, during work hours or for a photograph. Public educational institutions address the bans and restrictions imposed on students and teachers within primary and secondary level education as well as universities. Other public institutions include restrictions imposed on either users or public officials within courthouses, hospitals or prisons. Private workplace covers limitations of religious symbols or clothing imposed on employees. Public sphere indicates full face veil bans on streets, beaches, parks or any place that everyone uses without an authorization or admission. Figure 1 illustrates the escalating number of the applications before the ECtHR and the HRC.

¹⁴⁶ Article 15 of the ECHR reads as: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party."

Figure 1 : Applications before the ECtHR and the HRC



A. Temporary Removals

The organs of the ECHR have consistently dismissed complaints regarding compulsory and temporary removals of religious garments. Both the Commission and the Court refused to recognize the merits of the six applications before them, based either on the protection of public safety, public order or public health. The HRC, on the other hand, discussed the merits of all three applications before it, finding violation of the right to manifest religious belief in two cases.

1. Security Checks and Workplace Safety

First case regarding compulsory and temporary removal of religious garments was heard by the EComHR in 1978. Case of *X. v. United Kingdom*¹⁴⁷ concerns fining, prosecution and later conviction of a practising Sikh for breaching the obligation of wearing a crash helmet while riding a motorcycle. The applicant, an Indian citizen living in United Kingdom, stated that his religion requires him to wear turban at all times, and the MotorCycle (Wearing of Helmets) Regulations of 1973 violates his right to religious freedom, as compulsory wearing of a crash helmet consequently

¹⁴⁷ *X. v. United Kingdom*, App No. 7992/77 (EComHR, 12 July 1978), inadmissibility decision.

obliges him to remove his turban. He submitted that he was penalised 20 times between 1973 and 1976, for refusing to comply with the mentioned regulation. The Commission denied his complaint, and stated that the obligation to wear a crash helmet is a necessary safety measure for motorcyclists; and the interference was justified for the protection of health, in accordance with Article 9 (2).¹⁴⁸ Despite the amendment granting an exemption for Sikhs from wearing crash helmets made at the end of 1976¹⁴⁹, the Commission still concluded that it does not vitiate its opinion, as it considers regulations were based on valid health considerations.¹⁵⁰ The Commission therefore declared the application unanimously inadmissible.

Later in 2015, the Court dealt with another case regarding compulsory turban removal complaint raised again by a practising Sikh. In *Phull v. France*¹⁵¹, the applicant stated that he was compelled to remove his turban at Entzheim Airport, Strasbourg while passing through the security checkpoint. He argued that there had been no need for the airport security staff to remove his turban, as he had accepted the walk-through scanner or to be checked with a hand-held detector. As the applicant did not raise the complaints whether the measure was prescribed by law; the Court went forward to determine whether the interference was necessary in a democratic society in the interests of public safety. The ECtHR mentioned *X v. United Kingdom* and reached a similar conclusion. It stated that security checks necessary in the interests of public safety in accordance with Article 9 (2), and States have the margin of appreciation as regards implementing those.¹⁵² Therefore, the application was found manifestly ill-founded and unanimously declared inadmissible.

3 year later, the Court dealt with a similar complaint raised by a Moroccan citizen against France, concerning the obligation to remove her veil that was imposed on her visa appointment day at the Consulate-General of France in Marrakesh. In *El Morsli v. France*¹⁵³, the applicant is a Moroccan national who is seeking to request an entry to France so that she could join her husband, who is a French national. At the gate of

¹⁴⁸ *Ibid*, para 6.

¹⁴⁹ *Ibid*, para 4.

¹⁵⁰ *Ibid*, para 8.

¹⁵¹ *Phull v. France*, App No. 35753/03 (ECtHR, 11 January 2005), inadmissibility decision.

¹⁵² *Ibid*, para 10.

¹⁵³ *El Morsli v. France*, App No. 15585/06 (ECtHR, 4 March 2008), inadmissibility decision.

the consulate, Ms. Fatima El Morsli was asked to remove her veil for an identity check. In the absence of a female security officer, Ms. Morsli refused to do so, and she was denied entry into the consulate premises. Ms. Morsli therefore invoked the right to freedom of religion, along with right to respect for her family life and prohibition of discrimination. The court, similar to the grounds in *Phull v. France*, reiterated that the applicant did not argue whether the measure was ‘prescribed by law’ and moved on to consider whether the interference is concerned one of the legitimate aims listed in Article 9 (2). It concluded that the interference is legitimate, as it aims to guarantee public safety and protect public order. In its necessity test, the court clearly stated that security checks at the access to the Consulate’s premises are undoubtedly necessary in the interests of public safety. The court also declared that the lack of female security officers within the consulate remains within the State’s margin of appreciation.¹⁵⁴ Complaints raised by Ms. El Morsli were therefore declared inadmissible, however this time, by the votes of majority.¹⁵⁵

The Human Rights Committee also heard a case concerning compulsory removal of Sikh turban at work. In *Karnel Singh Bhinder v. Canada*¹⁵⁶, the applicant is a Sikh by religion who works as an electrician at the Canadian National Railway Company. He wears a turban at all times and refuses to wear safety headgear during his work, which resulted in the termination of his labour contract. At the time, Canadian Labour Code required every employee to wear safety headgear within the ‘hard hat area’.¹⁵⁷ Mr. Bhinder complained that his right to manifest his religious beliefs has been restricted by the hard hat regulations, which does not meet the requirements of Article 18 (3) of the Covenant. In particular, he argued that the limitation was not necessary to protect ‘public safety’, since any safety risk was confined to himself.¹⁵⁸ The Committee examined the application under both Article 18 and Article 26, pursuant to the claim that the legislation *de facto* affects persons of the Sikh religion differently. However, it concluded that the termination of Mr. Bhinder’s labour contract did not violate any provision of the Covenant, since the limitation is

¹⁵⁴ *Ibid*, para 11.

¹⁵⁵ When an application is found inadmissible, neither the EComHR, nor the ECtHR include the individual opinions appended to the decision. Therefore, why or how many judges dissented to those decisions is unavailable.

¹⁵⁶ *Karnel Singh Bhinder v. Canada*, Comm. No. 208/1986 (HRC, 9 November 1989), UN Doc. CCPR/C/37/D/208/1986.

¹⁵⁷ *Ibid*, at 2.4

¹⁵⁸ *Ibid*, para 3.

justifiable by Article 18 (3) and has reasonable and objective purposes that are compatible by the Covenant.

2. Photographs on Official Documents

The EComHR examined two cases¹⁵⁹ that concern rejection of a photograph demonstrating a headscarf on a diploma¹⁶⁰: *Karaduman v. Turkey*¹⁶¹ and *Bulut v. Turkey*¹⁶². Both applications concern Turkish female university students, who were refused by the University administration to obtain their diplomas, on the ground that they supplied identity photographs showing them wearing headscarves. The students were told that photos with head-coverings did not comply with the disciplinary regulations of the University or the circular of the Higher Educational Council of 30 December 1982.¹⁶³

Ms. Karaduman and Ms. Bulut stated that appearing without a headscarf is incompatible with their religious beliefs. They also stated that their identity cards, passports and driving licences also display photographs wearing them a headscarf. Besides Article 9, the applicants also relied on Article 14 of the ECHR, asserting that female students of foreign nationality have total liberty to dress within University premises, as this restriction only applies to Turkish female students. Although the case did not concern a restriction of wearing the headscarf within the University premises, the Commission acknowledged the aim presented by the State party to protect ‘the republican and secular nature of the university’. According to the Commission, it should be a legitimate effort for a secular university to try to prevent such fundamental religious movements from disturbing public order in higher education and posing a threat to others’ beliefs. The Commission also noted that, ‘allowing students to wear the headscarf could put pressure on those who choose not

¹⁵⁹ These cases are also of importance for being the first two decisions regarding the wearing of Islamic headscarf examined by an organ of the ECHR.

¹⁶⁰ There is also another case before the ECtHR that concerns rejection of a photo with a headscarf during the admission process instead of a diploma. It also concerns a Turkish female University student who sought to enrol in the Faculty of Theology of Marmara University, providing a photograph showing her wearing a headscarf. Her admission was rejected due to non-compliance with the regulations in force. However, the applicant claimed a breach of only Article 6 of the ECHR, and right to freedom of religion was not examined by the Court. See *Araç v. Turkey*, App No. 9907/02, (ECtHR, 19 September 2006), inadmissibility decision.

¹⁶¹ *Karaduman v. Turkey*, App. No. 16278/90, (EComHR, 3 May 1993), inadmissibility decision.

¹⁶² *Bulut v. Turkey*, App. No. 18783/91, (EComHR, 3 May 1993), inadmissibility decision.

¹⁶³ The circular required university students ‘to wear clean, simple and smartly ironed clothing, to wear nothing on their heads and to have tidily cut hair’.

to wear them'. In both of the cases, the Commission found no interference with Article 9, and declared the application manifestly ill-founded by the votes of the majority. The Commission also refused to examine the arguments presented under the Article 14, stating that discrimination allegations were not presented before the national courts.

The HRC never had the chance to examine a case concerning rights of Muslim women to manifest their religion on photographs affixed to an identification document. However, wearing of a turban on an official document was examined both by the ECtHR and the HRC, where significant divergence between the interpretation of the two bodies could be observed. *Mann Singh v. France*¹⁶⁴ before the ECtHR and *Ranjit Singh v. France*¹⁶⁵ and *(Shingara) Mann Singh v. France*¹⁶⁶ before the HRC all concern the same requirement in French Law that states photographs intended for use on official documents to show the subject 'bareheaded and facing forward'.

In *Mann Singh v. France* before the ECtHR, the applicant, Shingara Mann Singh, is a French national and a practising Sikh who wears turban at all times. His request for renewal of his driver's licence was rejected, on the ground that he submitted photographs in which he appeared wearing a turban. Before the ECtHR, Mr. Mann Singh claimed that the French authorities violated his right to privacy and right to manifest religion. He also disputed regulations results of different treatment to the members of the Sikh community and noted that this requirement was not in force in earlier years, as his previous licences showed him wearing a turban. The ECtHR held that the interference to Mr. Singh's rights was justified and proportionate as to the State's interest in upholding public safety and public order, and held the application inadmissible as manifestly ill-founded. The Court underlined two specific grounds: first, it concluded that the requirement to appear bareheaded on identity documents is particularly necessary in order to allow the identification of the driver and to avoid the high risk of fraud and falsification. Second, it stressed that the interference concerned only an occasional measure that is within the margin of appreciation of the

¹⁶⁴ *Mann Singh v. France*, App. No. 24479/07 (ECtHR, 13 November 2008), inadmissibility decision.

¹⁶⁵ *Ranjit Singh v. France*, Comm. No. 1876/2000 (HRC, 22 July 2011), UN Doc. CCPR/C/102/D/1876/2009.

¹⁶⁶ *Shingara Mann Singh v. France*, Comm. No. 1928/2010 (HRC, 26 September 2013), UN Doc. CCPR/C/108/D/1928/2010.

State. As for the complaints concerning right to privacy and prohibition of discrimination, the Court did not find any violation.

3 years after the *Mann Singh v. France* case before the ECtHR, the HRC released its opinion in a similar case. In *Ranjit Singh v. France* before the HRC, the author of the communication was an Indian national of Sikh origin who has a refugee status in France. When he applied to renew his residence permit in 2002, Mr. Ranjit Singh provided a photograph showing him wearing a turban, same as his previous document. However, he was rejected this time, as the new law was in force requiring the official photographs to be 'bareheaded'. Mr. Ranjit Singh stated that wearing a turban is an integral part of Sikhism and closely intertwined with his faith and personal identity. He claimed that the State interfered with his right to manifest religion, and also with his liberty of movement, as without a residence card he cannot obtain travel documents and cannot leave France. In its consideration on merits, the Committee recognized the State party's purposes of protection of public safety and order. However, it considered that the State had failed to demonstrate the necessity of the requirement of removal:

“The State party has not explained why the wearing of a Sikh turban covering the top of the head and a portion of the forehead but leaving the rest of the face clearly visible would make it more difficult to identify the author than if he were to appear bareheaded, since he wears his turban at all times. Nor has the State party explained how, specifically, identity photographs in which people appear bareheaded help to avert the risk of fraud and falsification of residence permits.”¹⁶⁷

The Committee also observed that even if the obligation to remove the turban for the identity document might be described as a one-time requirement, it would invite the risk of interfering with the author's right to manifest religious belief on a continuing basis. As he wears his turban at all times, he could be compelled to remove his turban during identity checks as well.¹⁶⁸ The HRC therefore concluded with a violation of the right to freedom of religion. The Committee did not examine the liberty of movement allegation, since it was not claimed before the domestic courts.

¹⁶⁷ *Ibid*, para. 8.4

¹⁶⁸ *Ibid*.

Mr. Fabian Omar Salvioli appended an individual opinion to the communication, stating that he is of the view that the State party is also responsible for a violation of Article 2 (2) of the ICCPR,¹⁶⁹ as the legislation itself is incompatible with the Covenant.¹⁷⁰ Mr. Salvioli stated that in order to guarantee that such events would not recur; the Committee should indicate explicit measures and in this case, France should amend its laws to remove the requirement that applicants must be photographed ‘bareheaded’.¹⁷¹

3 years after the *Mann Singh v. France* case before the ECtHR, the HRC had the chance to adjudicate the identical set of facts. Mr. Shingara Mann Singh, the same applicant before the ECtHR, turned to the HRC, this time raising a claim concerning the photograph on his passport (instead of his driver’s licence.) The Committee adopted the same reasoning as it did in *Ranjit Singh v. France*. It concluded again that prohibition of a Sikh man to wear a turban on an identification document without a sufficient explanation about how such a measure is necessary to uphold public safety amounts to a violation of his right to manifest religion. The Committee also reiterated its stance by stating that the requirement would potentially interfere with the author’s right to freedom of religion on a continuous basis as he could be asked to remove his turban over and over again. However, the HRC did not conclude a violation on right to non-discrimination under Article 26 of the ICCPR neither in the *Ranjit Singh*, nor in the *Mann Singh* cases.

Among all the cases that require compulsory and temporary removals of a religious symbol or clothing, it is apparent that the HRC choose not to follow the reasoning structures employed by the ECtHR. Unlike the ECtHR, the Committee required the states to prove that the measure at stake is truly necessary to guarantee the public safety or order.

¹⁶⁹ Article 2(2) of the ICCPR reads as: “Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”

¹⁷⁰ Individual Opinion of Mr. Fabian Omar Salvioli, para. 2.

¹⁷¹ *Ibid*, paras 11-12.

B. Public Educational Institutions

Restrictions of religious symbols and clothing within public educational institutions are treated differently than the other public institutions, as certain arguments of the State parties were exclusively invoked in this area. First, the risk of indoctrination of pupils would come into play. Moreover, many states also assert that the duty of neutrality and impartiality have a particular importance within the context of education and teaching. On the other hand, the context is essentially connected with the right to education and the right of parents to ensure such education is in conformity with their religious convictions under the Article 2 of the Protocol No.1 of the ECHR. Thus, the area of public educational institutions deserves a separate attention.

There are ten cases before the ECtHR that concern restrictions of religious symbols or clothing within the educational institutions. Seven cases among the ten were declared inadmissible, while three were concluded to be no violation of the right to manifest religious belief. The HRC, on the other hand, engaged with three communications concerning the educational institutions so far, and all concluded with a violation of the right to freedom of religion.

1. Schools

The ECtHR adjudicated nine cases concerning bans and dismissals of pupils and students from primary and secondary educational institutions. *Köse and 93 others v. Turkey*¹⁷² is the first case to deal with this issue. The case concerns a ban on wearing a headscarf within the premises of Imam-Hatip schools (religiously oriented public secondary schools) in Turkey. The first pile of the applicants were students at the Imam-Hatip schools, who claim that the ban on wearing a headscarf within the school premises violated their right to manifest religious belief as well as right to education. They also asserted that they provided photographs in the admission process demonstrating them wearing headscarves. Second pile of applicants consist of parents of those students, who claim that the ban also violated their right under Article 2 of the Protocol No. 1 of the ECHR. They stated that they had enrolled their

¹⁷² *Köse and 93 others v. Turkey*, App. No. 26625/02 (ECtHR, 24 January 2006), inadmissibility decision.

children to the İmam-Hatip schools, as they believed that their children would receive an education consistent with their religious and philosophical convictions. The ECtHR declared the application inadmissible as manifestly ill-funded. The Court found that the dress code on pupils was a general measure that is applied to all pupils irrespective of their religious beliefs, and even assuming that there had been an interference with the applicants' right to manifest religious belief, there was no appearance of a violation of Article 9 of the Convention. As for the claims under Article 2 of the Protocol No. 1 of the ECHR, the Court stated the students are free to attend the courses if they obey the rules, as the refusal has not been accompanied by disciplinary measures. The Court declared that the restriction was justifiable and proportionate to the aims of protecting the rights and freedoms of others, preventing disorder and preserving the neutrality of secondary education.

*Doğru v. France*¹⁷³ and *Kervancı v. France*¹⁷⁴ cases both concern French secondary school students of Turkish origin, who were refused to keep their headscarves on during physical education classes. Both of the applicants received disciplinary measures for failing to participate actively in those classes which were upheld by domestic courts. Unlike *Köse and others*, the ECtHR acknowledged that expulsion of pupils constitutes a 'restriction'. However, the Court held that there had been no violation of Article 9 of the Convention in both of the cases. First, it considered that the conclusion reached by domestic courts that wearing of a headscarf was incompatible with sport classes for reasons of health or safety is not unreasonable.¹⁷⁵ Second, it also concluded that the applicants were properly informed about the rules applicable on the school premises, and their refusal to comply with those rules cannot constitute a breach of their rights. It also underlined that the applicants are able to continue their studies.¹⁷⁶ Lastly, the Court noted that in the establishment of the requirements of secularism, a margin of appreciation must be left to the member states.¹⁷⁷

¹⁷³ *Doğru v. France*, App. No. 27058/05 (ECtHR, 4 December 2008).

¹⁷⁴ *Kervancı v. France*, App. No. 31645/04 (ECtHR, 4 December 2008).

¹⁷⁵ Para. 73 of both *Doğru v. France* and *Kervancı v. France*.

¹⁷⁶ Para. 76 of both *Doğru v. France* and *Kervancı v. France*.

¹⁷⁷ Para. 72 of both *Doğru v. France* and *Kervancı v. France*.

Only months after the *Doğru* and *Kervancı* judgments, the ECtHR released six decisions (*Jasvir Singh v. France*¹⁷⁸, *Ranjit Singh v. France*¹⁷⁹, *Aktaş v. France*¹⁸⁰, *Bayrak v. France*¹⁸¹, *Gamaleddyn v. France*¹⁸² and *Ghazal v. France*¹⁸³) as regards the expulsion of pupils from various primary or secondary schools, pursuant to French Law No. 2004-228 of 15 March 2004 which prohibits wearing of conspicuous religious symbols in state schools. Two of the applicants were Sikh boys wearing *keskis* (an under-turban worn by younger Sikhs), where the others were Muslim girls wearing bonnets (substituting a headscarf). After refusing to remove their apparels, all applicants got expelled from their school. They claimed the French authorities breached their right to manifest religious belief, right to education as well as their right to non-discrimination.

The ECtHR based its decision on the six applications on the reasoning used in its previous *Doğru* and *Kervancı* judgments. Taking into account the wide margin of appreciation granted to the states on matters of principle of secularism and religious freedom, the Court stated that the prohibition was not disproportionate, as it aimed to protect the rights of others and public order. It also stated that the applicants were proposed alternative ways of education, such as home-schooling or private schools. All claims concerning breach of the right to manifest religious belief were declared inadmissible as manifestly ill-founded. The Court stated that there is no need to examine the claims regarding the right to education separately. As for the claims regarding right to non-discrimination, the Court stated that the law is applicable to all religious signs and did not target the specific affiliation of the applicants in question. Therefore, the claims concerning right to non-discrimination were also found manifestly ill-founded.

Few years later, the same 2004 French legislation was discussed by the Human Rights Committee, which adopted an opinion completely opposing the decisions of the ECtHR. In *Bikramjit Singh v. France*¹⁸⁴, the applicant was a high school student

¹⁷⁸ *Jasvir Singh v. France*, App. No. 25463/08 (ECtHR, 30 June 2009), inadmissibility decision.

¹⁷⁹ *Ranjit Singh v. France*, App. No. 275/61 (ECtHR, 30 June 2009), inadmissibility decision.

¹⁸⁰ *Aktaş v. France*, App. No. 43563/08 (ECtHR, 30 June 2009), inadmissibility decision.

¹⁸¹ *Bayrak v. France* App. No. 14308/08 (ECtHR, 30 June 2009), inadmissibility decision.

¹⁸² *Gamaleddyn v. France* App. No. 18527/08 (ECtHR, 30 June 2009), inadmissibility decision.

¹⁸³ *Ghazal v. France* App. No. 29134/08 (ECtHR, 30 June 2009), inadmissibility decision.

¹⁸⁴ *Bikramjit Singh v. France*, Comm. No. 1852/2008 (HRC, 4 February 2013), UN Doc. CCPR/C/106/D/1852/2008.

in France, wearing a *keski* in accordance with his religious beliefs. First, he was denied access to his classes pursuant to Law No. 2004-228. Then, he was sent to the school canteen, where he studied on his own while a teaching assistant provided him with the materials on request. He applied before a local administrative court for interim measures allowing him to attend class normally, or at least appear before a disciplinary board.¹⁸⁵ The Administrative Court ordered the high school for a disciplinary board to convene, which later issued a ruling for the immediate and permanent expulsion of the author. Before the Human Rights Committee, Mr. Bikramjit Singh claimed breaches of his right to manifest religious belief, right to respect one's private life (pursuant to Article 17 of the ICCPR) as well as right to non-discrimination (pursuant to Articles 2 and 26 of the ICCPR). The Committee considered the application under right to manifest religious belief, and built its reasoning structure based on the GC22. First, the HRC stated that the State party has not furnished compelling evidence as regards how the author posed a threat to the rights and freedoms of other pupils or to the order at the school by wearing a *keski*.¹⁸⁶ Second, the Committee also stated that the permanent expulsion of the author from the public school is disproportionate and led to serious effects on his education.¹⁸⁷ For his reasons, the HRC concluded a violation of the right to manifest religion. In line with its previous opinion on *Ranjit Singh v. France*, the Committee did not examine the claim based on a separate violation of the right to non-discrimination.¹⁸⁸

Besides the students, the ECtHR also adjudicated a case concerning the situation of a teacher wearing a headscarf in a state school.¹⁸⁹ The reasoning structure of the ECtHR in *Dahlab v. Switzerland*¹⁹⁰ is regarded as one of the most significant landmarks of the Court's jurisprudence on Islamic headscarves. The applicant, Ms. Lucia Dahlab was a public-school teacher to 4 to 8-year-old pupils, who converted to Islam and started wearing headscarves after she had joined the school. Ms. Dahlab wore her headscarf to work for five years until she was asked to remove it by the Director General of Primary Education. Upon her request, the Director General

¹⁸⁵ *Ibid*, para 2.5.

¹⁸⁶ *Ibid*, para 8.7.

¹⁸⁷ *Ibid*.

¹⁸⁸ *Ibid*, para 8.8.

¹⁸⁹ The HRC did not have the chance to adjudicate an application that concerns the rights of teachers within primary or secondary state schools to wear religious symbols of clothing yet.

¹⁹⁰ *Dahlab v. Switzerland* App. No. 42393/98 (ECtHR, 15 January 2001), inadmissibility decision.

issued a formal ruling on the matter, which was later approved by the Federal Court on the ground that the measure imposed on Ms. Dahlab was justified with the principle of denominational neutrality in state schools. Before the ECtHR, Ms. Dahlab complained of her right to manifest religious belief. She also submitted that the prohibition amounted discrimination on the ground of her sex within the meaning of Article 14 of the ECHR. In its examination, the ECtHR first noted that the Federal Court took into account the fact that the state school teachers are representatives of the State, and weighed the protection of the legitimate aim of ensuring the neutrality of the State education system against the applicant's freedom to manifest religion. Second, it also stated that the pupils were aged between four and eight and they could be easily influenced by a 'powerful external symbol' such as headscarf, as it may have some kind of a proselytising effect. Third, the Court also explicitly stated that the headscarf is "hard to square with the principle of gender equality". In the light of these determinations, the ECtHR concluded that the authorities did not exceed their margin of appreciation on freedom of religion, and declared the application inadmissible as manifestly ill-founded by the votes of the majority. As regards the complaint in conjunction with Article 14 of the Convention, the Court stated that the measure was not directed at her as a member of the female sex, as it could also be applied to a man who wore clothing that identified him as a member of a different faith. Accordingly, the court concluded that there was no discrimination on the ground of sex.

2. Universities

Three cases before the ECtHR¹⁹¹ and two before the HRC concern the bans, refusals and dismissals of (adult) students or teachers for wearing religious symbols or clothing within the University premises. All applications before the ECtHR were concluded inadmissible as manifestly ill-founded,¹⁹² whereas all communications before the HRC were concluded with a violation of right to manifest religion as well as the right to non-discrimination.

¹⁹¹ An application is pending before the ECtHR concerning the ban and refusal of an applicant's attendance to classes in a university while wearing a beard as a part of his religious observance. The applicant was also suspended with disciplinary sanctions on account of non-compliance with clothing regulations of the university, which resulted in his exclusion. See *Ince v. Turkey*, App No. 52772/08, Communicated on 18.09.2017.

¹⁹² The case of *Leyla Şahin v. Turkey* was later referred to the Grand Chamber and concluded with no-violation of Article 9 of the ECHR.

On 29 June 2004, the ECtHR issued its Chamber judgment on *Leyla Şahin v. Turkey*¹⁹³, rejecting a claim of a female university student who was prohibited from wearing a headscarf in classes. On 10 November 2005, the Grand Chamber of the ECtHR¹⁹⁴ upheld its Chamber judgment.¹⁹⁵ The case concerns an applicant who was then in her fifth year at Cerrahpaşa Faculty of Medicine in Istanbul University. In February 1998, the Vice-Chancellor of Istanbul University issued a circular, stating that “students whose heads are covered and students with beards must not be admitted to lectures, courses or tutorials.” Subsequently, Ms. Şahin was denied entrance to lectures and exams. She was also officially prevented from enrolling in a course. After participating in a demonstration protesting against the headscarf ban, Şahin and other demonstrators were suspended from Istanbul University.¹⁹⁶ The decision was upheld by the Administrative Court, stating that the Vice-Chancellor has the authority to regulate the dress codes within the university in order to maintain order. Before the ECtHR, Ms. Şahin claimed breaches of her right to manifest religion taken together with prohibition on discrimination, right to respect privacy, freedom of expression and right to education. Both the Chamber and the Grand Chamber (GC) built its reasoning structure on the right to manifest religion based on two principles: the importance of the protection of the principle of gender equality, and preserving the secular nature of the institutions.¹⁹⁷ The GC also noted that various forms of religious attire were forbidden at Istanbul University and the authorities conducted a dialogue with those concerned to avoid barring access to the campus.¹⁹⁸ In those circumstances and taking into account the margin of appreciation of States, the GC concluded that the measures should be considered to have been necessary in a democratic society, by sixteen votes to one. Regarding her claim on right to education, the GC also ruled that the applicant could reasonably have foreseen that she ran the risk of being refused access to courses and examinations if she continued to wear her headscarf that is contrary to the university regulations.¹⁹⁹ It concluded that the ban had not impaired the very essence of the applicant’s right to

¹⁹³ *Leyla Şahin v. Turkey*, App No. 44774/98 (29 June 2004).

¹⁹⁴ *Leyla Şahin v. Turkey*, App No. 44774/98 (10 November 2005), Grand Chamber.

¹⁹⁵ The GC of *Leyla Şahin* is also of importance for being the first case when an organ of the ECHR examines the merits of a case concerning wearing of a Islamic headscarf.

¹⁹⁶ The disciplinary penalties imposed on the applicant were later revoked under an amnesty law.

¹⁹⁷ *Leyla Şahin v. Turkey*, App No. 44774/98 (10 November 2005), Grand Chamber, paras 115 – 117.

¹⁹⁸ *Ibid*, paras 117-121.

¹⁹⁹ *Ibid*, paras 152 – 161.

education, again by sixteen votes to one. Ms. Şahin's claims regarding Articles 8,10 and 14 were rejected unanimously.

Judge Tulkens did not vote with the majority on the right to manifest religion and right to education. In her strong dissenting opinion, she discussed essential points that the judgment failed to address. First, Tulkens observed that the judgment did not address the fact that it is not the intent of the applicant to contravene the principle of secularism.²⁰⁰ Second, she argued that the judgment did not make any distinction between teachers and students, whereas it did so in *Dahlab*, stating the importance of the role-model aspect of the applicant. Tulkens also noted that the public servants and teachers are voluntarily taken up posts in a neutral environment, but the position of students should be considered differently.²⁰¹ Lastly, in her much-cited paragraph, Tulkens strongly opposed the constant contextualization of headscarves with Islamist extremism:

“Not all women who wear the headscarf are fundamentalists and there is nothing to suggest that the applicant held fundamentalist views. She is a young adult woman and a university student, and might reasonably be expected to have a heightened capacity to resist pressure, it being noted in this connection that the judgment fails to provide any concrete example of the type of pressure concerned. The applicant's personal interest in exercising the right to freedom of religion and to manifest her religion by an external symbol cannot be wholly absorbed by the public interest in fighting extremism.”²⁰²

In her assessment on the right to education, Tulkens also stated that the exclusion from lectures, examinations and consequently the university itself rendered Ms. Şahin's right to education ineffective and should be amounted to violation.²⁰³

In between the Chamber and the Grand Chamber judgments of *Leyla Şahin*, the ECtHR released another decision concerning the refusal of a Turkish male university student from entering the campus because he had a beard. In *Tığ v. Turkey*²⁰⁴, upon

²⁰⁰ Dissenting opinion of Judge Tulkens, para 7.

²⁰¹ *Ibid.*

²⁰² *Ibid*, para 10.

²⁰³ *Ibid*, paras 16 – 19.

²⁰⁴ *Tığ v. Turkey*, App No. 8165/03 (ECtHR, 24 May 2005), inadmissibility decision.

refusal, the applicant continued his education without a beard, and completed his course. Before the ECtHR, he claimed breaches of his right to respect privacy, right to manifest religious belief, freedom of expression and right to education. The ECtHR found all the applications inadmissible as manifestly ill-founded. In its determination on the right to manifest religious belief, the Court stated that the applicant had not claimed to have been inspired by a specific belief in which he was observing.

Also in between the Chamber and the Grand Chamber judgments of *Leyla Şahin*, on 18 January 2005, the HRC engaged with similar set of facts and claims in its communication on *Hudoyberganova v. Uzbekistan*²⁰⁵. The case concerned the claims of Ms. Raihon Hudoyberganova, a female university student wearing a headscarf at the Tashkent State Institute for Eastern Languages. In September 1997, the Institute closed the Muslim Prayer room, and students wearing headscarf were urged to study at the Tashkent Islamic Institute instead. In 1998, the Institute adopted new regulations under which students had no right to wear religious dress, and were requested to sign them. Ms. Hudoyberganova signed it, although next to her signature, she wrote that she disagreed with the relevant provisions. The next day, the Deputy Dean on Ideological and Educational Matters summoned her during a lecture, showed her the new regulations, and asked her to take off her headscarf. Later, she was suspended from the Institute, on the grounds that she had a negative attitude towards professors and she violated the Institution's regulations. Her appeals before the domestic courts were dismissed referring to a national law entered on 15 May 1998, which barred Uzbek nationals from wearing religious dresses in public places.²⁰⁶

Before the HRC, Ms. Hudoyberganova claimed that her right to manifest religion and her freedom of expression were violated. The Committee examined the application solely under Article 18 of the ICCPR. In its assessment, it stated that the State party has not invoked any specific ground as prescribed in the Article 18 (3) of the ICCPR.²⁰⁷ In the absence of any justification, the Committee concluded that there has been a violation of Article 18 (2) of the ICCPR. Three members appended

²⁰⁵ *Hudoyberganova v. Uzbekistan*, Comm. No: 931/2000 (HRC, 18 January 2005), UN Doc. CCPR/C/82/D/931/2000.

²⁰⁶ *Ibid*, para 2.10.

²⁰⁷ *Hudoyberganova*, para 6.2.

individual opinions to the decision. Sir Nigel Rodley made a comment solely as regards to the reasoning used by the majority. He stated that, since Uzbekistan had not explained the basis to justify the restriction, the HRC should not have taken into account the specifics of the context at all.²⁰⁸ Mr. Hipolito Solari-Yrigoyen, on the other hand, openly dissented to the conclusion of the Committee and argued that a State institute of education is not a place of worship²⁰⁹ and the academic institutions have the right to adopt specific rules to govern their own premises. Therefore, he stated that he is of the opinion that Ms. Hudoyberganova is not a victim of Article 18 of the ICCPR. Lastly, Ms. Ruth Wedgwood argued that the facts of the case were too obscure to make a conclusion on violation of the right to manifest religion. She also cited *Leyla Şahin* judgment of the ECtHR, stating a secular university could restrict women students in the use of a traditional headscarf because of the impact on other women students.²¹⁰

13 years after *Hudoyberganova*, the HRC had another chance to adjudicate another case concerning restrictions imposed on a student wearing a headscarf in a university. In *Şeyma Türkan v. Turkey*²¹¹, the applicant was then a student who recently passed the National Student Selection and Placement Examination (ÖSYS) in 2006 and became eligible to enrol in the School of Economics and Administrative Sciences of Karamanmaraş Sütçü İmam University. During the exam, she wore a wig to cover her hair, as the examination rules prevented students wearing headscarves from entering the examination room. Upon receiving her results, Ms. Türkan travelled to Kahramanmaraş for registration, using a wig again. However, she was refused to register, and told that the President of the University had given instructions not to register students wearing wigs in accordance with the Constitutional Court judgment in 1991. The decision of the University was upheld by the Administrative Court as well as the Council of State, referencing the principles of secularism and equality.²¹² Ms. Türkan claimed breaches of her right to manifest

²⁰⁸ Individual Opinion of Sir Nigel Rodley.

²⁰⁹ Individual Opinion of Mr. Hipolito Solari-Yrigoyen.

²¹⁰ Individual Opinion of Ms. Ruth Wedgwood.

²¹¹ *Şeyma Türkan v. Turkey*, Comm. No. 2274/2013 (HRC, 22 October 2018), UN.

Doc.CCPR/C/123/D/2274/2013/Rev.1.

²¹² *Ibid*, paras 2.4 – 2.8.

religion and right to non-discrimination (under both the Article 3 and Article 26 of the ICCPR) before the Human Rights Committee.

The HRC based its examination mainly on the principles enshrined in the GC22. It stated that although the author was wearing a wig instead of a headscarf, she did so in accordance with her religious beliefs and it should be considered as a manifestation of religious belief.²¹³ The Committee concluded that the State party did not clearly explain how the restriction satisfied the requirements of Article 18 (3) of the ICCPR or how it was necessary and proportionate. It noted that such a broad restriction without a clear justification on protection of public health, public safety, health, morals, or protecting the rights of others disproportionately affected the author, who lost the opportunity to pursue her studies.²¹⁴ As regards claims under right to non-discrimination, the Committee stated that the restriction disproportionately affected her as a Muslim woman; therefore it constitutes a form of intersectional discrimination.²¹⁵ Therefore, the HRC concluded a violation of Articles 18, 26 and 3 of the ICCPR unanimously. A concurring opinion was appended to the decision by Mr. Olivier de Frouville, stating that the Committee should find a violation on Article 18 on the grounds that the restriction lacked legal basis, as the Constitutional Court banned headscarves, which did not include wigs.²¹⁶

Besides the students, the ECtHR also examined a case regarding the situation of teachers wearing religious symbols or clothing in higher education.²¹⁷ *Kurtulmuş v. Turkey*²¹⁸ concerns an application of an associate professor at Istanbul University who faced disciplinary investigation for wearing a headscarf while teaching. She received a caution and was barred from promotion for two years. As she continued to wear a headscarf later, she received a reprimand and was deemed to have resigned. Her application seeking her penalties to be set aside was rejected by the Administrative Court as well as the Council of State, and she applied to the ECtHR claiming violations of her right to manifest religion. The ECtHR considered that the interference pursued legitimate aims, namely the protection of the rights and

²¹³ *Ibid*, para 7.3.

²¹⁴ *Ibid*, para 7.6.

²¹⁵ *Ibid*, paras 7.7 – 7.8.

²¹⁶ Individual opinion of Olivier de Frouville.

²¹⁷ So far, a teacher's right to manifest religion by wearing a clothing or symbol within higher education premises has not discussed by the Human Rights Committee.

²¹⁸ *Kurtulmuş v. Turkey*, App No. 65500/01 (ECtHR, 24 January 2006), inadmissibility decision.

freedoms of others and prevention of disorder. It stated that the applicant had chosen to become a civil servant and the dress code is applied to all members of the civil service aiming to uphold the principles of secularism and neutrality, particularly in the area of State education. In the light of the margin of appreciation, the Court concluded that the measures were justified and proportionate, and declared the case inadmissible as manifestly ill-founded.

Among all the cases that concern restrictions of religious clothing within public educational institutions, the ECtHR accepted the justifications provided by the States aiming to protect the secular nature of the institutions, through ‘protecting the rights and freedoms of others’. However, the HRC rejected similar claims, asserting that they do not meet the requirements provided by the Article 18 (3) of the ICCPR. Moreover, unlike the ECtHR, the HRC is also receptive towards the claims regarding gender based discrimination.

C. Public Institutions

Apart from the educational institutions, bodies of the ECHR and the ICCPR also adjudicated cases that concern restrictions of religious symbols and clothing within other public institutions such as hospitals, courthouses or prisons. A distinction can be made between the users and the representatives of the state.

1. Users

As regards users of the public institutions, the EComHR and HRC both had the chance to examine applications as regards claims of a prisoner to grow a beard. In *X. v. Austria*²¹⁹ before the EComHR, the applicant was a convert Buddhist, who was serving a twenty-year life sentence in prison. He claimed that the prison authorities interfered with his freedom to manifest religion by denying him to grow a chin beard that is in line with his religious beliefs. The authorities rejected his wish and forced him to shave, asserting that growing beards would hinder identification, therefore will be against prison order. The Commission, in agreement with the State, declared

²¹⁹ *X. v. Austria*, App No. 1753/63 (EComHR, 15 February 1965), inadmissibility decision.

the application inadmissible as manifestly ill-founded, stating that the restrictions were justified under Article 9 (2).²²⁰

The Human Rights Committee dealt with a similar set of facts decades later. In *Clement Boodoo v. Trinidad and Tobago*²²¹ before the HRC, the applicant was a citizen of Trinidad and Tobago of a Muslim faith, who is serving a 10-year prison sentence at the time of the submission. His beard was forcibly shaved off by the authorities multiple times, and he has been forbidden from growing a beard since. The Committee stated that growing a beard is a form of manifesting religion and in the absence of an expression from the State party; it concluded that there has been a violation of Article 18 of the Covenant.²²²

In *Hamidović v. Bosnia and Herzegovina*²²³, the Court dealt with the conviction of a witness for contempt of court for refusing to remove his skullcap during a hearing. The applicant, Mr. Husmet Hamidović, is a witness in a criminal case concerning the attack on the US Embassy in Sarajevo in 2011.²²⁴ On 10 September 2012, Mr. Hamidović appeared before the State Court as summoned, stood up as requested, but refused to remove his skullcap. Upon the decision of the presiding judge, he was expelled from the courtroom, convicted for contempt of court, and sentenced to fine. The appeals chamber held that “in a secular state as Bosnia and Herzegovina, any manifestation of religion in a courtroom was forbidden”.²²⁵ After Mr. Hamidović failed to pay the fine, it was converted into 30 days of imprisonment, which he duly

²²⁰ Since the application is nearly six decades old, it might not reflect the current position of the Court. Five applications are now pending before the ECtHR concerning the same issue. See *Taran v. Russia*, App No: 11327/10, Communicated on 02.05.2016, *Abakar Gaziyeu and others v. Azerbaijan*, App No. 49349/12, Communicated on 29 August 2017, *Kotelnikov v. Russia and 4 other applications*, App No. 1519/13, Communicated on 20.09.2017, *Kulesh v. Russia and 3 other applications*, App No. 45919/13, Communicated on 05.10.2017 and *Kulesh v. Russia and 3 other applications*, App No. 45919/13, Communicated on 05.10.2017.

²²¹ *Clement Boodoo v. Trinidad and Tobago*, Comm. No: 721/1996 (HRC, 15 April 2002), UN Doc. CCPR/C/74/D/721/1996.

²²² *Ibid*, para 6.6

²²³ *Hamidovic v. Bosnia and Herzegovina*, App No. 57792/15 (ECtHR, 5 December 2017).

²²⁴ Mr. Hamidović is of the same religious community as the three accused people in that case, namely the Wahhabi/Salafi version of Islam. The accused people also wore a skullcap throughout the hearings, but unlike Mr. Hamidovic, they publicly expressed that they did not recognize the court.

²²⁵ *Hamidovic*, para 8.

served. Later on 9 July 2015, the Constitutional Court of Bosnia and Herzegovina found no breach as regards religious freedom or discrimination clauses.²²⁶

Before the ECtHR, Mr. Hamidović first contested as to the legality of the limitation, stating that no statutory provision expressly prohibited the wearing of the skullcap in the courtroom, as the relevant article of the Criminal Procedural Code only mentions ‘causing a disturbance’ or ‘failing to comply with the orders’.²²⁷ Mr. Hamidović also contested as to the proportionality, stating that the ban eventually sends a message to the religious community that they would be imprisoned when they enter into the state court premises.²²⁸ The judgment of the ECtHR is primarily based on proportionality analysis. The Court first underlined that the applicant had no choice but to appear before the court, as witnesses who fail to appear would be fined or arrested. Also, he stood up while addressing the court, as he aimed no hidden agenda of mockery. Second, the court distinguishes the case from the cases concerning wearing religious symbols of the public officials, ‘who may be under a duty of discretion, neutrality and impartiality.’²²⁹ The Court therefore concluded that punishment of Mr. Hamidović on the sole ground of his refusal to remove his skullcap was not necessary in a democratic society, and that the domestic authorities had exceeded their margin of appreciation.²³⁰ Two separate concurring opinions and a dissenting opinion were issued to the judgment. First, Judge De Gaetano discussed the requirement of legality. He argued that the applicant’s claim should not even reach the proportionality stage, as the provisions were not sufficiently provided in law.²³¹ Second, Judge Bošnjak mentioned that since the presiding judge failed to explain in

²²⁶ *Hamidovic*, paras 10 and 11. However, it found a breach as regards right to a fair trial, because of the automatic conversion of the fines into imprisonment, relying on the principle of legal certainty. It also should be noted that two of the eight judges of the Constitutional Court appended dissenting opinions. The two judges disagreed with the majority based on two arguments. First, they stated that the applicant was not disrespectful to the court, as he appeared as summoned and stood up. Second, unlike public officials, private citizens do not owe a duty of neutrality. Therefore, in their opinion, the applicant’s sentence is a disproportionate interference with his right to freedom of religion.

²²⁷ “Should ... a witness ... cause a disturbance in the courtroom or fail to comply with an order of ... the presiding judge, ... the presiding judge shall warn him or her. If the warning is unsuccessful...the presiding judge may order that the person be expelled from the courtroom and be fined in an amount of up to BAM 10,000”, *Hamidovic*, para. 17.

²²⁸ *Hamidovic*, para. 28.

²²⁹ *Hamidovic*, para. 37.

²³⁰ It should be noted that the ECtHR stated in *obiter dictum* that “there may be cases when it is justified to order a witness to remove a religious symbol” while referring to niqab and burqa. See paras 22 and 41 of the *Hamidovic*.

²³¹ Concurring Opinion of Judge de Gaetano, para 3.

what way the skullcap undermined the order of the courtroom, the sanction imposed on Mr. Hamidović would be disproportionate.²³² Lastly, the single dissenter Judge Razzoni suggested that principles of subsidiarity and the margin of appreciation should limit the interference of the ECtHR, and it should not interfere the way that national courts choose to regulate wearing of religious symbols within courtrooms.²³³

In *Lachiri v Belgium*²³⁴ before the ECtHR, the court also examined claims of a woman who was excluded from a courtroom for wearing a headscarf. The applicant, Mrs. Hagar Lachiri was a civil party in a criminal case, seeking damages in relation to the violent killing of her brother. On 20 January 2007, Mrs. Lachiri went to the Indictments Division of the Brussels Court of Appeals, to attend a hearing dedicated to decide whether the accused person should be tried for unintentional death or murder. At the gate, the usher of the court warned Mrs. Lachiri that she would not be accepted to the courtroom unless she removed her headscarf, upon the decision of the presiding judge. In response to a clarification request made by Mrs. Lachiri's lawyer, the president stated that their ruling is based on Article 759 of the Belgian Judicial Code which states that the audience should attend the sessions with 'uncovered heads'. Mrs Lachiri refused to comply with the order, and eventually did not attend the hearing. Her lawyers unsuccessfully challenged the decision before the Court of Cassation, which was declared inadmissible. Before the ECtHR, Mrs. Lachiri relied on Article 9 of the ECHR, complaining that her exclusion from the courtroom on account of her refusal to remove her headscarf had infringed her freedom to manifest her religion.

Seven judges of the ECtHR have divided into three in their ways of conclusion. Four of them found a violation of the right to manifest religious belief, based on the interference could not be deemed 'necessary' in terms of Article 9 (2) of the ECHR. Like *Hamidovic*, the court stated the fact that she is not a representative of the state, but a mere citizen. Therefore, she is not bound by any duty of discretion in the public manifestation of her beliefs.²³⁵ It was concluded that the restriction on her right to manifest religious beliefs would not be justified in a democratic society. Two judges of the ECtHR also found a violation of the right to manifest religious belief, however

²³² Concurring Opinion of Judge Bosnjak, paras. 3-4.

²³³ Dissenting opinion of Judge Ranzoni, paras. 16 – 22.

²³⁴ *Lachiri v. Belgium*, App No. 3413/09 (ECtHR, 18 September 2018).

²³⁵ *Lachiri*, para. 44.

they argued that the rule on uncovering the heads is not sufficiently predictable, therefore the interference could not be counted as '*prescribed by law*' under the 9 (2) of the Convention.²³⁶ Judge Mourou-Vikström is the single dissenter in the case who is of the opinion that denying the entry of Mrs. Lachiri is not a disproportionate interference in this case, as she had a lawyer and was still being represented in the trial.²³⁷ She also stated that the States should enjoy a wide margin of appreciation regarding the dress to be adopted in courtrooms, as the national authorities have the direct democratic legitimacy.²³⁸

The cases of *Hamidovic* and *Lachiri* are of particular importance as regards discussing the limits of margin of appreciation in accordance with wearing of religious dresses.²³⁹ Also, the cases provide an explanation about the duty of neutrality, by stating that this duty primarily concerns the actions of the public officials, and not citizens.

2. Public Officials

The situation of the public officials to wear religious symbols and clothing were extensively discussed in three applications before the ECtHR, and appeared in one application before the HRC. The ECtHR first examined the situation of Ms. Shirley Chaplin, the second applicant in *Eweida and others v. the United Kingdom*²⁴⁰. Ms. Shirley Chaplin was working as a geriatrics nurse at a state hospital in the UK. She was asked to remove her cross necklace, on the grounds that it might cause injury if an elderly person pulled on it, or it could come into contact with open wounds. Ms. Chaplin was offered to wear her cross in the form of a brooch attached to her uniform, or tucked under a high-necked top. Refusing to comply with the policy, Ms. Chaplin was transferred to a non-nursing position. In less than a year, that position was closed by the hospital for lack of need. She applied to an employment tribunal complaining on both direct and indirect discrimination on religious grounds which rejected her claims.

²³⁶ Concurring opinions of Judges Vucinic and Gritco.

²³⁷ Dissenting opinion of Judge Mourou-Vikström, para. 26.

²³⁸ Dissenting opinion of Judge Mourou-Vikström, paras. 34-40.

²³⁹ *Lachiri v. Belgium* is also of importance for being the first judgment of the ECtHR concluding a violation of the right to manifest religious belief in accordance with wearing an Islamic headscarf.

²⁴⁰ *Eweida and others v. the United Kingdom*, Apps Nos. 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).

In its judgment, the ECtHR mentioned that the applicant's employer was a public authority, and the reason for asking her to remove the cross was in accordance with health and safety on a hospital ward.²⁴¹ The Court noted that this is also a field where the domestic authorities must be allowed a wide margin of appreciation. It was unanimously concluded that the interference was necessary in a democratic society, and there has been no violation of Article 9. Also, the Court stated that there is no basis to examine Article 14 of the ECHR.

In *Ebrahimian v. France*²⁴², the ECtHR adjudicated another case concerning a social worker who was recruited by a public hospital on a fixed-term contract. The applicant, Ms. Christine Ebrahimian was informed by the hospital that her contract would not be renewed based on her refusal to remove her headscarf and the subsequent complaints made by a number of patients. The hospital also stated that they have to comply with the opinion of the *Conseil d'État*, noting the principle of neutrality in public services. Ms. Ebrahimian's applications to domestic courts were also rejected on the basis of the principle of *laïcité* of the French State.

In its judgment, the ECtHR mainly relied on its previous case-law, especially on *Kurtulmuş* and GC judgment of *Leyla Şahin*. The Court stated that the restriction aimed to establish the neutrality of the public service, therefore pursued the aim of protecting the rights and freedoms of others. In its necessity assessment, the Court noted in particular that the applicant was employed in a public hospital, and is entitled to refrain from manifesting her religious beliefs when carrying out her duties, in order to guarantee equality of treatment for the individuals concerned.²⁴³ Thus, the ECtHR concluded no violation of the right to manifest religious belief, by six votes to one. Despite voting with the majority, Judge O'Leary wrote a critical concurring opinion. She stated that the case differs from the previous jurisprudence of the ECtHR, as it does not concern the educational context and the judgment did not sufficiently discuss this extension.²⁴⁴ Judge De Gaetano was the single dissenter in

²⁴¹ *Eweida and others v. the United Kingdom*, paras. 98 – 100.

²⁴² *Ebrahimian v. France*, App. No: 64846/11 (ECtHR, 26 November 2015).

²⁴³ *Ibid*, para. 64.

²⁴⁴ Partly Concurring and Partly Dissenting Opinion of Judge O'Leary.

the case, mainly arguing that manifesting religious belief of a public official does not necessarily overturn the impartiality of the public service.²⁴⁵

The situation of an attorney wearing a headscarf appeared before the ECtHR in 2016; however, it lost the chance to be examined thoroughly. Case of *Barik Edidi v. Spain*²⁴⁶ concerned an application of Ms. Zoubida Barik Edidi, a lawyer, who was asked to return to the area within the courtroom that was reserved for public attendants on the ground that she was wearing a headscarf instead of an official cap (biretta) required for the barristers. Ms. Barik Edidi lodged an administrative appeal about the ruling, concerning the internal functioning of the courts. She also requested for judicial review. Both her applications were dismissed, as was her appeal to the Constitutional Court. In its decision, the ECtHR agreed with the submissions made by the State, which states that the Supreme Court was the appropriate channel to Ms. Edidi's complaints. However, she did not appeal to it on time. Therefore, the ECtHR did not discuss the merits either, for failure to exhaust domestic remedies and declared the application inadmissible by the votes of the majority.

In 2002, the HRC examined a unique case concerning an application of retired police officers who are claiming that the decision of the Royal Canadian Mounted Police to allow wearing of the Khalsa Sikh turbans instead of a stetson hat as a uniform should be unconstitutional. In *Kenneth Riley, Howard Stacey Davis and Kirsten Margrethe Mansbridge v. Canada*²⁴⁷, the authors asserted that the police forces are the most visible State agency, and in order to protect their rights under Article 18 of the ICCPR, the State should remain secular.²⁴⁸ They also claimed that this special status allowed to Khalsa Sikhs created a distinction on the basis of religion and it is contrary to non-discrimination clauses of the Articles 2 and 26 of the ICCPR. In its proceedings, the HRC briefly stated that "the authors have failed to show how the enjoyment of their rights under the Covenant has been affected by allowing Khalsa Sikh officers to wear religious symbols"²⁴⁹ The Committee decided that the

²⁴⁵ Dissenting Opinion of Judge De Gaetano.

²⁴⁶ *Barik Edidi v. Spain* App No. 21780/13 (ECtHR, 26 April 2016), inadmissibility decision.

²⁴⁷ *Kenneth Riley, Howard Stacey Davis and Kirsten Margrethe Mansbridge v. Canada*, Comm. No. 1048/2002, (HRC, 21 March 2002), UN. Doc. CCPR/C/74/D/1048/2002.

²⁴⁸ *Ibid*, para .3.3.

²⁴⁹ *Ibid*, para. 4.2.

applicants cannot be considered as victims, and declared the communication inadmissible.

Considering all the applications before the ECtHR regarding the situation of public institutions, it could be stated that the Court draws a line between users and state representatives, and it started to reject the state justifications on protecting the secular nature of the public services for the former. *X v. Austria* before the EComHR might be the only exception. However, taking into account the recent case law, the arguments of the Commission might not be adopted by the Court in the future. It can therefore be safely assumed that, regarding the applications concerning users of the public institutions, positions of the ECtHR and the HRC could converge in the future. On the other hand, the ECtHR is willing to accept the justifications of States as regards the public officials. Considering the insufficient applications before the HRC as regards the situation of the state representatives, it would be hard to make a health comparison between the two bodies at this point.

D. Private Workplace

The first applicant in *Eweida and others v. the United Kingdom* before the ECtHR and *F.A v. France*²⁵⁰ before the HRC examined the claims concerning wearing of religious symbols or clothing at private workplace.²⁵¹ Both cases were concluded with a violation of the right to manifest religious belief.

The case of Ms. Nadia Eweida concerns claims of a woman working as a check-in staff for British Airways, a private company. She started to wear a visible cross necklace contrary to the uniform policy of British Airways. Refusing to comply with the instructions, she was suspended from work. Ms. Eweida was later offered administrative work without customer contact, but she rejected. Four months later, British Airways changed its policy to allow the display of certain religious symbols and Ms. Eweida returned to work with permission to wear the cross. However, the company refused to compensate her lost earnings during the period of her

²⁵⁰ *F.A v. France*, Comm. No. 2662/2015 (HRC, 24 September 2018), UN. Doc. CCPR/C/123/D/2662/2015.

²⁵¹ An application is now pending before the ECtHR concerning the claims of a woman wearing a headscarf who is working as a nurse in a private hospital. The hospital refused the applicant's wish and notified her that it would not be possible to continue employment under these conditions. See *Türk v. Germany*, App No. 61347/16, Communicated on 12.09.2018.

suspension, which was approved by the domestic courts. Ms. Eweida claimed breaches of her right to manifest religious belief taken in conjunction with Article 14 of the ECHR.²⁵² The ECtHR built its examination on proportionality analysis, and stated that there was no evidence that items of religious clothing had any negative impact on British Airways' brand or image.²⁵³ By a majority of five votes to two, the ECtHR found a violation of the right to manifest religious belief. The Court did not consider it necessary to examine Article 14 separately. Judges Bratza and Björgvinsson wrote a joint partly dissenting opinion, arguing that the British Airways had not acted disproportionately as they offered to change her position during the review, and finally offered her original job back.²⁵⁴

The case of *F.A v. France* before the HRC concerned an educational childcare centre employee who was fired for violating the centre's policy on secularity and neutrality by wearing a headscarf. Ms. F.A challenged the decision of the centre before the French Courts; however, the decision was found proportionate by the Court of Cassation, taking into account the nature of the tasks performed by the applicant (being in a constant and direct contact with young children and their parents).²⁵⁵ She brought to complaint before the HRC, alleging a violation of her right to manifest religion under Article 18 and prohibition of discrimination under Article 26 of the ICCPR.

The HRC first stressed that restriction was not objectively justified. It noted that the State party has not provided sufficient justification in accordance with Article 18 (3) of the ICCPR as to why the wearing of a headscarf by an educator in a childcare centre would violate the rights and freedoms of children and parents.²⁵⁶ The Committee also stated that the obligation imposed on the author to remove her headscarf which followed her dismissal cannot be considered as a proportionate measure in the light of paragraph 8 of the GC22.²⁵⁷ It concluded that there was a

²⁵² The applicant did not invoke the right to freedom of religion before the domestic courts and her case was discussed under discrimination provisions. However, the Court stated that Ms. Eweida's behaviour was a manifestation of her religious belief and attracted the protection of Article 9 of the ECHR. *Eweida and others*, para. 89.

²⁵³ *Eweida and others*, paras. 93 – 94.

²⁵⁴ Joint Partly Dissenting Opinion of Judges Bratza and Björgvinsson.

²⁵⁵ *F.A v. France*, para 2.6.

²⁵⁶ *Ibid*, para. 8.8.

²⁵⁷ *Ibid*, paras. 8.4 and 8.9.

violation of right to manifest religion, and also an intersectional discrimination based on gender and religion, in violation of Article 26 of the ICCPR.²⁵⁸

Although the circumstances of the applications are not fully comparable, both *Eweida* and *F.A* concluded with a violation of the right to manifest religious belief. As women with a headscarf or other people wearing religious clothing or symbols had also suspended from work at the British Airways, the ECtHR did not examine the discrimination claims in *Eweida*. The difference between the two bodies would be fully comparable once the ECtHR releases its decision in *Türk v. Germany*.²⁵⁹

E. Public Sphere

Four cases were examined by the ECtHR and two by the HRC that concern restrictions of religious clothing in the public sphere, where the bodies employed completely different reasoning structures.

*Ahmet Arslan and others v. Turkey*²⁶⁰ concerns the criminal conviction of 127 members of a religious group (Aczmendi tarikati) for wearing religious clothing in public (including a turban, baggy pants, a tunic of all black colour, and a stick.). The members of the group participated in a religious ceremony in Kocatepe Mosque in Ankara, and then went around the city while wearing the same outfit. They were arrested and charged under anti-terrorism laws. On their hearing day, the applicants appeared before the court wearing the same outfits. Some members also refused to remove their turban when asked by the court. In the end, all applicants were sentenced for violating Law No. 671 of 28 November 1925 on the wearing of hats (which abolishes the use of religious headgear) and Law No. 2596 of 3 December 1934 on regulating the wearing of certain garments (which imposes a ban on religious clothing other than places of worship or at religious ceremonies).

The ECtHR first noted that the applicants were actually convicted for their religious dresses in public, rather than disrespecting the court.²⁶¹ Then, the Court emphasised that the applicants are ordinary citizens, and not representatives of the State. Therefore, they cannot be subjected to an obligation of discretion of their religious

²⁵⁸ *Ibid* paras. 8.10 and 8.13.

²⁵⁹ *Supra* note 251.

²⁶⁰ *Ahmet Arslan and others v. Turkey*, App. No. 41135/98 (ECtHR, 23 February 2010).

²⁶¹ *Ibid*, para. 46.

convictions.²⁶² Lastly, the Court underlined that the reasoning developed in *Leyla Şahin* is not applicable here, as the case concerns public places open to all, rather than the public institutions.²⁶³ The Court concluded that the restriction was not based on sufficient grounds under Article 9 of the ECHR, and found a violation thereof by six votes to one. Judge Popovic disagreed with the majority, stating the wide margin of appreciation would be appropriate in order to protect the principle of secularity and the maintenance of the constitutional democracy regime in Turkey.

Four years later, the ECtHR upheld the ban on face-covering in public in a controversial case of *S.A.S v. France*²⁶⁴, where it developed a completely different reasoning structure than *Ahmet Arslan and others*. The applicant challenged the Law No. 2010-1192 of 12 October 2010, which prohibits the covering of face in public in France. She stated that she wears burqa and niqab in accordance with her religious beliefs, but did not claim that she should be able to keep her veil while undergoing a security check, at the bank or in the airports. She also agreed to show her face when requested to do so for necessary identity checks.

The Grand Chamber of the ECHR examined the application under right to private life, right to freedom of religion and prohibition of discrimination. The Court noted that the government invoked two aims in relation to the Law No. 2010-1192. First, it stated that the restriction satisfied the need to identify individuals in order to prevent danger and to combat identity fraud, which was linked with ‘protection of public safety’.²⁶⁵ Second, the government referred to three values: respect for equality between men and women, respect for human dignity and respect for minimum set of values of an open and democratic society (also named ‘living together’ or ‘le vivre ensemble’) which were linked with ‘protection of the rights and freedoms of others’.²⁶⁶ The Court was not convinced by the first two arguments, but stated that ‘living together’ can be linked to the legitimate aim of the protection of the rights and freedoms of others.²⁶⁷ Therefore, the Court only tested the necessity of the arguments of public safety and ‘living together’ doctrine.

²⁶² *Ibid*, para. 48.

²⁶³ *Ibid*, para. 49.

²⁶⁴ *S.A.S v. France*, App No. 43835/11 (ECtHR, 1 July 2014), Grand Chamber.

²⁶⁵ *Ibid*, para. 115.

²⁶⁶ *Ibid*, para. 116.

²⁶⁷ *Ibid*, paras. 118 – 121.

In assessing the necessity of public safety, the Court stated that a blanket ban on face-covering can be regarded as proportionate only in contexts where there is a general threat to public safety. In the absence of such a threat, the ECtHR found that a blanket ban was disproportionate.²⁶⁸ While assessing the necessity of ‘living together’, the ECtHR first attempts to describe the importance of ‘face’ in society:

“The face plays an important role in social interaction. It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question.”²⁶⁹

After recognizing the importance of face in social interaction and the government claim on Law No. 2010-1192 was framed in a neutral way,²⁷⁰ the ECtHR was convinced that the State party was “seeking to protect a principle of interaction between individuals”.²⁷¹ The majority concluded that there has been no violation of Articles 8 and 9 of the ECHR as the ban was proportionate to the aim pursued. A critical dissenting opinion was presented by Judges Nussberger and Jäderblom, stating that the concept of ‘living together’ cannot be considered as a legitimate aim of protecting the rights and freedoms of others, as the concept is far-fetched and vague.²⁷² The judges also stated that a criminalization of a full-face veil cannot be considered proportionate even with the acceptance of a broad margin of appreciation, as the ECtHR still has the task to protect minorities against disproportionate interferences.²⁷³

On 11 July 2017, the ECtHR delivered two judgments concerning the Belgian niqab ban, reaching the same conclusions as in *S.A.S. In Belcemi and Oussar v. Belgium*,²⁷⁴ two applicants were fined based on a municipal face-covering ban, after the enactment of the national ban. The first applicant, Ms. Samia Belcemi stated

²⁶⁸ *Ibid*, para. 139.

²⁶⁹ *Ibid*, para. 122.

²⁷⁰ *Ibid*, para 151.

²⁷¹ *Ibid*, para 153.

²⁷² Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom, para 5.

²⁷³ *Ibid*, para 20.

²⁷⁴ *Belcemi and Oussar v. Belgium*, App No. 37798/13 (ECtHR, 11 July 2017).

that she decided to continue wearing niqab in the street after the ban, however she constantly fears of being fined or imprisoned. The second applicant, Ms. Yasmina Oussar stated that she decided to stay at home which resulted in restrictions on her private and social life. The two applicants brought an action for annulment of the law before the Belgian Constitutional Court. Their cases were dismissed. In *Dakir v. Belgium*²⁷⁵, the applicant Ms. Fouzia Dakir challenged a by-law adopted by three Belgian municipalities banning face-coverings before the *Conseil d'État*. Her case was also dismissed for failure to comply with an admissibility condition. The ECtHR, in nearly identical judgments, accepted that the State party was responding to a practice that is considered incompatible with social communication and functioning of a democratic society.²⁷⁶ Although the penalties imposed by Belgian law include a prison sentence for repeat offenders, the Court considered the restriction was proportionate and held that the applicants right to manifest religious belief were not violated.

The same 2010 French legislation prohibiting face covering in public also appeared before the HRC. On 18 July 2018, the Committee released its opinion in *Yaker v. France*²⁷⁷ and *Hebbadj v. France*,²⁷⁸ where it came to the opposite conclusion to the ECtHR. The cases began when two applicants, Sonia Yaker and Miriana Hebbadj were separately stopped for identity checks while wearing their niqab on the streets of Nantes. Two women were prosecuted and then convicted to pay a fine of 150 euros for wearing a garment to conceal their face in public, pursuant to the Law No. 2010-1192. Before applying to the HRC, both applicants also tried the ECtHR. However, their applications were rejected as inadmissible for unspecified reasons.²⁷⁹ Ms. Yaker and Ms. Hebbadj raised identical complaints before the HRC, stating that wearing niqab is a part of their religious practice, and the convictions violated their right to freedom of religion under Article 18 of the ICCPR. The authors also submitted a claim under Article 26 of the ICCPR, arguing that the application of Law No. 2010 – 1192 does not treat them in the same way as it treats the rest of the

²⁷⁵ *Dakir v. Belgium*, App No. 4619/12 (ECtHR, 11 July 2017).

²⁷⁶ Paras. 55 of *Belcacemi and Oussar and Dakir*.

²⁷⁷ *Yaker v. France*, Comm. No. 2747/2016 (HRC, 17 July 2018), UN Doc. CCPR/C/123/D/2807/2016.

²⁷⁸ *Hebbadj v. France*, Comm. No. 2807/2016, (HRC, 17 July 2018), UN Doc. CCPR/C/123/D/2807/2016.

²⁷⁹ Paras. 2.11 of *Yaker and Hebbadj*.

population, causing indirect discrimination.²⁸⁰ The government invoked public safety and ‘living together’ arguments, as it did in S.A.S.

In both cases, the HRC first noted that the State party has not provided any public safety justification for why covering the face for non-religious purposes, including sporting, artistic or other traditional purposes is allowed when religious purposes are not.²⁸¹ Second, the Committee observed that the concept of ‘living together’ is vague and abstract, and the State party “has not identified any specific fundamental rights or freedoms of others that are affected by the fact that some people present in the public space have their face covered”.²⁸² The Committee further highlighted that even if a justification on public order was presented or assuming the concept of living together considered a legitimate objective, the State party also failed to demonstrate that the criminal was proportionate to the least restrictive measure to these aims.²⁸³ Consequently, the HRC concluded that the prohibition was not necessary to serve a legitimate interest, and the applicants’ right to freedom of religion were therefore violated. As for the right to non-discrimination, the HRC found that the prohibition has a disproportionate impact on Muslim women, as the law is primarily enforced against women wearing a niqab and burqa. The Committee therefore held that the ban violated the applicants’ right to non-discrimination.²⁸⁴

The decisions were not reached with the same arguments by all members of the HRC. Two concurring opinions and two dissenting opinions were issued to both decisions. In the first joint concurring opinion, five members of the HRC were more receptive towards State’s implicit claim that full-face veils may perpetuate gender inequality. They considered the wearing of the full-face veil to be a “traditional practice that has allowed men to subjugate women in the name of preserving their ‘modesty’, which results in women not being entitled to occupy public space on the same terms as men.”²⁸⁵ In the second joint concurring opinion, two members of the HRC further observed that the State has failed to explain in which ways its

²⁸⁰ Paras. 3.12 – 3.14 of *Yaker* and *Hebbadj*.

²⁸¹ Paras. 8.6 – 8.8 of *Yaker*; paras. 7.6 – 7.8 of *Hebbadj*.

²⁸² Paras. 8.9 – 8.12 of *Yaker*; paras. 7.9 – 7.12 of *Hebbadj*.

²⁸³ *Ibid.*

²⁸⁴ Para 8.13 of *Yaker*; para 7.13 in *Hebbadj*.

²⁸⁵ Joint opinion of Committee members Ilze Brandis Kehris, Sarah Cleveleand, Christof Heyns, Marcia V.J.Kran and Yuval Shany, para 2.

previously existing legislation providing uncovering one's face for specific times and locations is not adequate to ensure public safety and order.²⁸⁶

The dissenting opinions in *Yaker* and *Hebbadj* were in line with the earlier judgments of the ECtHR. In the first dissenting opinion, Committee member Yadh Ben Achour concluded that prohibition of the wearing of full-face veil and its penalization by fine is justified by the State's interest in public safety and order, especially in the French context, "given the ongoing battle against terrorists, some of whom have carried out attacks and assassinations in France and elsewhere disguised with niqabs".²⁸⁷ He also argued that "niqab in itself is a symbol of stigmatisation and degrading of women" and it "violates the fundamental rights and freedoms of others, precisely, the rights of other women".²⁸⁸ In the second dissenting opinion, Committee member Jose Manuel Santos Pais cited the arguments used by the ECtHR on S.A.S and several terrorist attacks by Al-Qaida and ISIS in France between 2015 and 2017. He underlined the importance of identification of the possible perpetrators, and argued that the prohibition is justified on protecting rights and freedoms of others as well as public order grounds.²⁸⁹ As regards the allegations of indirect discrimination, Mr. Jose Manuel Santos Pais argued that the penalties were not imposed in a discriminatory manner on Islamic women, as "they violated the ban".²⁹⁰

Among all cases, the reasoning structures used by the ECtHR and the HRC completely oppose each other. The HRC firmly disagreed with the ECtHR as regards acceptance of 'living together' as a legitimate aim to restrict manifesting religious belief. Moreover, unlike the ECtHR, the Committee found violation on right to non-discrimination on both applications before it. Although every decision was held with strong dissenting opinions, this is the area where the strongest divergence between the two bodies is observed.

²⁸⁶ Joint opinion of Committee members Ilze Brandis Kehris and Sarah Cleveland, paras. 1-2.

²⁸⁷ Individual opinion of Committee member Yadh Ben Achour, para 2.

²⁸⁸ *Ibid*, para 3.

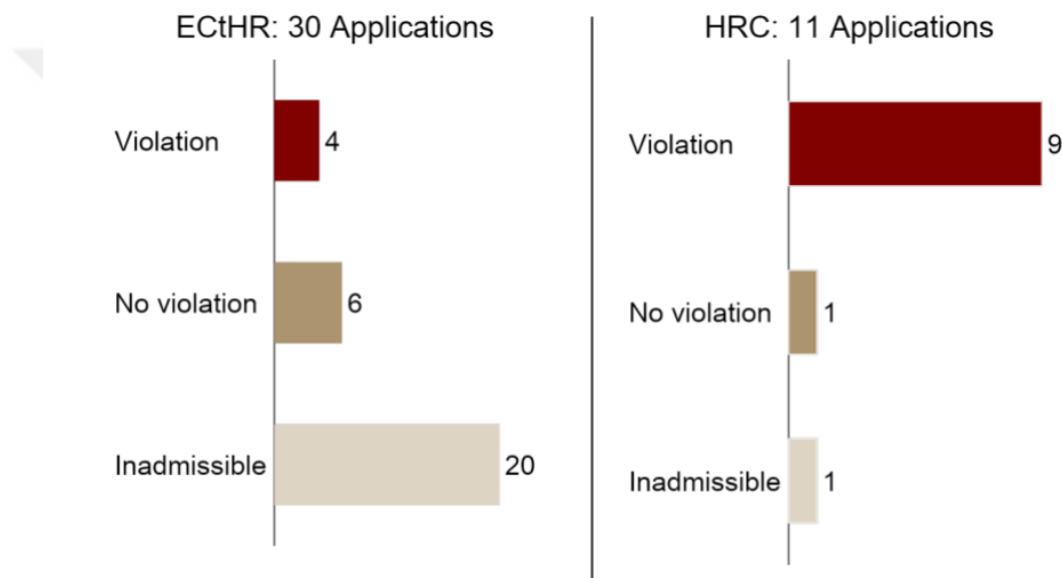
²⁸⁹ Individual opinion of Committee member Jose Manuel Santos Pais, paras 9-13.

²⁹⁰ *Ibid*, para 14.

III. The Divergence in the Reasoning Structures of the Two Bodies

This chapter identifies and discusses the main paths of divergence between the ECtHR and the HRC based on the 41 cases described in Chapter II. As can be seen on Figure 2 below, the bodies delivered different outcomes.

Figure 2: Different Outcomes



The main paths of divergence can be categorised by looking at the different rationales accepted by the two bodies when dealing with a similar set of facts. The ECtHR and the HRC had different, and in many times contradicting interpretations on three rationales for restricting religious symbols and clothing: (i) safety and order, (ii) barrier to equality or social interaction, and (iii) protection of the duty of neutrality.

A. Safety and Order

In most of the cases before it, the ECtHR have accepted the need for removing religious symbols or clothing for public safety and public order rationales. In *Doğru*,

the ECtHR stated that removal of religious clothing during a physical education class could be justified under the aim of public safety and order without providing a detailed justification. Also in *Phull* and in *El Morsli*, the Court briefly concluded that removal of religious clothing for a security check is necessary for guaranteeing the aim of public safety. It did not further assess whether compelling an individual to remove their turban or headscarf was necessary to reach that aim. Similarly, in *Mann Singh*, the Court declared that a driver's licence could require a bareheaded photograph in order to ensure identity controls and public order. However, it did not examine why and how wearing a turban on a driver's licence would make it more difficult to identify the driver.

Unlike the ECtHR, the HRC has asked more questions in its determinations of necessity, and discussed in detail whether the restriction is needed to protect the safety and order. In *Ranjit Singh* and *Shingara Mann Singh*, the Committee explicitly stated that the State party had failed to explain why a photograph demonstrating the individual wearing a turban would make the identification harder. The HRC also pointed out the fact that these one-time requirements potentially include the risk to repeat and become a continuous practice.

On the other hand, the Grand Chamber of the ECtHR engaged with 'less restrictive means' reasoning while dealing with a public safety claim presented as a justification of a blanket-ban. In *S.A.S.*, the Grand Chamber stated that a blanket-ban of all face-coverings cannot be declared as necessary in a democratic society under the aim of public safety, unless there is a general threat to the public.²⁹¹ This could be regarded as a certain level of shift in the ECtHR jurisprudence in its assessment of public order and safety requirements.

B. Barrier to Gender Equality or Social Interaction

The ECtHR and the HRC have also responded differently to arguments of State parties which claim religious clothing (especially Islamic headscarf or veil) could be a barrier to gender equality or social interaction.

In the early jurisprudence of the ECtHR, the Court regarded the Islamic female dress as incompatible with gender equality. In *Dahlab*, it explicitly stated that a headscarf

²⁹¹ *S.A.S v. France*, para. 139.

is ‘a powerful external symbol’ which was ‘appeared to be imposed on women by a precept which is laid down in the Koran’ and ‘hard to square with the principle of gender equality’. In *Leyla Şahin*, the Grand Chamber reaffirmed these arguments. However, the ECtHR has abandoned these views in *S.A.S.* The Court stated that it is not convinced by the State Party’s argument that a blanket ban on full face veils aimed to establish equality between men and women:

“(…) a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.”²⁹²

While changing its views on gender equality, the *S.A.S.* judgment accepted that the full-face veils can be regarded as a ‘barrier raised against others’ as concealing the face could ‘breach the rights of others to live in a space of socialisation which makes living together easier’.

The HRC, on the other hand, never associated headscarves or veils with gender inequality in its communications. Moreover, in *Şeyma Türkan, Yaker and Hebbadj*, the Committee also concluded that the applicants faced intersectional discrimination as a Muslim woman, and concluded a violation of Article 26 of the ICCPR. The Committee was not convinced on invoking the ‘barrier to social interaction’ or ‘living together’ arguments for justification of the bans on full-face veils. In *Yaker and Hebbadj*, the HRC agrees with dissenting judges Nussberger and Jäderblom in *S.A.S.*, and stated that barriers to social interaction arguments are ‘vague and abstract’. The Committee therefore concluded that ‘living together’ rationale cannot pursue one of the legitimate grounds listed in Article 18 (3) of the ICCPR.

C. Duty of Neutrality and Impartiality

Neither Article 9 (2) of the ECHR, nor Article 18 (3) of the ICCPR lists the principle of secularism or duty of neutrality as a ground for restriction for the right to manifest religious belief. However, protection of the duty of neutrality is becoming increasingly prominent within the ECtHR jurisprudence under the legitimate ground

²⁹² *S.A.S v. France*, para. 119.

of ‘protection of fundamental rights and freedoms of others.’ The ECtHR is receptive towards the State party arguments concerning the protection of secular nature of the constitutional order, educational institutions, or public services.²⁹³ The HRC on the other hand, is not convinced that those claims meet the requirements of the Article 18 (3) of the ICCPR.

Mostly, protecting secularity and neutrality appears in the ECtHR jurisprudence within the context of public education. Particularly in *Doğru, Kervancı, Dahlab* and *Leyla Şahin*, the ECtHR accepts limitations on the wearing of religious signs in order to protect the neutrality of public education as well as to protect other students from proselytism or pressure. On the other hand, the Court also accepted this rationale in the context of public officials. In *Ebrahimian* and in *Eweida and others* (as regards the second applicant), the ECtHR accepted the restriction on religious symbols or clothing that could be declared necessary in the name of protecting the secular nature of the public service. It should be noted that the Court did not uphold the State parties’ arguments on protection of secularism or state neutrality as regards ordinary citizens or users of the public service, as can be seen in *Ahmet Arslan and others*, *Eweida and others* (as regards the first applicant) and *Hamidovic*. In these three cases, the Court concluded that the policies regarding duty of neutrality implemented by the States were beyond the limit provided by Article 9 of the ECHR, as the applicants were not public officials and were not bound by the policies of the State.²⁹⁴

Although claims concerning manifesting religious belief of a public official have not been considered by the HRC, the Committee had the chance to discuss the States parties’ justifications regarding the protection of secularity and neutrality of the public services. Both in *F.A* and *Şeyma Türkan*, the HRC did not employ the same reasoning as the ECtHR, and rejected to consider the protection of secular nature of an institution as a legitimate aim under the Article 18 (3) of the ICCPR.

²⁹³ This is strongly criticised by Judge Bonello on his concurring opinion in *Lautsi and others v. Italy*: “Secularism, pluralism, the separation of Church and State, religious neutrality, religious tolerance are not values protected by the Convention, and it is fundamentally flawed to juggle these dissimilar concepts as if they were interchangeable with freedom of religion.” See Lautsi and others, App. No. 30814/06 (ECtHR, 18 March 2011), Concurring opinion of Judge Bonello, para 2.2.

²⁹⁴ It should be noted that in *Lachiri v. Belgium*, the Belgian government did not invoke the principle of secularism; therefore, the ECtHR did not discuss the duty of neutrality in its assessment.

IV. Analysing the Reasons of the Divergence

A. Different Mandates

To a certain extent, the divergence between the ECtHR and the HRC on their assessment on the right to manifest religious belief could be explained with the different mandates of the two bodies. Indeed, the ECtHR and the HRC have been created to fulfil unique purposes and entrusted with different authorities.

First, the different nature of the decisions of the ECtHR and HRC could partly explain this. The ECtHR issues binding judgments, whereas the HRC issues non-binding individual communications. This could explain the relatively more cautious interpretation of the ECtHR while engaging with cases that are strongly linked with government policies and constitutional values.

Second, different composition of the two bodies could also provide an explanation to a certain extent. Eighteen members of the HRC are elected from candidates that are nominated by State Parties,²⁹⁵ for a renewable term of four years. The ECtHR is composed of 47 members who are elected by the Parliamentary Assembly of the CoE for a non-renewable term of nine years. The compact structure of the HRC could explain the consistency of its decisions. Also, the members of the HRC should be independent experts and who demonstrate a recognized competence in the field of human rights, whereas the members of the ECtHR must all be lawyers. The diverse background of the members of the HRC could explain its success while adjudicating profound claims.

Third, the differing jurisdiction of the HRC and the ECtHR could also contribute to this divergence. The ECtHR has compulsory jurisdiction to the 47 member states of the Council of Europe. The HRC, on the other hand, has jurisdiction to receive individual communications with regard to the states that have ratified the Optional Protocol 1.²⁹⁶ Therefore, despite the applicants triggering the individual communication procedure less than the ECtHR, the HRC receives applications

²⁹⁵ Article 31 of the ICCPR states that “consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilisation and of the principal legal systems”.

²⁹⁶ UNGA, Optional Protocol to the International Covenant on Civil and Political Rights, 999 UNTS 171, 19 December 1966, entered into force on 23 March 1976. So far, 118 states have ratified the Optional Protocol No.1

coming from a more diverse range. This could explain the experience of the HRC in dealing with claims concerning diverse cultures and backgrounds, which have particular importance as regards cases concerning the right to manifest religious belief.

Lastly, unlike the ECtHR, the HRC has many functions other than receiving individual complaints. It also reviews State Reports, provides Concluding Observations and formulates General Comments. These documents create a great measure of continuity and uniformity in deciding specific problems in examination of the individual communications as well.²⁹⁷ Unlike the ECtHR, the HRC has first-hand information regarding a State Party through these documents that helps it to adjudicate better on the details.

However, the different roles and structures of the HRC and the ECtHR cannot fully explain the divergent interpretation of the two bodies as regards their arguments on social interaction barriers or establishment of gender equality.

B. Different Doctrines

The role of the margin of appreciation doctrine (MoA) is also of importance in explaining the divergence between the HRC and the ECtHR to a certain extent. Unlike the HRC, the ECtHR frequently uses the MoA doctrine, considering the different legal approaches and lack of uniformity of the member states.²⁹⁸ Especially, case law regarding freedom of religion is prominently figured by the MoA doctrine.²⁹⁹ Despite being asserted by some experts,³⁰⁰ the HRC does not recognize the principle of MoA. Also, former Special Rapporteur on right to freedom of religion, Asma Jahangir mentioned the risks in her 2006 annual report:

“While acknowledging that the doctrine of ‘margin of appreciation’ may accommodate ethnic, cultural or religious peculiarities, this approach should not

²⁹⁷ For a detailed review of different roles of the HRC, See Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*.

²⁹⁸ See Yuval Shany ‘All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee’, 9 (2) *Journal of International Dispute Settlement* 180

²⁹⁹ Tom Lewis, *Religious Rights, the European Court, and the Margin of Appreciation*, 56 *International and Comparative Law Quarterly* 395 – 414 (2007), p. 396-398.

³⁰⁰ See Dominic McGoldrick, *A Defence of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee*, 65 *International and Comparative Law Quarterly* 21 – 60 (2016).

lead to questioning the international consensus that ‘all human rights are universal, indivisible and interdependent and interrelated’ as proclaimed in the Vienna Declaration and Programme of Action.”³⁰¹

Nonetheless, as can be seen from the reasoning structures of the case law in Chapter II, the principal difference between the two bodies was not created solely by the use or rejection of the MoA doctrine. Before discussing the necessity or proportionality of these restrictions, two bodies are not accepting the same rationales as legitimate grounds for restricting the right to manifest religion. The HRC does not accept every restriction in the name of ‘public safety’ and it rejects ‘living together’ to fall under the legitimate aim of ‘rights and freedoms of others’. Therefore, the role of MoA in explaining the divergence between the HRC and the ECtHR is insufficient.

C. Different Interpretative Contexts

The divergence between the HRC and the ECtHR can be best explained with regard to the different interpretive contexts of the bodies. Although the right to freedom of religion appeared with almost identical formulations within the UDHR, ICCPR and the ECHR; the HRC and the ECtHR apply the right by referencing different secondary resources, and they interpret the right within different contexts.

As digested in Chapter I, the UN system has more resources and mechanisms in relation to right to freedom of religion (Krishnaswami Study, the 1981 Declaration, reports of the Special Rapporteur, General Comments and Concluding Observations of the HRC) compared to the CoE system. These resources are also more detailed as regards various aspects of religious symbols and clothing. The HRC consistently gives reference to these documents in its decisions, and builds its reasoning structure relying on the principles laid there. Since the General Comments are based on the information gained in examining the State Reports and concluding observations, they reflect a diverse range of religions, cultures and different types of manifestations.

On the other hand, most of the resolutions and recommendations made by the Parliamentary Assembly of the CoE solely focus on the female Islamic dress. Moreover, these documents frequently refer to headscarves or veils as a potential

³⁰¹ Report of the Special Rapporteur on Freedom of Religion of belief, Asma Jahangir, UN.Doc. E/CN.4/2006/5, *see supra* note 90.

threat to freedoms, or women's dignity. The ECtHR often quotes the works of CoE and builds its reasoning structure within an interpretive context of these recommendations and resolutions.³⁰² These preferences consequently affect the Court's adjudication on cases that concern different aspects of religious clothing.

A particular mechanism that has a major role in creating these dual interpretive contexts is the role of the Special Rapporteur on the right to freedom of religion. The rapporteurs themselves are coming from diverging cultures³⁰³ and they focus on different problematic areas among various religions, cultures and traditions. They also conduct country visits to collect first-hand information and observe the actual practices. The findings of the Special Rapporteurs, as well the principles they develop are of unique significance in assessing the claims concerning wearing of religious clothing or symbols. The HRC frequently cites the works of the Special Rapporteur in its observations. The judgments of the ECtHR on the other hand, does not engage with these reports. This makes the HRC relatively more instructed and experienced than the ECtHR.

It can therefore be concluded that the main reason for the divergence between the HRC and the ECtHR as regards the right to manifest religious belief in general, and wearing of religious symbols and clothing in particular could be attributed to the well-detailed resources and effective mechanisms of the UN system.

V. Implications of the Divergence in International Human Rights Law

The contradictory decisions and different reasoning structures of the HRC and the ECtHR have certain implications. First, it invites debates on universality of the right and raises concerns as regards fragmentation of international human rights law. Second, the divergence also has an impact on future applicants and strategic litigation, as choosing the right forum to bring their complaints becomes critical. Moreover, the divergence eventually has an impact on respondent States as regards

³⁰² See George Letsas 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' 21 (3) *The European Journal of International Law* 509.

³⁰³ Three out of six rapporteurs are of Muslim heritage. See *supra* note 80.

their duty to implementation. This chapter addresses these implications exploring the possibility of developing higher engagement between the bodies, better opportunities for individuals, and clearer meaning for states.

A. Fragmentation of International Human Rights Law

International human rights bodies are formally mandated to apply the provisions of their own treaties, so do the HRC and the ECtHR. The two bodies are autonomous in interpreting the ICCPR and the ECHR respectively, and they deal with disputes arising from their own jurisdictions. However, to some extent, they are expected to engage with the jurisprudence of the other international bodies as well, as referred in literature as “judicial dialogue”³⁰⁴ The judicial dialogue, or the borrowings between different jurisdictions forms an important part of the development of international law.³⁰⁵ Through the judicial dialogue, the bodies can engage with different arguments invoked in relation to similar claims in other jurisdictions, and be able to adjudicate their cases through a more developed reasoning structure.

Since the HRC and the ECtHR frequently engage with similar claims concerning the wearing of religious symbols, a high level of judicial dialogue might be expected between them. However, this is not the case. Among all the 41 decisions concerning the right to wear religious symbols, a little level of cross-referencing between the two bodies could be observed. In the early jurisprudence of the two bodies, the level of engagement is particularly weak. For example in *Leyla Şahin*, the Grand Chamber of the ECtHR did not acknowledge *Hudoyberganova* of the HRC, despite the claims raised being nearly identical, and the HRC communication was issued only months earlier. However in *SAS*, the Grand Chamber of the ECtHR cited the works of the HRC. In the first time of its Article 9 jurisprudence, the Court explicitly acknowledged the General Comments No: 22 and No: 28 of the HRC.³⁰⁶ It also acknowledged some case-law of the HRC, including *Hudoyberganova*. However, it stopped its research on HRC and continued its own legal analysis, by pointing out

³⁰⁴ Erik Voeten, ‘Borrowing and Non-borrowing among International Courts’ 39 (2) The Journal of Legal Studies 547.

³⁰⁵ See Anja Seibert-Fohr, ‘Judicial Engagement in International Human Rights Comparativism’ in A. Reinisch, M. E. Footer, & C. Binder, *International Law and... Select Proceedings of the European Society of International Law* (Bloomsbury:2014)

³⁰⁶ *S.A.S v. France*, para 38.

that the HRC “...has not yet ruled on the question of a blanket ban on the wearing of the full-face veil in public places”.³⁰⁷

Despite the weak level of engagement between the majority judgments and communications, separate opinions often cite the majority decisions of the other body. Nussberger calls this an ‘unofficial dialogue’ and observes that it has superseded the ‘official dialogue’.³⁰⁸ For example, the HRC member Ruth Wedgwood cited *Leyla Şahin* in her individual opinion in *Hudoyberganova*, where she stated the HRC also should apply the arguments used there. Similarly, the assessment of the HRC as regards ‘living together’ doctrine in *Yaker* and *Hebbadj* aligns with the opinions of the partially dissenting judges of *S.A.S.* of the ECtHR. Besides the Committee members, former Special Rapporteur Asma Jahangir explicitly stated that she agrees with Judge Tulkens’s closing remarks in her dissenting opinion in *Leyla Şahin*.³⁰⁹

It can be stated that the constant practice of the HRC and the ECtHR to follow different trajectories and to refuse engagement of each other’s case law would create a certain level of fragmentation in the international human rights law and compromise the universality of the right. Nevertheless, there are ongoing reform projects in order to engage regional human rights and UN Treaty bodies. The judgments of the ECtHR and the communications of the HRC might continue to oppose each other. However, in the light of these reform projects and the rising engagement in the latest case law, a certain level of convergence can be expected in the near future.

B. Applicants and Strategic Litigation

Numerous factors may affect an individual’s decision on choosing between the HRC and the ECtHR to litigate their claims on the right to manifest religion on the body. The following are some of the most crucial issues that should be considered by the future applicants as well as their representatives.

³⁰⁷ *S.A.S v. France*, para 39.

³⁰⁸ Angelika Nussberger, ‘The ECtHR’s Use of Decisions of International Courts and Quasi-Judicial Bodies’ in A. Müller, & H. E. Kjos (Eds) *Judicial Dialogue and Human Rights* (Cambridge: Cambridge University Press, 2017), p. 432.

³⁰⁹ 2006 Report of Asma Jahangir, *see supra* note 90.

First, the prospective applicants are bound by the different jurisdictions of each body. The ECtHR has compulsory jurisdiction as regards the 47 member states of the CoE, whereas the HRC has jurisdiction on states that have ratified the First Optional Protocol of the ICCPR.³¹⁰ Also, some states have provided reservations to the First Optional Protocol, limiting the jurisdiction of the HRC. Therefore, the prospective applicants should consider if they have the chance to apply for both or not.

If the prospective applicants have the chance to apply to both the HRC and the ECtHR, next consideration should be the different admissibility criteria of each body.³¹¹ The six-month rule of the ECHR is not employed by the ICCPR. Therefore, if an individual has already exceeded the six-month period after the alleged violation, the HRC would be their only option. If not, trying the ECtHR first would be more plausible. The applicants should also take into account the fundamental procedural law principles of *res judicata* and *lis pendens*.³¹² The Article 5 (2) (a) of the Optional Protocol to the ICCPR and Article 35 (2) (b) of the ECHR only provides a complaint admissible 'if the same matter is not being examined under another procedure of international investigation or settlement'.³¹³ Litigation strategies are of crucial importance there.³¹⁴ Same individual could split its two interrelated complaints (as in photograph claims of the driving licence and passport of *Mann Singh*). Or, a group of individuals could decide to direct different individuals before the two bodies (as in *S.A.S* and *Yaker and Hebbadj*).

Lastly, the applicants might consider the different rights that they could assert in relation to their claims. Unlike the ECHR, the ICCPR has Article 26 which prohibits indirect discrimination while imposing positive obligations upon States. If a claim is

³¹⁰ For the list of states ratified the Optional Protocol No.1:
https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-5&chapter=4&clang=_en
(Last accessed on 10 August 2019).

³¹¹ For a further discussion, See Lorna McGregor, *The Relationship of the UN Treaty Bodies and Regional Systems* (2013) in S. Sheeran, & S. N. Rodley (Eds.), *Routledge Handbook of International Human Rights Law* (pp. 505 - 520).

³¹² The principle of *res judicata* provides that once a case has been determined, the same set of facts cannot be submitted in another court. The principle of *lis pendens* provides that if proceedings are pending before a court, the same facts cannot be submitted to another one. For further analysis, see Catherine Phuong, 'The Relationship between the European Court of Human Rights and the Human Rights Committee: Has the 'Same Matter' Already Been 'Examined'?' (2007) 7(2) *Human Rights Law Review* 385, p. 387.

³¹³ It should be noted that there are also reservations to the Article 5 (2) (a) of the Optional Protocol to the ICCPR.

³¹⁴ For a seminal work discussing this, see Laurence R. Helfer, 'Forum Shopping for Human Rights' (1999) 148(2) *University of Pennsylvania Law Review* 285, p. 303.

related to an indirect and intersectional discrimination, these claims have better chances to be examined before the HRC.

Taking into account the recent jurisprudence of the two bodies, it is likely that applicants will bring more disputes to the HRC rather than the ECtHR in the future. However, considering its remedial powers, the ECtHR will probably remain the primary forum regarding complaints concerning the right to manifest religion.

C. State Obligations and Implementation

The judgments of the ECtHR and the communications of the HRC have different remedial powers. This also contributes to the discussions as regards to the obligations of states, since it creates a certain extent of confusion on their implementation duties. According to Article 46 of the ECHR, ‘the contracting parties undertake to abide by the final judgment of the Court in any case to which they are parties’ and the Committee of Ministers is mandated to supervise the execution of the judgment. On the other hand, according to the Article 5 (4) of the Optional Protocol to the ICCPR, the Human Rights Committee is only mandated to ‘examine communications’ and ‘forward its views to the State Party concerned’. In the light of these, it would be expected that in a case of a contradicting decision, the state party would try to follow ECtHR judgments, since the decisions of the HRC are not strictly binding.

However, the contradictory decisions of the ECtHR and the HRC should be considered in the light of the Article 53 of the ECHR, which provides that the Convention should be interpreted in line with other international human rights treaties. This provision could be interpreted to include the jurisprudence of the treaty bodies as well. Therefore, if a State chooses to implement the decisions of the ECtHR, they should do so in the light of the Article 53 of the ECHR, and cannot disregard interpretation of the ICCPR by the HRC.

Also, the States should be aware that their reservations to the Optional Protocol might not always work. For example, France submitted a reservation to the Article 5 (4) of the Optional Protocol, rejecting the HRC’s jurisdiction over individual complaints where “the same matter is being examined or has already been considered under another procedure of international investigation or settlement”. However, in *Yaker and Hebbadj*, the HRC found the complaints admissible, since the ECtHR did

not provide an argument or clarification regarding the inadmissibility decision before it.

Conclusion

This research comparatively examined the diverging approaches of the HRC and the ECtHR focusing on their interpretation and application of the right to manifest religious belief through symbols and clothing. The first aim of the thesis was to identify the diverging points between the two bodies. The research analysed the textual provisions within the UN and CoE human rights system in order to detect the possible roots of the divergence. There, it observed that the UN system provides more resources and mechanisms on the right to freedom of religion compared to the CoE. Then, the study examined the relevant 41 applications before the HRC and the ECtHR. Through a detailed analysis of the reasoning structures of the two bodies, the research identified that the bodies have different interpretations as regards certain rationales used for restricting the right to manifest religious belief. The study identifies the diverging points as safety and order, barrier to equality and social interaction, and duty of neutrality.

Second aim of the thesis was to examine the possible arguments that account for the divergence. There, the thesis identified three reasons: different mandates, different methods and different interpretive contexts. It is argued that each reason has contributed to the divergence to a certain extent. However, the thesis claims that the difference of the interpretive contexts within the UN and CoE human rights law standards is the primary reason creating this divergence. The HRC builds its arguments relying on the comprehensive sources within the UN system, giving frequent references to the General Comments, works of the Special Rapporteur, and the 1981 Declaration. Therefore, the HRC is able to balance the arguments concerning claims related to religious clothing and symbols in a more convincing way. The detailed and diverse resources of the UN system also explain the HRC's receptive approach towards acknowledging the claims related to intersectional discrimination. The research also shows that the ECtHR does not properly engage with the principles regarding the right to manifest religious belief that are developed within the UN system. Nevertheless, recent judgments of the ECtHR signals a certain

level of shift as regards the Court's interpretation of gender equality and right to manifest religious belief of the individuals at the public institutions.

The research also discussed the possible implications of the divergence on universality of the right, litigation strategies of possible applicants and implementation duties. It is stated that the divergence created a certain level of fragmentation of the international human rights law. This can be solved through ensuring the better engagement of the ECtHR with the standards that have developed within the UN System. The ECtHR could particularly benefit from the principles laid down by the General Comments, and observations made by the Special Rapporteur. As regards strategic litigation, the research stated that bringing complaints before the ECtHR would be plausible for the applicants who could apply to both of the bodies, considering its remedial powers and strict 6-month rule. As regards the implementation of the decisions, the research stated that despite the non-binding nature of the HRC decisions, the states cannot ignore the decisions of the HRC, considering the treaty interpretation rules, as well as their considerable influence on domestic courts. Also, considering the ECtHR's increasing references to the HRC, as well as the ongoing reform procedures between the two bodies, a higher level of engagement seems possible in the near future.

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Annex – 1: Table of Applications, Cases and Communications

The European Commission of Human Rights

X. v. Austria, App No. 1753/63 (EComHR, 15 February 1965), inadmissibility decision.

X. v. United Kingdom, App No. 7992/77 (EComHR, 12 July 1978), inadmissibility decision

The European Court of Human Rights

Abakar Gaziyeve and others v. Azerbaijan, App No. 49349/12, Communicated on 29 August 2017.

Ahmet Arslan v. Turkey, App No. 41135/98 (ECtHR, 23 February 2010).

Aktaş v. France, App. No. 43563/08 (ECtHR, 30 June 2009), inadmissibility decision.

Araç v. Turkey, App No. 9907/02 (ECtHR, 19 September 2006), inadmissibility decision.

Barik Edidi v. Spain App No. 21780/13 (ECtHR, 26 April 2016), inadmissibility decision.

Bayrak v. France App. No. 14308/08 (ECtHR, 30 June 2009), inadmissibility decision.

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Annex – 2: Table of Declarations, Treaties and Other International Instruments

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