

14 The headscarf debate

Approaching the intersection of sex, religion and race under the European Convention on Human Rights and EC equality law

Titia Loenen

14.1 Introduction

European Union (EU) equality law has become much more encompassing and multidimensional since the adoption of several Directives covering discrimination on the basis of race, religion, sexual orientation, disability and age. Whereas formerly the European Equal Treatment Directives concerned sex equality only,¹ we now have a Directive on equal treatment irrespective of race or ethnic origin in employment and regarding access to and supply of goods and services (Race Directive),² and a Directive covering discrimination on the basis of religion or belief, sexual orientation, disability and age in employment (Framework Directive).³ The latter Directive thus does not extend to goods and services. Regarding sex equality, on the other hand, a Directive banning discrimination on the basis of sex regarding access to and supply of goods and services has been added.⁴

The choice to have different instruments for different grounds of discrimination raises the question as to the relationship between the equality and non-discrimination standards in the Directives. This is of special interest in cases where grounds of discrimination intersect. An interesting case study in this respect, which has received much attention in Europe, is the issue of banning headscarves in public education. Here we find an intersection of (potential) discrimination on the basis of sex, race and religion.⁵ How should we approach this under the Equality Directives? To complicate matters further, another type of European multidimensionality is at stake as well since this issue is subject not just to EC law, but also to the binding standards deriving from the European Convention on Human Rights (ECHR).

This chapter endeavours to explore and compare approaches to the headscarf in public education under these two legal regimes. The European Court of Human Rights has rendered several decisions concerning the question whether prohibitions to wear a headscarf in public education are compatible with the ECHR. EU equality law also covers major aspects of the headscarf

issue. This chapter discusses the similarities, differences and potential conflicts between the approaches to this issue under the two legal regimes. To start with, I will briefly sketch the way in which sex, race and religion intersect in debates on the headscarf. The next paragraph will address some points concerning the relationship between the ECHR and EU equality law to keep in mind, as well as concerning the overlap between the standards set under both legal settings, all of course only as far as relevant for this chapter. After discussing the case law of the European Court of Human Rights on headscarf bans and the approach to take under the EU Directives, I will draw some conclusions on the questions posed.

14.2 Headscarves at the intersection of sex, race and religion

The Islamic headscarf has become a contested issue in Europe, especially the French legislation banning it from public schools, which attracted attention worldwide. Due to increasing tensions between ‘the West’ and ‘Islam’ as for instance manifested in the September 11 attacks, the wars in Iraq and Afghanistan, and the Danish cartoon crisis, the issue seems to have become symbolic of Western approaches to Islam.

On one level, the reasons put forward to ban wearing a headscarf in a public school, be it by schoolchildren or by teachers, concern religion as such. Being a manifestation of religion, the headscarf is deemed to jeopardise the denominationally neutral and open educational environment which the state has to guarantee to pupils of public schools, so as to give full respect to all religions and beliefs, including atheistic ones, which the pupils and their parents may nourish. Whatever its merits, in this reasoning it is not just headscarves that pose problems, but equally Sikh turbans or Jewish *kippas*. As soon as people enter the public sphere, they have to forego manifestations of their private convictions and beliefs. Thus, the French legislation, which was adopted in 2004, bans all ostentatious religious symbols in French public schools.

Yet, if one takes a closer look at the context in which the French ban was introduced, it seems pretty clear that this was not so much to curb religious manifestations per se, but to curb expressions of Islam.⁶ Clearly, Islam is not an indigenous religion in France or any other European country, but only has become a considerable element in those countries with the influx of Muslim immigrants over the last decades. In France, and this could very well hold true similarly for other European countries with considerable immigrant Muslim minorities, banning religious symbols in public schools thus, in fact, is connected closely with issues of race.⁷ Race here used in its broad meaning, including ethnic origin.⁸ In this reading, banning religious symbols in public schools is not really just about guaranteeing the denominational neutrality of schools, but about how the majority society perceives and reacts to the position of its immigrant minority groups of non-Western descent. Is this non-Western, immigrant identity allowed to be seen and to express itself in

the public sphere, or is it to remain hidden in the private sphere only? Put together in this way, the ban on religious symbols in public schools does not just raise the question whether it is a justified infringement of religious freedom in general, but also whether it would constitute (indirect) discrimination on the basis of religion and/or race.

To complicate matters further, on a third level the discussion on banning headscarves from public schools touches on gender equality. A major argument put forward to ban headscarves in public schools derives from the idea that the headscarf is symbolic of the inferior position of women in Islam and that many girls and women are pressured into wearing it.⁹ If valid, this argument could work as a powerful counterclaim to claims that banning religious manifestations in public schools constitutes, in fact, discrimination on the basis of religion and/or race. On the other hand, if this argument is unfounded one might also argue that banning headscarves, or religious symbols as such – potentially – constitutes indirect discrimination on the basis of sex, as in many European countries it will probably affect and disadvantage much more women than men.¹⁰

14.3 Relationship between the European Convention on Human Rights and European Union equality law

Before embarking on a comparison between the applicable EU Directives and the ECHR, a few remarks concerning the relationship between the two regimes are in order. In fact, this relationship is of increasing importance due to several factors. To start with, the Treaty on European Union specifically refers in Art 6 to the ECHR by stating that ‘... The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . .’. This suggests the ECHR is to be given priority whenever legal norms stemming from both legal regimes conflict.¹¹ Similarly the EU Charter of Fundamental Rights pays tribute to the ECHR by stipulating that insofar as the Charter contains rights which correspond to rights in the ECHR, ‘the meaning and scope of those rights shall be the same as those laid down by the said Convention’, be it that EU law may provide more extensive protection (Art 52, s 3).¹²

The commitment to abide by the human rights standards as guaranteed under the ECHR is reflected in the Recitals to both the Framework Directive and the Race Directive. In addition, the Framework Directive contains a general limitation clause to the principle of equal treatment notwithstanding religion or belief, disability, sexual orientation and age, which closely resembles limitation clauses in the ECHR. Article 2, s 5 of this Directive stipulates:

This directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of

criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

14.3.1 Different mandates

When exploring the relationship between EU law and the ECHR it seems very important to keep in mind the different legal role and function or mandate of the European Court of Justice (ECJ) and the European Court of Human Rights respectively. The main function of the former is to guarantee a uniform interpretation of EU law throughout the EU, whereas the latter is called upon to decide whether a state party violates the ECHR in a specific case. In this respect, in the case law of the European Court of Human Rights the ‘margin of appreciation’ to be left to the states parties plays an important role. Besides, the ECHR sets minimum standards only, which means EU law is free to give more human rights protection. Problems arise if EU law would give less protection than the ECHR. In that case EU law would have to be amended to conform to the ECHR minimum standards.

14.3.2 Overlapping standards concerning headscarves in public education

It is important to note that the ECHR mainly concerns vertical relationships, not horizontal ones. This means that any overlap between EU law and the ECHR in an area such as employment will be limited mainly to public employment. Adoption of the Twelfth Protocol, which adds a general non-discrimination provision to the ECHR, has not changed this.¹³ The Twelfth Protocol is important, however, in a different way, as it has broadened the scope of application of non-discrimination under the ECHR considerably by giving the prohibition of discrimination an independent status instead of the accessory one provided for in Art 14 of the ECHR. This means that complaints concerning discrimination do not have to be connected to one of the other rights protected in the ECHR, but can be brought to the European Court of Human Rights in their own right. Regretfully, not many countries so far have ratified the Twelfth Protocol.¹⁴

As for the overlapping provisions of the EU Directives and the ECHR concerning the issue of prohibiting headscarves in public education, the applicability of the ECHR to this issue poses no problems. Under the ECHR, state regulations prohibiting teachers or pupils to wear a headscarf or religious symbols in general fall under the scope of Art 9 of the ECHR. Section 1 of Art 9 guarantees everyone’s right to freedom of thought, conscience and religion, which ‘includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief, in worship, teaching, practice and observance’. Under s 2, limitations are allowed only if they 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'. Article 14 may be applicable as well if discrimination on the basis of sex, race or religion is at stake, but so far it has played no significant role in the court's case law, given its accessory character.¹⁵

The picture under the EU Directives, however, is much more complicated. As far as teachers are concerned, if discrimination on the basis of religion is involved it would be covered by the Framework Directive, as far as sex discrimination is at stake the directive on equal treatment between men and women in employment would apply; and concerning potential discrimination on the basis of race or ethnic origin the Race Directive is applicable. All three Directives cover both public and private employment.

As far as the pupils are concerned, the Race Directive is the only one to apply fully to education, as explicitly provided for in Art 3, s 1(g). The Directive on equal treatment of men and women in the access to and supply of goods and services explicitly *excludes* the area of education from its scope of application (Art 3, s 3). This leaves us with the sex equality in employment Directive, which covers education as far as 'vocational training' is concerned (Art 1). Vocational training covers any form of education which prepares for a qualification or the necessary training and skills for a particular profession, trade or employment, whatever the age and level of training of the pupils or students, and even if the training programme includes an element of general education. Primary and general secondary education as such seem to be excluded.¹⁶ In respect of discrimination on the basis of religion the Framework Directive similarly applies to vocational training only (Art 3, s 1(b)).

The above shows that the issue of the headscarf in public education is largely covered by both legal regimes, except where pupils in primary and general secondary education are concerned. Prohibitions on wearing a headscarf affecting the latter do not fall within the scope of application of the EU Equality Directives, except where race discrimination is involved.

14.4 The European Convention on Human Rights and prohibiting headscarves in public education

As far as the ECHR is concerned, two important cases dealing with the prohibition of headscarves in public education merit attention. The first case, *Dahlab v Switzerland*, concerns a public school teacher, the second, *Sahin v Turkey*, a state university student.¹⁷

14.4.1 Dahlab v Switzerland

The case of *Dahlab v Switzerland* concerned a female, Catholic teacher at a Swiss public school who converted to Islam and started wearing a headscarf. After three years the General Director of primary education in the *Kanton* Geneva initiated action and prohibited her from wearing the headscarf. The

Director considered that wearing a headscarf, being a religious manifestation, jeopardised the principle of the separation of church and state and endangered the neutrality to be upheld by the state in a public school classroom. The Swiss Federal Court that heard her case upheld the ban and gave priority to the right of the pupils to receive education in a religiously neutral context over the teacher's freedom to manifest her religion.

Bringing a complaint to the European Court of Human Rights, Dahlab claimed that her right to freedom of religion was infringed, as well as her right to non-discrimination, as a Muslim man could teach at a state school without being subject to any form of prohibition.

The European Court of Human Rights upheld the judgment of the Swiss court in 2001. The interference with Dahlab's freedom of religion as protected by Art 9 of the ECHR was considered to be justified. The European Court emphasises the national court has been very careful in balancing the rights at stake. The fact that, before the General Director's actions, already three years had passed without complaints by either parents or the school board does not influence the court's judgment.

The most crucial part of the decision starts with the court's consideration that it is difficult to assess what the exact impact of wearing a clearly religious sign like a headscarf will have on the freedom of conscience and religion of the pupils, especially on pupils of such a tender age, four to eight-year-olds, who are even more vulnerable to being influenced than older children. Interestingly, the court then links the question of the required neutrality of the teacher to the question how wearing a headscarf relates to gender equality. This is rather surprising, as the Swiss Court time and again identified the problem a teacher wearing a headscarf poses as one of religious expression as such, and only referred to its possible meaning in terms of women's inequality in a sideline. Yet, according to the court, in the circumstances:

it cannot be denied outright that the wearing of a headscarf might have some kind of proselytizing effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.¹⁸

After this rather sweeping denouncement of what a headscarf represents the conclusion of the court cannot come as a surprise: the interference with Dahlab's freedom to manifest her religion is justified. As far as the claim of discrimination on the basis of sex is concerned the court is pretty brief. As the prohibition to wear a headscarf is 'not directed at her as a member of the female sex but pursued the legitimate aim of ensuring the neutrality of the state primary-education system', such a measure 'could also be applied to

a man who, in similar circumstances, wore clothing that clearly identified him as a member of a different faith'. The court accordingly concluded that there was no sex discrimination at stake.¹⁹

14.4.2 *Sahin v Turkey*

The second case concerning headscarves in a public educational setting worth mentioning here is the case of *Sahin v Turkey*. It concerned a university student who objected to the dress regulations of a Turkish state university, which prohibited religious attire being worn in the university. In 2004 the European Court of Human Rights held the ban to be compatible with the rights enshrined in the ECHR. The Grand Chamber of the court confirmed this decision in 2005.²⁰ In its decision the court repeated its consideration, citing from *Dahlab*, that wearing a headscarf is hard to reconcile with the principle of gender equality, tolerance, respect for others and non-discrimination.²¹ In its further considerations, however, it kept its distance and emphasised that 'where questions concerning the relationship between state and religions are concerned, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance'.²² Thus, it left a large margin of appreciation to the Turkish government to decide whether it is indeed 'necessary' in the Turkish context to prohibit wearing religious symbols in teaching institutions. The court accepted the arguments put forward by the Turkish government, especially those which referred to the specific Turkish history regarding *laïcité* and the strong political significance which wearing a headscarf had taken on in Turkey with the growing influence of extremist political movements in that country.

Although *Sahin* raises the issue of sex-discrimination in her complaint as well, she did not dwell on this in any significant way, but focused on her freedom of religion. Subsequently, the court did not feel inclined to explore this issue any further either. It just remarked that the reasons that led the court to conclude that there was no violation of Art 9 also apply to the complaint under Art 14, taken together with that Article or individually.

In the above cases the way in which the European Court of Human Rights perceives wearing a headscarf as 'difficult to reconcile' with the notions of gender equality and more generally tolerance and respect for others, stands out. In deciding the resulting conflict between the right to freedom of religion and those notions the court gives prevalence to the latter. The rather sweeping and very principled character of the court's statements in this respect raises the question whether state parties to the ECHR would not just be *allowed* to prohibit headscarves in public education, but would perhaps even be *required* to do so. Yet, the judgment in *Sahin* seems to decide that question in the negative, as it expressly leaves a large margin of appreciation to the state parties where the regulation of the relationship between state and religion is concerned. Thus it seems more likely the court will be reluctant to

get in the way of the national authorities' assessment whether a ban on religious symbols in public education (or elsewhere) is 'necessary' or not. If this is a correct interpretation of the *Sahin* judgment, it will mean the decision on the limits to be put on religious manifestations is left largely at the national level. This could mean that the European Court allows freedom of religion to mean something fundamentally different between European countries.

In terms of discrimination, the court does not address the question whether Art 14 is infringed in the cases at hand, at least it does not do so in any serious way. As the complainants did not do so themselves in anything but a very superficial manner, this is hardly surprising.

14.5 The EC Directives and prohibiting headscarves in public education

As no case law by the ECJ on the subject of prohibiting headscarves in public education exists yet, we have to hypothesise about how the Directives apply to this issue. In the following I will try to do this by addressing the issue in terms of (potential) discrimination on the basis of religion, sex or race successively. I will address the applicability of the EU Directives covering these grounds of discrimination, and if so, the possible outcome of applying the standards contained in them to the case at hand.

14.5.1 Applicability of the Directives

14.5.1.1 Discrimination on the basis of religion

As far as potential discrimination on the basis of religion is at stake in headscarf bans, the Framework Directive is determining. Prohibiting a headscarf falls within its scope of application as it poses a barrier to access to employment (as far as teachers are concerned) and vocational training (as far as pupils are concerned) based on religion.

An important question seems to be whether direct or indirect discrimination is at stake. The answer depends on the form of the prohibition. Prohibiting all religious symbols as such because of their religious nature constitutes direct discrimination on the basis of religion (that is, discrimination between persons with and without a religion of whatever kind). If, however, dress codes are formulated neutrally to guarantee state neutrality in a broader way (for instance by prohibiting all symbols showing personal convictions, be they religious, political, or other) they would not constitute direct discrimination, but could still amount to indirect discrimination, if religious individuals are more affected than non-religious ones or the individuals belonging to a specific faith are much more affected than others.²³ This seems, in fact, often the case. Neutral bans like this are quite likely to pose indirect discrimination on the basis of religion, as they seem to disproportionately affect non-Christian

faiths, which are more often acquainted with dress codes, such as dress codes for Muslim women and male Sikhs.²⁴

Whether or not the issue of prohibiting headscarves in public education is to be constructed as direct or indirect discrimination on the basis of religion may be less important after all as the Framework Directive provides for an open system of review regarding both direct and indirect discrimination. By this, I mean to say that the legal space to refute a claim of discrimination is not limited to specific exemption clauses, but can be based on any kind of justification. As far as indirect discrimination is concerned this is provided for by the 'objective justification' clause (Art 2, s 2(b)), which is familiar to EC equality law for many years now from the area of sex discrimination. To justify a measure having a discriminatory effect, it must be shown to pursue a 'legitimate aim' and to be 'appropriate and necessary' to achieve that aim. The latter basically boils down to a (rather strict) proportionality test.²⁵

But as far as both direct and indirect discrimination are concerned, Art 2, s 5 contains another general justification clause:

This directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

This limitation clause is clearly inspired by the ECHR, which contains very similar provisions, including in Art 9 of the ECHR (see para 3.1). Applying these provisions, the European Court of Human Rights is concerned mostly with the requirement that limitations must be 'necessary in a democratic society'. In this respect it requires the interference to correspond to a 'pressing social need' and to be 'proportionate to the legitimate aim pursued'.²⁶

As it is, this test in its turn shows several basic similarities with the 'objective justification' test by also demanding a legitimate aim (be it in this case limited to several specific ones such as the protection of the rights of others) and a relationship of proportionality between this aim and the measures taken to realise it.

14.5.1.2 Discrimination on the basis of race

The Directive on equal treatment irrespective of race or ethnic origin covers both employment and access to goods and services, including education, so both teachers and pupils could invoke the Directive against a headscarf ban or a more general ban on all religious symbols, that is if such a ban also constitutes discrimination on the basis of race or ethnic origin (race for short). It seems evident a ban like that cannot be construed as direct discrimination on the basis of race, but a claim of indirect discrimination seems quite feasible, given the fact that the majority of people affected by the ban

will be of non-Western origin. If so, this is only allowed if the ban is based on a legitimate, non-discriminatory aim and is appropriate and necessary to achieve that aim (the objective justification test, see Art 2, s 2(b) of the Race Directive).

14.5.1.3 Discrimination on the basis of sex

The Directive concerning equal treatment of men and women in employment applies to teachers, and to pupils as far as vocational training is concerned. As mentioned before, two sex equality issues may be at stake in prohibiting headscarves in public education. First, it is often contended that the Islamic headscarf is a symbol of the inferior position of women in Islam and that women are often pressured into wearing it.²⁷ As such, allowing it in public education constitutes condoning sex inequality. This is a highly contested issue. The case of *Dahlab* shows that the European Court of Human Rights takes it on board. Yet, interestingly, in Germany the Constitutional Court, the *Bundesverfassungsgericht*, has taken a very different position on this issue. In 2003, it decided that prohibiting a teacher in a public school from wearing a headscarf must have a basis in law and that it is up to the legislatures of the states to decide whether valid reasons exist to do so. At the same time, it explicitly stated that such a decision could not be based on the presumption that wearing a headscarf is symbolic of women's oppression. The German court referred to recent research which shows young women often start wearing a headscarf to lead self-chosen lives without foregoing their culture of origin.²⁸ I would think this is the more convincing position to take, as research indeed suggests many Muslim women start wearing a headscarf for this or other reasons not involving a sense of their inferiority.²⁹ The European Court of Human Rights does not refer to any research whatsoever in its assessment of the headscarf being 'hard to reconcile' with notions of equality and non-discrimination.

But even if one concluded otherwise, it would seem very hard to bring the issue of *not prohibiting* headscarves in public education under the scope of application of the sex equality Directive. It would mean constructing this as an act of discrimination on the basis of sex by the employer (as far as the teacher is concerned) or by the school (in the case of the pupil). I wonder whether the Directive covers such 'acts of omission'.

The second sex equality issue that may be at stake in prohibiting headscarves (or religious symbols more generally) in public education goes in the opposite direction: such a prohibition entails indirect sex discrimination against the pupil or teacher, because it will affect mainly Muslim women. If so, it is only allowed if it can be objectively justified, that is if it has a non-discriminatory aim and if it is appropriate and necessary to achieve that aim. In fact, this is the approach taken by the Norwegian Ombud in a case involving a private employer who did not allow a Muslim worker to wear her headscarf at work.³⁰

To conclude: teachers wearing a headscarf in public education are protected under EC law against discrimination on the basis of religion, sex and race. Pupils, however, are not always protected under EC law against all three forms of discrimination. Protection against discrimination on the basis of race is guaranteed in all types of education, but protection against religious discrimination and sex discrimination is limited to vocational training. The latter does not include primary and general secondary education. So for pupils it can make a difference which grounds of discrimination are indeed considered to be at stake.

In all instances, EC law allows for the possibility of justifying banning headscarves from public education. So far no case law exists on this specific issue, but what outcome can we expect if we apply the EC non-discrimination standards described above?

14.5.2 Application of the EC standards to headscarf bans in public education

As we have seen, the ‘objective justification’ test to be applied when indirect discrimination is at stake and the general limitation clause of Art 2, s 5 of the Framework Directive boil down to very similar requirements. Thus at the end of the day, and irrespective which Directive is applied, banning headscarves or other religious symbols from public education is allowed only if this pursues a legitimate aim, can reasonably be expected to achieve that aim and is proportional. Much then seems to depend on the question how strictly this test is applied, especially the proportionality test.

Applying similar criteria, the European Court of Human Rights upheld headscarf bans in public education regarding both teachers and pupils. This would seem to suggest the ECJ could very well come to the same conclusion under the Directives. Yet, several factors seem to me to point to a different conclusion. To start with, as mentioned before, the European Convention on Human Rights provides for minimum standards only, so the ECJ could provide more protection to Muslim teachers and pupils than the European Court of Human Rights is prepared to give. Second, in upholding the ban in the Turkish case of *Sahin* the European Court of Human Rights stressed the wide margin of appreciation to be left to the state parties to the ECHR in organising the relationship between state and religion. Given the role and the mandate of the court this seems understandable, yet one wonders whether it makes as much sense in the context of EU law, which is more concerned with uniform application in all member states. Last but not least, EU law traditionally requires a strict application of the objective justification test before accepting any exceptions to equal treatment irrespective of sex.³¹ I would contend the same applies in cases of indirect discrimination on the basis of race, race being the classic example of a suspect category. Religion would seem to call for a pretty strict approach as well, given the similar role of race, sex and religion as core identity markers.

A strict application of the objective justification test and of the general limitation clause of Art 2, s 5 of the Framework Directive would seem to lead to the conclusion that headscarf bans in public education cannot be justified. Generally speaking, three arguments tend to be put forward to justify headscarf bans in public education: headscarves are incompatible with the notion of sex equality, with the requirement of state neutrality in public education and with public order.³² None of these arguments is really convincing.

The first argument was dealt with above and seems to be untenable. Even if it may have validity in some cases, research indicates it is not true as a general rule in the European context.

The second major argument also seems unconvincing. Not because state neutrality is not to be protected in public education, but because wearing a headscarf as such cannot be presumed to endanger it. For this contention we can find support in a Dutch case decided by the Dutch Equal Treatment Commission under the General Equal Treatment Act.³³ This Act prohibits direct and indirect discrimination on the basis of religion, belief, political orientation, race, gender, nationality, sexual orientation and civil status. The case concerned a student teacher at a public primary school, who was not allowed by the school authorities to wear her headscarf in class. The argument turned on the required neutrality of the state. As public education must respect all religions and denominations, teachers must have an open attitude towards different convictions and beliefs. This, in turn, means teachers should be very reluctant in expressly manifesting their adherence to a particular religion or conviction. This is all the more so, the school authorities added:

... in case a way of dressing identifies a person with a group which does not only live according to strict opinions themselves, but which also has shown little tolerance towards persons with different opinions within the same religion. It seems evident that an Islamic woman, who considers it her duty to wear the headscarf even in the intimacy of her classroom, bears witness to holding very stringent opinions, also in comparison with the large majority of her fellow-believers, and may thus be perceived as threatening to other women and girls of the same religion, who mostly achieved the right to a freer way of living with difficulty.³⁴

In assessing whether the exclusion of the student teacher amounts to discrimination on the basis of religion, the Equal Treatment Commission is very brief. The Commission affirms the legitimacy of requiring public school teachers to have and display an open attitude towards all convictions and beliefs. Yet, to find out whether the student teacher complied with this requirement it was not legitimate for the school to just presume from her wearing a headscarf that this open attitude was missing. The school should have inquired after the actual opinions and ideas of the teacher instead.

The public order argument put forward to ban religious symbols from the

classroom seems rather shaky as well. Given the controversies surrounding the headscarf, it may indeed create a lot of tension and unrest in schools. The Commission Stasi put quite some emphasis on this point.³⁵ Likewise, the German constitutional court, the *Bundesverfassungsgericht*, considered it could provide a legitimate reason to prohibit headscarves being worn by public school teachers.³⁶ Although tensions created by the headscarf issue can, indeed, sometimes lead to serious problems, one wonders whether this should ever be a sufficient argument to put a ban on religious symbols in school. It would rather seem like giving in to intolerance.

14.6 Conclusions

A comparison of the ECHR and the EU legal regimes shows up different approaches to the issue of banning headscarves from public education. Under the ECHR, the issue is mainly discussed in terms of freedom of religion, not in terms of (indirect) discrimination, as it is under the EC Directives. Yet, similar criteria are used to decide whether a prohibition to wear headscarves or other religious symbols in public education is allowed.

Does that mean the outcome of this test must be the same under both legal regimes, as the ECHR would take priority over EU law in cases of conflict? From the perspective of EC law, I would answer this question in the negative. Several reasons can be put forward. First, the ECHR intends to give a minimum standard only. EU law can give more protection, as is expressly provided for in the EU Charter of Fundamental Rights. I would say the EU should do so, given its enhanced commitment to human rights. Second, the European Court of Human Rights leaves large margin of appreciation to the state parties to regulate religious expressions, whereas the ECJ is focused much more on setting a uniform standard for all Member States. And lastly, traditionally exceptions to sex discrimination are supposed to be reviewed very strictly. I would say the same holds true for race and religion, as both are very important as identity markers; Applying a strict test, I would say that no sufficiently strong arguments exist for prohibiting headscarves in public education as such. At the same time, we have to be aware of the politically sensitive nature of the issue, so we will have to wait and see what direction the ECJ will take if ever it is confronted with it.

Notes

- 1 The most important of these are Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L45/19, incorporated by [1994] OJ L1/484; Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 9/40, Derogation in 194N, incorporated by [1994] OJ L1/484 and Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal

- treatment for men and women in matters of social security 1979 OJL 6/24, incorporated by [1994] OJ L1/484.
- 2 Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.
 - 3 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (Framework Directive).
 - 4 Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/37.
 - 5 Wherever I use the term 'race' in this chapter I mean it to cover racial and ethnic origin, as in the EC Directive.
 - 6 The initiative to ban religious symbols in schools was largely inspired by incidents concerning the *hijab*, and the headscarf was the main issue in the subsequent debates. Many considered it a reaction to the failing integration of Muslim immigrant groups in French society. See more extensively on this issue, e.g. TJ Gunn (2004) 'Religious freedom and *laïcité*: a comparison of the United States and France', *Brigham Young University Law Review*: 419–505.
 - 7 Cf. Germany, where the case of *Ludin*, a Muslim teacher who was refused as a public school teacher because she was wearing a headscarf, created similarly heated debates as in France. Here again it was not religion as such which can explain the agitation it created throughout Germany, since in some of the German *Länder* no such turmoil surrounds the Catholic nuns who sometimes still teach in public schools, even in full religious dress. See more extensively on the German debate, e.g. D Schiek (2004) 'Just a piece of cloth? German courts and employees with headscarves', *Industrial Law Journal*, 33: 68–73 or M Mahlmann (2003) 'Religious tolerance, pluralist society and the neutrality of the state: the Federal Constitutional Court's decision in the headscarf case', *German Law Journal*, 4: 1099–116, available at www.germanlawjournal.com/ (accessed 8 January 2008).
 - 8 The Convention on the elimination of all discrimination on the basis of race embraces a broad definition as well. Race under this Convention includes 'colour, descent, or national or ethnic origin' (Art 1, s 1).
 - 9 See, e.g. the report of the Stasi Commission, which advised the French Government on the headscarf ban: Commission de réflexion sur l'application du principe de *laïcité* dans la République (2003) *Rapport au président de la République*, 11 décembre 2003, available at <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf> (accessed 8 January 2008).
 - 10 In a country such as the UK a general ban on religious symbols will also affect a large number of male Sikhs who wear a turban for religious reasons.
 - 11 In the *Bosphorus* decision the European Court of Human Rights clarified the relationship between the European Convention on Human Rights and Community law and the responsibilities of the states parties under both. The Court's general approach is rather deferential: as the protection offered by the Community can be considered to be 'equivalent' to the protection offered by the Convention, the European Court of Human Rights will presume no conflict with the Convention exists unless 'in the circumstances of a particular case, it is considered that the protection of the Convention rights was manifestly deficient', ECHR, 30 June 2005, *Bosphorus v Ireland*, Application no 45036/98, s 156.
 - 12 Charter of Fundamental Rights of the European Union [2000] OJ C 364/1. The Reform Treaty agreed upon at the European Council meeting in June 2007 stipulates that the Charter 'shall have the same legal value as the Treaties'. This means it will become legally binding after all.
 - 13 See Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 2000, CETS 177, *Explanatory Report*,

- available at <http://conventions.coe.int/treaty/en/Reports/html/177.htm> (accessed 8 January 2008).
- 14 To date, only about 15 states have ratified the protocol.
 - 15 Article 14: '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'.
 - 16 Case 293/83 *Françoise Gravier v City of Liège* [1985] ECR 593.
 - 17 ECHR, 15 February 2001, *Dahlab v Switzerland* (decision on admissibility), Application No 42393/98, and ECHR, 10 November 2005, *Sahin v Turkey* (Grand Chamber), Application No 44774/98, available at www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/ (accessed 8 January 2008).
 - 18 *Dahlab v Switzerland* (decision on admissibility), Application No 42393.
 - 19 For a long time the ECHR has been quite reluctant to acknowledge the concept of indirect discrimination. See more extensively D Schiek (2007) 'Indirect discrimination', in D Schiek, L Waddington and M Bell (eds) *Non-Discrimination Law*, Oxford: Hart Publishing, pp 341–5.
 - 20 ECHR, 10 November 2005 (Grand Chamber), *Sahin v Turkey*, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=Sahin%20%7C%20v.%20%7C%20Turkey&sessionId=4499387&skin=hudoc-en> (accessed 8 January 2008).
 - 21 *Ibid.*, para 111.
 - 22 *Ibid.*, para 109.
 - 23 Another way in which direct discrimination on the basis of religion could be at stake regards the situation of the Islamic religion being singled out. Although this may be the hidden agenda, states probably will not expressly do so. Thus French legislation is formulated neutrally by banning all ostentatious religious symbols.
 - 24 This is, in fact, the approach taken by the Dutch Equal Treatment Commission, see e.g. oordeel 2001–53, available at www.cgb.nl/ (accessed 8 January 2008) (available in Dutch only).
 - 25 See extensively C Tobler (2005) *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, Antwerpen, Oxford: Intersentia.
 - 26 P van Dijk, F van Hoof, A van Rijn and L Zwaak (eds) (2006) *Theory and Practice of the European Convention on Human Rights*, 4th edn, Antwerpen, Oxford: Intersentia, pp 334–42.
 - 27 In fact this was a major argument for the Commission Stasi to advise the French government to ban headscarves and other ostentatious religious symbols from public schools, see its report, op cit., fn 9.
 - 28 BVerfGE 108, 282–340 (24 September 2003 – file no 2 BvR 1436/02): '*Die Forschungsergebnisse zeigen jedoch, dass die Deutung des Kopftuchs nicht auf ein Zeichen gesellschaftlicher Unterdrückung der Frau verkürzt werden darf. Vielmehr kann das Kopftuch für junge muslimische Frauen auch ein frei gewähltes Mittel sein, um ohne Bruch mit der Herkunftskultur ein selbstbestimmtes Leben zu führen*' (s 52).
 - 29 E.g. C Dwyer (1999) 'Veiled meanings: Young British Muslim women and the negotiation of differences', *Gender, Place and Culture*, 6: 5–26, and C Killian (2003) 'The other side of the veil. North African women in France respond to the headscarf affair', *Gender & Society*, 17: 567–90.
 - 30 This case is mentioned in H Skjeie (2007) 'Headscarves in schools: European comparisons', in T Loenen and J Goldschmidt (eds) *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?*, Antwerp: Intersentia, pp 129–46.

- 31 See extensively C Tobler (2005) *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, Antwerpen, Oxford: Intersentia; exceptions regard mainly social security cases.
- 32 See, e.g. the case of *Sahin v Turkey* (Grand Chamber), Application No 42393/98 and the report of the Stasi-Commission (see n 9 above).
- 33 Oordeel (decision) 1999–18 and 1999–103, available at www.cgb.nl/ (accessed 8 January 2008) (the decisions are available in Dutch only).
- 34 The translation is by the author. The original Dutch reads: ‘*Die noodzaak tot terughoudendheid geldt te meer als het gaat om een wijze van kleden die de betrokkene vereenzelvigt met een groepering, die niet alleen voor zichzelf zeer strenge opvattingen naleeft, maar ook weinig blijkt geeft van tolerantie ten opzichte van andersdenkenden binnen dezelfde religie. Het lijkt evident dat een Islamitische vrouw die zelfs in de beslotenheid van het eigen klaslokaal meent de hoofddoek te moeten dragen, ook in vergelijking met de grote meerderheid van haar geloofsgenoten, getuigt van zeer stringente opvattingen en daarmee impliciet bedreigend kan overkomen op de vrouwen en meisjes van dezelfde godsdienst, die zich veelal met grote moeite het recht op een vrijere leefwijze hebben verworven*’.
- 35 See report of the Stasi-Commission (see n 9 above).
- 36 See BVerfGE 108, 282–340 (see n 28 above).