CENTRE FOR EUROPEAN POLICY STUDIES

CEPS POLICY BRIEF NO. 49
APRIL 2004

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IS THE PROPOSED FRENCH BAN SAFE FROM EUROPEAN LEGAL CHALLENGE?

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The French Ban on Religious Symbols

On 10 February 2004, by an overwhelming majority, the French National Assembly voted to ban state school pupils wearing obvious religious symbols, including large Christian crosses, Jewish skull caps, Sikh turbans and headscarves, such as the Islamic Hijab on school premises.[1] The ban was approved by the Senate on March 3rd, and will come into force in time for the beginning of the new school year in September 2004.[2]

While the proposed ban has aroused controversy throughout Europe and beyond, there has been little consideration so far given to the question whether, if the ban is enacted, it can successfully survive European legal challenge in the French and European courts. The existing case law on the subject in national supreme courts such as the Judicial Committee of the House of Lords, the British supreme court, and the Bundesverfassungsgericht, the German supreme court, does not provide much comfort to the French authorities. In each case, although for differing reasons, these supreme courts have rejected as disproportionate absolute prohibitions on the wearing of clothing suffused with religious symbols, such as headscarves and turbans.

More worrying still for the French authorities is the recent adoption by the European Community of two directives on discrimination on grounds of race and ethnic origins and discrimination on grounds of religion or belief. This Community legislation, together with the provisions on religious freedom in the EU Charter of Fundamental Rights, is likely to result in a formidable legal challenge for the new legislation as soon as it comes into force.

Even the weaker protection offered by the European Convention of Human Rights is likely to present the French state with a further legal obstacle to a successful defence of the new law.

* Associate Research Fellow, Centre for European Policy Studies, Brussels, and Senior Lecturer in Law, Centre for Legal Research, Nottingham Law School (alan.riley@ntu.ac.uk).

[1] Given that the text of the bill focuses on obvious religious symbols, 'Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit', small stars of David and Christian crosses worn round the neck are likely to be compatible with the new law. The legality of permitting 'small' religious symbols but not 'larger' ones is discussed below.

[2] The current text was approved by the Senate on 3 March 2004. See Projet de loi relatif à l'application du principe de laïcité dans les écoles, collèges et lycées publics (vendredi 3 mars 2004). The website link can be found at http://www.assemblee-nationale.fr/12/dossiers/laicite.asp

European Community Anti-Discrimination Law

In 2000 the European Community enacted two anti-discrimination directives, the Council Directive 2000/78/EC[3] establishing a general framework for equal treatment in employment and occupation, which prohibited discrimination in respect of age, disability, orientation and religion. A second Council Directive, Directive 2000/43/EC[4] implementing the principle of equal treatment in respect of racial and ethnic origins. Member states may delay implementation of the age and disability provisions until December 2006. All the other discrimination provisions should have been implemented into national law by December 2003.

At first sight, any discrimination assessment of the French law should take place in relation to Directive 2000/78/EC, as it applies to discrimination in respect of religion and belief. However, that directive only applies to discrimination in employment and occupation. It does extend to vocational training and therefore probably applies to vocational courses taking place in schools and colleges. As a result of the Directive's narrow scope, it is unlikely to be the principal legal challenge to the French law. The impact of this directive is discussed further below.

Directive 2000/43/EC by contrast has a much broader scope: it prohibits direct and indirect racial and ethnic discrimination in employment and occupation, but also in relation to the provision of goods and services by private and public sectors, including education.[5] Furthermore, there are very strong grounds for arguing that the phrase 'race or ethnic origin' can be applied to protect religious groups who share the same racial or ethnic origins.

Given that the Community has very little case law on racial or religious discrimination, the European Court of Justice (ECJ) is likely to draw upon the case law of the member states to assist in the interpretation of the race and general framework directives. In this regard the ECJ is likely to give considerable weight to the British case law, as the United Kingdom has the most developed case law on racial discrimination of the 25 member states. Of particular relevance is the approach of the British courts as to the proper scope of racial discrimination legislation.

In *Mandla v. Dowell Lee*, the House of Lords, the British supreme court, ruled that the protection afforded by the Race Relations Act of 1976 could be extended to certain religious groups.[6] In that case, the Court was faced with a situation in which a Sikh had been refused a place at a private school because the school authorities refused to permit the appellant to wear a turban. The case focused on the issue of whether the Sikhs were a group defined by their ethnic origins. The Court held that term ethnic origins was broader than a strictly biological or racial definition. The Court took the view that for a group to constitute an ethnic group in the sense of the 1976 Act it must regard itself and be regarded by others, as a distinct community by virtue of certain characteristics. The identified characteristics were 1) a long shared history of which the group is

[3] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. The provisions in respect of religious discrimination were to be brought into force by national law by 2 December 2003.

[4] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origins. The directive is to be brought into force by 19th July 2003.

[5] There is an argument as to whether the Community can in fact adopt broad anti-discrimination legislation in respect of race or ethnic origins and religion or belief. The argument is that the Community has no general competence to legislate in such areas. That argument is further supported by Article 149 (4) which explicitly excludes harmonisation in the field of education. However, there is a powerful alternative view that Article 13 grants the Community express powers in respect of discrimination matters, and to that extent acts as a *lex specialis*. It is likely that faced with a legal challenge under this directive the French government will seek to challenge its legal basis.

[6] [1983] AC 548.

conscious as distinguishing it from other groups and the memory of which keeps it alive; and 2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition, a number of other characteristics are relevant, such as a common geographical origin or descent from a small number of common ancestors; a common language not necessarily peculiar to the group; a common literature peculiar to the group; a common religion different from that of neighbouring groups or from the general community surrounding it; being a minority or being an oppressed or a dominant group within a larger community.[7]

This approach of bringing certain religious groups who can demonstrate they have distinct ethnic origins within British race discrimination legislation has significantly extended the protection of that legislation to Sikhs and Jews.[8] The British courts so far have failed to find that Muslims are able to provide sufficient evidence of specific ethnic origins to obtain protection from direct discrimination. However, the courts have provided protection for Muslims as a matter of indirect discrimination.[9] Furthermore, some academic commentary argues that Muslims could provide sufficient evidence of distinct ethnic origins to meet the *Mandla* criteria.[10]

Given there is very little Community case law on the issue, the ECJ is likely to give significant weight to the views and approach of the House of Lords to the definition of race and ethnic origin. The law purports to ban all large religious symbols being worn in state schools. Hence Sikhs, Jews and Muslims will have a strong argument under the *Mandla* case law that such legislation constitutes racial discrimination against them on grounds of ethnic origins.

The French government can argue that the law is non-discriminatory in that it applies to all large religious symbols being worn in school.[11] However, the principal effect of that argument is to shift the legal challenge from direct to indirect discrimination, where the French government would still have to justify its prohibition under the directive as objectively justified by a legitimate aim.[12] Arguments concerning, for example, public order or public safety would have to be objectively justified in respect of the ban on all religious symbols. The French government may find this argument difficult to sustain. It is hard to see how a public order or public safety argument could be justified for a ban on *all* large religious symbols.

What is not at all clear is the extent to which the Community courts would give credence to the principle of secularism as an objectively justified legitimate aim under the directive. One difficulty for the French government is that unlike the Strasbourg Human Rights Court, the EJC is likely to undertake a much more intensive investigation of such an aim as secularism. In particular, it may well take a close look at the extent to which the French state breaches its own secularist principles. For example, the argument to the effect that the French state cannot rely on the principle of secularism because in practice the state does in fact support private schools where the religious symbols, such as headscarves, skull caps and crosses are worn. The intensive investigation carried out by the ECJ is likely to make it more difficult for the French government to sustain the argument that the secularism principle is a legitimate aim sufficient to justify the

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[7] Ibid.

[8] *Seide v. Gillette Industries Ltd* [1980] IRLR 427.

[9] *JH Walker v. Hussain* [1996] ICR 291.

[10] Dobe, K.S. and Chhokar, S.S. (2000), "Muslims, Ethnicity and the Law", *International Journal of Discrimination and the Law*, Vol. 4, 369-86.

[11] See the argument on discriminatory application of the law below.

[12] Art 2(2)(b) of Directive 2000/43 provides that 'indirect direct discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.

prohibition of large religious symbols in schools.[13] Challengers to the ban can also point out that the French secularist principles are not even uniformly applied within the territory of Metropolitan France in that secularism does not apply in Alsace-Moselle. In fact in that region the state directly supports public religious schools.[14]

The ECJ is also like to be heavily influenced by the case law of the other superior and supreme courts of the member states. The most recent notable discussion before a European superior court was before the Bundesverfassungsgericht, the German Federal Constitutional Court, which discussed the scope for secularist principles in the context of a headscarf ban applied to a school teacher.[15] Although the Court took a procedural approach to settling the case – ruling that express legal rules were required by the Lander for any ban to apply – the discussion of the Bundesverfassungsgericht raises a number of relevant issues.

The Court took the view that the wearing of clothing such as headscarves only unfolded a meaning in conjunction with the person who wears such clothing. In its view decisive as to how such garments are to be understood is the view of the neutral observer. The Court also took the view that the wearing of such garments cannot be reduced to simply a sign of the suppression of women. It also held that the wearing of a headscarf does not in principle impede the teaching of the values of the German Constitution. It also argued that there is a crucial difference between religious symbols installed on public property on the order of the state, and the state tolerating the personal decision of an individual to wear a religious symbol herself. If the state tolerates such a symbol worn by an individual, it is not making this a symbol of its own.[16]

The ECJ is also likely to be influenced by the broad protection against religious and racial discrimination in many international agreements that have been ratified by the member states. In addition, the Court is likely to take into account, the EU Charter of Fundamental Rights, particularly if the EU Constitution comes into force before a case arrives in Luxembourg, which will give legal force to the Charter. Article 10 of the Charter provides broad protection for freedom of thought, conscience and religion. Even if the Constitution has not come into force, the Court will apply fundamental rights in respect of religion as part of the general principles of Community law.[17]

One particular discrimination argument that may well place immense pressure on the French government is the argument that relates to the scope of the ban. The ban applies so that small religious symbols, such as crosses and stars of David, are permitted but larger religious symbols are not. There is thus a potentially strong discrimination argument with which the French state is likely to have difficulty. This would appear to be a *prima facie* case of indirect discrimination, technically neutral but bearing down on some faith communities, namely Muslims, Sikhs and Jews, but not others, in this case Christians. Christians, even the most devout, do not usually enter schools, or for that matter any other premises, even Churches, carrying large crosses.

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[13] Tim King (2004), Secularism in France', *Prospect*, No. 64, March.

[14] When the secularist law was adopted in 1905, the region of Alsace-Moselle was part of Germany. The German state applied the Napoleonic Concordat of 1808 which gave the Catholic and other churches, as well as Jewish organisations directly state-supported schools and priests, pastors and rabbis paid by the state. After the return of the region to France, all French governments since have foresworn secularist principles and honoured the 1808 Concordat.

[15] BverG, 2BvR 1436/02, 24 September 2003.

[16] Mattias 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* , Vol. 4, No. 11.

[17] Case 130/75 *Prais v. Council* [1976] ECR 1589. In that case the ECJ held that there was a violation of the right to religious freedom, recognised as a general principle of Community law. A Jewish job applicant was required to take an examination on a Saturday and, as a result of her religious obligations, she was precluded from applying for a week-day job.

As explained above, an alternative legal basis to challenge the French law stems from Directive 2000/78/EC, which would permit a direct challenge on grounds of religious discrimination. However, that challenge would be limited by the scope of the directive to colleges where vocational training took place. The French government, however, is equally likely to find some difficulty in justifying the ban on religious symbols within the scope of Directive 2000/78 as it will under Directive 2000/43. The ECJ has already held that religious freedom is a general principle of Community law. Furthermore, as pointed out above, religious freedom also receives broad protection under Article 10 of the EU Charter of Fundamental Rights. And again unlike the ECHR system where the states are given a margin of discretion (in Convention terms appreciation) in assessing what interferences are justified, Community law requires strict objective justification of interference with Community rights.

The European Convention of Human Rights (ECHR)

The Convention case law is likely to provide significantly less protection against the French prohibition on religious symbols. In part this is because of the margin of appreciation given to the Contracting States of the ECHR in enacting and enforcing the laws of their respective states. In part because the existing case law has taken, compared with the case law of the superior courts of the member states, a notably unreflective approach to similar questions as those raised by the French law. However, Articles 9 and 14 are likely to still provide France with some problematic legal issues to overcome.

Article 9 of the Convention protects two rights.[18] The first is the right to hold and change religious beliefs. This right is absolutely protected under Article 9. The second protected right is the right to manifest religious beliefs. This however is subject to restrictions under Article 9(2) by such limitations that are prescribed by law and are necessary in a democratic society in the interests of public order, health or morals or for the protection of rights and freedoms of others.[19]

At first sight the French government has a very powerful case that it can legitimately impose a ban on religious symbols being worn by pupils on state school premises. In the first place the ECtHR has made it clear that the states have a margin of appreciation to balance the religious freedom of one party or group against the religious freedoms and freedom of conscience of others. This margin of appreciation would appear to give the French government sufficient discretion to control the type of clothing and religious symbols to be worn in French schools. In particular, the government can argue the ban is proportionate, and does not step outside its margin of appreciation, as it affects all religious symbols, and does not discriminate against any one religion.

Secondly, the Strasbourg-based Commission of Human Rights in *Karaduman v. Turkey* ruled as inadmissible a case in which a university student had refused to remove her headscarf in order to obtain a degree certificate.[20] In that case, the Commission took the view that a student joining a

[18] Article 9 of the ECHR provides:

"1. 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.

2. 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 rights and freedom of others."

[19] Claims under Article 9 are often also made alongside claims under the right of freedom of expression contained in Article 10 and freedom of assembly contained in Article 11. Article 9 claims can also be bundled with an ancillary claim under Article 14 which protects holders of Convention rights from discrimination.

[20] *Karaduman v. Turkey* (1993) Application No. 16278/90. Application before the Commission of Human Rights.

secular institution could be obliged to comply with the rules of that institution. The Commission also pointed to the rights and freedoms of the other students not to be pressured into wearing the headscarf.

Thirdly, in the recent *Dahlab v. Switzerland* case, the Court expressly upheld, as justified under Article 9(2), a ban on the Islamic headscarf being worn by a teacher in a state infant school, and ruled inadmissible.[21]

It is unfortunate that so far no case has reached a full chamber of the European Court of Human Rights. The *Karaduman* case, while being only a Commission case, is particularly problematic. No account was taken of whether any other educational institutional was available nor whether there was indeed any pressure on students at the University to wear the headscarf. Given the developed law in other jurisdictions since *Karduman,* particularly the arguments that could be derived from the recent case in the Bundesverfassungsgericht, it is open to question how far a ban on religious symbols being worn by students would survive an ECHR legal challenge.

Furthermore, the detail of the ruling in *Dahlab* suggests that the position of the French state is not as secure as it first appears. The ECtHR accepted that the ban was proportionate and that the Swiss state did not exceed its margin of appreciation under Article 9(2). The Court argued that the measures taken by Switzerland were justified given the role of Ms Dahlab as a state school teacher, exercising educational authority and representing the state and the tender age of the children for whom she was responsible.

The difficulty for the French state is that the entire focus of the Court's acceptance on a restriction of Ms Dahlab's religious freedom was based on her position as a superior, able to influence her charges. That basis for a restriction is not available to France in relation to its ban on religious symbols. Worse still, the Court has previously used this 'superior' distinction as the basis of holding that a restriction on religious freedom is justified, and where the same religious freedom did not involve the exercise of such a freedom by a superior, then a similar restriction was deemed to have infringed Article 9.

In *Kokkinakis v. Greece*,[22] the Court had ruled that a conviction for prosyletism infringed Article 9. In *Lariss v. Greece*,[23] the applicant had been also convicted of prosyletism. However, in that case, the applicant had been a superior in the Greek army who had sought to prosyeltise his subordinates. The Court took the view that restrictions on prosyletism by army superiors were justified under the Convention as a proportionate response to protect subordinates.

Without the 'superior' element present, it is likely to be more difficult for the French government to sustain its prohibition against schoolchildren wearing religious symbols under Article 9. One approach for the French government would be to rely on some of the public order and public safety justifications in Article 9(2). France could argue that the right to wear religious symbols pressures other students to conform, restricting their own right to religious liberty. However, there is the question of evidence for this proposition. The Bundesverfassungsgericht indicated that there was very little research on this issue of the impact of religious clothing on schoolchildren.[24] There is also the question of whether any blanket ban would be proportionate. It could be argued for instance that a ban could be justified to protect the religious freedom of younger children but could it be justified on older teenagers who would be less impressionable and have a significant degree of personal autonomy in their lives at such an age.

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[21] *Dahlab v. Switzerland* (2001) Application No. 42393/98.

[22] *Kokkinkas v. Greece* (1993) EHRR 397.

[23] *Lariss v. Greece* (1998) EHRR 329.

[24] Mahlmann, op. cit., 1105.

The greatest difficulty for France is likely to be in respect of the scope of the ban. If small religious symbols are permitted, then the French government is likely to find it difficult to justify the ban. As explained above, the challengers to the ban will be able to argue that the ban is in fact discriminatory. Additionally such challengers will be able to rely upon Article 14 of the Convention, which prohibits discrimination that occurs within the ambit of Convention rights.[25]

Conclusion: A prohibition under pressure?

It is almost certain that as soon as the law banning religious symbols in schools comes into force it will face a legal challenge in the French courts. It is almost as certain that the challengers will rely on EC law to challenge the prohibition. As explained above the EC law argument is likely to be stronger; in addition, a result can be obtained from the ECJ faster than the Strasbourg Court. A first instance national court can refer the issues involved in the case to the ECJ, there is no need to send the case spiralling up the national judicial hierarchy. In addition, if the ECJ rules against the ban, the national courts will directly overturn the ban, without need of government intervention. By contrast, the arguments are not only weaker under the Convention case law, the process to be heard in Strasbourg is slower and if the Court ruled against the French government there is no mechanism to ensure direct application of the Court's ruling in France. Therefore the overwhelming focus of the legal debate is likely to be on EC law. Hence the French ban is likely to provide the newly re-constituted court of 25 judges in Luxembourg an early opportunity to rule on the scope and substance of the Race Discrimination Directive.

[25] Article 14 provides that "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 or political or other opinion, national or social origin, associated with a minority, property birth or other status".

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