

RELIGIOUS SYMBOLS AND ATTIRE IN PUBLIC SCHOOLS: A COMPARATIVE CONSTITUTIONAL ANALYSIS

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I. INTRODUCTION

In this paper I will be examining the Secular State's approach towards religious symbols in public schools in a comparative constitutional method. Here in religious symbols I have included the symbols and other religious clothing and attires worn by members of several religions.

In light of the current controversies regarding right to display religious symbols in schools, colleges and other public institutions it has become necessary to do a comparative analysis of several multicultural and 'secular' societies and draw some lessons from them. Although secular values and privacy of religion is being increasingly accepted, there is a danger that secularism itself may degenerate into a dogma and may become oppressive for people by violating their freedom of religion. This paper is therefore an attempt in this direction of finding a pragmatic solution to this problem.

This issue has created a storm of controversies especially in Europe. There are several facets of this controversy. First pertains to display of religious symbols in schools and display of religious symbols by the teachers. In this context I have examined some European countries, some North American Countries and South Africa to get a better perspective.

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II. EUROPEAN COUNTRIES

France:

France guarantees equality of all irrespective of religion.¹ However the strict separation between religion and state practised in France is well known. France embodies the enlightenment principle of religion is private matter and it should not be brought into “public sphere” in its fullest extent. It follows the doctrine of *laïcité* i.e. the neutrality of the state towards religious beliefs, and the complete isolation of religious and public spheres which translates into the French state and government not taking a position on any religion or its practices.² However, in practical terms it means the separation between a person’s private and public life must be complete. He/she has to practise his/her religion in private sphere only and should not bring it to public sphere and thus it should not affect everyday life of the person.³ Thus, nothing connected to religion is allowed to appear in public life of a person.⁴

However, the major problem with this approach is most religions are not compatible with staying private. More often than not, the religious codes strive to regulate entire life of a person and do not differentiate between public and private lives. Thus, if a religion prescribes certain attire, it has to be worn always irrespective of private and public life. The French government had enacted a law in 2004 banning ‘conspicuous religious symbols’ such as Muslim headscarf, Sikh turbans, Jewish skullcap and large Christian crucifixes in schools.⁵ In 2010 the French parliament passed a law prohibiting the concealment of one’s face in public which prevents Muslim veils that cover the face in all public places and not only in schools.⁶ This law,

¹ 1946 CONST. 1946.

² Frederick Mark Gedicks, Religious Exemptions, Formal Neutrality, and *Laïcité*, *Indiana Journal of Global Legal Studies*, Volume 13, Issue 2, Summer 2006 pp. 473-492 10.1353/gls.2006.0014; The concept of *Laïcité* in France, <http://www.normandyvision.org/article12030701.php> (Last visited on: 21-07-2013).

³ *Ibid.*

⁴ *Id.*

⁵ French scarf ban comes into force, <http://news.bbc.co.uk/2/hi/3619988.stm> (last accessed on: 21-07-2013).

⁶ Questions and Answers on Restrictions on Religious Dress and Symbols in Europe, <http://www.hrw.org/news/2010/12/21/questions-and-answers-restrictions-religious-dress-and-symbols-europe> (Last visited on: 21-07-2013).

approved by the French Constitutional Council, makes it a crime to coerce women to wear such veils.⁷ This had created huge debates and protests by minorities especially from Muslims who saw it as directed against Islamic Headscarf which Muslim women were obligated to wear.⁸ However, the French government did not back out but justified the move on basis of its 'deep secular roots' and *laïcité* principle.⁹ This position is completely different from that of the principles followed by South Africa, India etc. Even most other countries of Europe have only declined to interfere when the school or local administration has imposed such a ban or their judiciary has effectively banned them but few countries indeed have actively banned religious attires in schools.

Switzerland

The 1999 constitution of Switzerland provides in its general equality clause that *"No person may be discriminated against, in particular on grounds of origin, race, gender, age, language, social position, way of life, religious, ideological, or political convictions, or because of a physical, mental or psychological disability."*¹⁰ Article 15 which pertains to freedom of religion and conscience guarantees freedom of religion and conscience, gives people right to practice and profess any religion they want and says that each person has right to join any religious organisation but they may not be forced to do so.¹¹ Article 72 makes Cantons (provinces) responsible for relation between state and church and to preserve public peace among several communities.¹² The interesting observation about The Swiss constitution does not expressly declare it to be secular, nor does it establish a state religion or church. However from the general equality clauses and freedom of religion clauses the proper inference would be that it establishes a secular state.

⁷ *Ibid.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Constitution fédérale de la Confédération Suisse [Cst] [Constitution] April 18, 1999 art. 8.

¹¹ Constitution fédérale de la Confédération Suisse [Cst] [Constitution] April 18, 1999 art. 15.

¹² Constitution fédérale de la Confédération Suisse [Cst] [Constitution] April 18, 1999 art. 72.

Coming to the judicial interpretations regarding secularity, doctrine of state impartiality and religious symbols in public schools has been considered in many cases. In the *Swimming lessons* case the Swiss Supreme Court allowed a Muslim father “to remove his daughter from co-ed swimming lessons in the second year of primary school” based on the Koranic dictum that females should cover their body from sexual maturity onwards.¹³ Although in this case the girl was not sexually mature, nevertheless the court allowed the appeal on ground of ‘strong faith’.¹⁴ Although this case is not about religious symbols, it shows that the Swiss Courts were ready to consider religious beliefs of parents in deciding upon such cases. In the *Genevan vetements religieux* decision, the court held that although “the scope of religious profession generally covers the right to wear religious clothing” but on balance of reasonableness it was likely that the feeling of students and their parents will be hurt if a teacher wears such religious clothes and the aim of state should not only be espousing religious freedom but also achieving religious harmony.¹⁵ It said the school might become a place of confrontation if teachers were allowed to wear religious clothes.¹⁶ However, students have been generally allowed to wear religious attire.¹⁷

In the landmark *crocifisso* decision Swiss Federal Court ruled about the religious symbols in primary schools and upheld a cantonal council of Geneva a female primary school teacher’s wearing an Islamic headscarf¹⁸ and also decided on question that whether crucifixes attached to walls of every classroom violated the doctrine of state impartiality.¹⁹ It held that it was important to observe religious and denominational impartiality in public schools as the education was compulsory and children from many religions studied there. Thus, display of religious symbols like crucifixes in classrooms

¹³ Cavelti, U. J., “Die Religionsfreiheit in Sonderstatusverhältnissen,” Pahud de Mortanges, R. (ed.), *Religiöse Minderheiten und Recht*, Freiburg i. Ue. 1998 (Freiburger Veröffentlichungen zum Religionsrecht, volume 1), 51; Angehrn, M., *Volksschulen und lokale Schulbehörden vor neuen Herausforderungen*, dissertation St. Gallen 2004, 162 ff.

¹⁴ *Ibid.*

¹⁵ *Id.*

¹⁶ Marcel Stiissi, *Religious Symbols in Switzerland*.

¹⁷ BGE 116 Ia 252, E. 7, S. 262 f.

¹⁸ Code of practice of the Swiss Supreme Court 47 (1998), 295.

¹⁹ *Ibid.*

could conceivably be seen as instruction to follow Christian precepts in education and offend people and make an impression on young students.

However, it is has been said that children wearing religious attire like headscarves would be allowed in Switzerland.²⁰

United Kingdom

In United Kingdom the position of law is more ambiguous. UK has accepted the religious diversity and made some exemptions, like allowing turbaned Sikhs exemption from wearing helmets.²¹ However, this does not mean that it has uniformly allowed the wearing of religious attire in all places including schools. Indeed in many cases restrictions in name of security etc. have been imposed. For example, Sikhs' are not allowed to carry *Kirpan* in Airports.

Recently in *R. (Begum) v. Governors of Denbigh High School*, the Court of Appeals allowed a girl to wear 'jilbab' (an Islamic attire) in her school. However, in House of Lords the case was decided in favour of the school.²² It observed that the school had allowed other Islamic dresses like the hijab, a headscarf, and trousers and tunic, but banned the full body covering Jilbab. It had "taken immense pains to devise a uniform policy which respected Muslim beliefs".²³ In case of Sarika Singh, the girl was allowed to wear the Sikh bangle '*Kara*' by the High Court of Wales and held that it was an expression of her Sikh faith and that she was a victim of unlawful discrimination by the school which had prevented her from wearing it.²⁴ In another case of Aishah Azmi, a British Muslim teacher alleged discrimination by the school for dismissing her when she declined to remove the niqab (full

²⁰ Stiissi, op.cit., supra. C.f. Gloor (ann. 21), 2; Jean Francois Aubert, *L'islam a l'école publique*, Ehrenzeller, B. u.a. (ed.), Festschrift für Yvo Hangartner (Dike Verlag, St. Gallen 1998), 479 et seq.

²¹ Bangle discrimination case: Religious symbol cases that have come to court, <http://www.telegraph.co.uk/news/religion/2469623/Bangle-discrimination-case-Religious-symbol-cases-that-have-come-to-court.html> (Last visited on: 21-07-2013).

²² [2006] UKHL 15.

²³ School and religious symbol cases, http://news.bbc.co.uk/2/hi/uk_news/7530726.stm (Last visited on: 21-07-2013).

²⁴ *Ibid.*

face covering veil) in presence of any male colleague.²⁵ Although the School was ready to allow her to wear niqab anywhere in school, it insisted that she must remove it while teaching.²⁶ The employment appeal tribunal held that the “*Respondent had shown that the imposition of the prohibition was a proportionate means of achieving their legitimate aim (of improving education.*” However, the court found that she had been victimised for complaining, and awarded £1,100 for victimisation and reprimanded the Borough for not following statutory grievance procedure.²⁷

There have been certain other controversies which have not come to courts but have been resolved by school allowing for hijabs etc.²⁸ It can be concluded from these cases that there is no settled principle of law in UK regarding this but the courts are approaching this issue cautiously in a case-by-case basis. Generally it can be deduced that courts are willing to allow some religious attire like Kara, Hijab etc. but are unwilling to allow full body covering veils etc. on the ground that they will impair education.

III. VIEW OF ECHR

Lautsi v. Italy

This was the landmark judgement of the European Court of Human Rights in which it allowed the Schools of Italy to display crucifixes in their classrooms which was mandated by Italian Law.²⁹ In this case Mrs. Soile Lautsi complained that the display of crucifixes in classrooms violated principle of secularism and created an atmosphere of indoctrination into Christian religion.³⁰ However, the Supreme Administrative Court in Italy upheld the law saying that the crucifixes symbolised values like tolerance, mutual respect which characterised the Italian civilisation but did not symbolise the

²⁵ Azmi v. Kirklees Metropolitan Borough Council [2007] IRLR 434.

²⁶ *Ibid.*

²⁷ *Supra* note 23.

²⁸ *Ibid.*

²⁹ Lautsi v. Italy, Application no 30814/06: ECHR (Grand Chamber).

³⁰ *Ibid.*

Christian religion.³¹ The ECHR held in 2009 that the law violated the Articles 2 and 9 of the European Convention on Human Rights.³² It held that among many meanings of crucifixes the symbol of Christianity was predominant and that it violated secular principles. However, the matter went to the Grand Chamber of ECHR and in 2010 it held on basis of margin of appreciation principle, to uphold the ruling of Italian Courts.³³ It decided that since the Christian ethos and symbols like crucifixes had been integral part of Italian nation and its civilisation it would be better to leave such matter to the country than deciding it in a European Court.³⁴

Sahin v. Turkey³⁵

In this case the ECHR upheld a ban on headscarf by the University of Istanbul does not of Sahin's freedom of thought, conscience, and religion under Convention Article 9.³⁶ The Court also stated that *"the University of Istanbul's regulations imposing restrictions on the wearing of Islamic headscarves and the measures taken to implement them were justified in principle and proportionate to the aims pursued and, therefore, could be regarded as "necessary in a democratic society".*³⁷

South Africa

The South African Constitution has been acknowledged as a fairly multicultural constitution respecting the religious and cultural rights of all communities. The general equality clause of the constitution prohibits the state's unfair discrimination on basis of religion among others.³⁸ Article 31 provides right to any cultural, religious or linguistic community to enjoy and practise their culture.³⁹ Article 15 provides that

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Sahin v. Turkey*, (hereinafter *Sahin*), Application no. 44774/98, Council of Europe: European Court of Human Rights, 10 November 2005.

³⁶ ¶ 117 *Sahin*.

³⁷ ¶ 188 *Sahin*.

³⁸ S. AFR. CONST. 1996 art. 9(3).

³⁹ S. AFR. CONST. 1996 art. 31.

- “1. *Everyone has the right to freedom of conscience, religion, thought, belief and opinion.*
2. *Religious observances may be conducted at state or state-aided institutions, provided that*
 - a. *those observances follow rules made by the appropriate public authorities;*
 - b. *they are conducted on an equitable basis; and attendance at them is free and voluntary.*
3. a. *This section does not prevent legislation recognising marriages concluded under any tradition, or a system of religious, personal or family law; or systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.*
- b. *Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.*⁴⁰

This part of the South African Constitution is very important as it is very significant departure from the European Approach to secularism and freedom of Religion. Unlike European model, where we saw that the state is being required to maintain impartiality through effecting separation of state and religion, here the state is equally accommodating all religions. The provision on religious observance being done in state or state aided institutions might sound shocking and completely anti-secular to a person trained in the European model. However, the South African approach is in consonance with approach of other countries like India, with instead to strictly separating religion and state actually recognise religion and incorporate the symbols of religion in their institutions.

⁴⁰ S. AFR. CONST. 1996 art. 15.

The South African Constitution promotes a 'Co-operative Model' for religion and public education according to which although they have different spheres of influence they cooperate.⁴¹

In the landmark case of MEC for Education: KwaZulu-Natal & Ors. v. Pillay the Constitutional Court of South Africa recognised the right of students to wear religious attire to school. In this case a Hindu mother contended that by preventing her daughter from wearing nose stud the school was violating their right to equality and right not to be discriminated against on the grounds of religion, conscience, belief or culture.⁴² The Constitutional Court held that the School had unfairly discriminated her, the school governing body has to amend the School and dress code with a view not only to *"accommodate religious and culturally based deviations, but also to set out the procedure for applying and possibly granting such exemptions"*.⁴³ This can be contrasted with positions of countries like France, which follow almost militant secularism and ban any sort of religious symbols wore by anyone.

Similarly, in Antonie case a Rastafarian student was suspended for five days from the school for arranging her hair in dreadlocks and wearing a cap over it.⁴⁴ The court ruled in her favour and held that such prohibition and the punishment meted out to her violated her human dignity and freedom of expression. Commenting on freedom of expression the court held that the freedom of expression does not include only freedom of speech, it includes the freedom to *"seek, hear, read and wear. The freedom of expression is extended to forms of outward expression as seen in clothing selection and hairstyles."*⁴⁵ In the Monayi incident, an educator confiscated a nine year old

⁴¹ Religion and Schools, http://www.erp.org.za/hm/issuepg_religion.htm (Last visited on: 21-07-2013).

⁴² Pillay v. MEC for Education, KwaZulu Natal AR 791/05 2006 ZAKZHC 8 (5 July 2006) (hereafter Pillay (N)) originally brought in the Durban Equality Court as case AR 791/05.

⁴³ Pillay (CC) ¶ 117.

⁴⁴ Learners' religious-cultural rights: A delicate balancing act, <http://www.dejure.up.ac.za/index.php/en/volumes/46-vol-1-2013/164-article-6.html> (Last visited on: 21-07-2013).

⁴⁵ E de Waal, Re Mestry and CJ Russo, Religious And Cultural Dress At School: A Comparative Perspective, ISSN 1727-3781 available at: <http://dx.doi.org/10.4314/pelj.v14i6.3> (Last visited on: 21-07-2013).

student's goatskin bracelet because it contravened school jewellery rules although the student Sibusiso was given that bracelet during a religious ritual and was not supposed to be taken off-it had to come off by itself.⁴⁶ This matter was resolved by The Gauteng Department of Education which spoke out in support of Sibusiso and said that they cannot recognise a school policy which did not recognise cultures of various students.⁴⁷

Although cases involving wearing of religious attire by teachers or display of religious symbols in schools have not come up yet, it is submitted that in South Africa, such cases will be decided differently than they were decided in Swiss courts in the light of the 'assimilationist' and diversity promoting approach of the Constitution of South Africa. The South African Constitution has expressly recognised the right to religious observances in public institutions, so there is no reason why the courts will disallow wearing of religious attire or symbols by teachers.

United States of America

The Freedom of Religion has been protected in U.S. through First Amendment, which includes the free exercise, free speech and non-establishment of religion by state clauses.⁴⁸ In U.S. it has been long settled position of law that students are allowed to wear religious attire in schools and on this basis they cannot be discriminated against.⁴⁹ In the case of *Tinker v. Des Moines Independent School District*⁵⁰ the Federal Court held that the students do not "shed their constitutional rights to freedom of speech or expression at the school gate".⁵¹ School can restrict free speech and expression relating to religion only if it materially or substantially disrupts

⁴⁶ *Ibid.*

⁴⁷ *Id.*

⁴⁸ First Amendment: An Overview, http://www.law.cornell.edu/wex/first_amendment (Last visited on: 21-07-2013).

⁴⁹ *Morse v. Frederick*, 551 U.S. 393 (2007); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

⁵⁰ 393 U.S. 503 (1969).

⁵¹ *Ibid*; Religious Clothing at School, <http://aclj.org/education/religious-clothing-at-school>. (Last visited on: 21-07-2013).

school discipline.⁵² However, when it comes to religious attire to be worn by teachers the courts in US have been largely on the side of schools. For example, in the case of *United States v. Board of Education*, the court dismissed that religious discrimination claim by a Muslim teacher against the board of education which had banned him from wearing religious attire. In states such as Oregon and Pennsylvania statutes actively banning teachers in public schools from wearing any religious attire or marks.⁵³ However, these statutes have been repeatedly upheld on ground on state's religious neutrality.⁵⁴ However, this does not mean that religious attire by teachers is banned throughout U.S. Indeed in Arkansas and Tennessee there are laws explicitly allowing teachers to wear religious attire in public schools.⁵⁵ In the states where there is no such law regarding religious attire to be worn by teachers, courts have mostly allowed the teachers to wear religious symbols and dresses.⁵⁶

Canada

Canada follows a policy of accommodation of minorities in its Freedom of religion laws and does not prescribe 'one-size fits all' equality.⁵⁷ Hence *"Canada's form of religious neutrality attempts to make laws receptive to the particular needs of minorities, rather than espousing a more uniform conception of equality"*.⁵⁸ Canadian courts have largely allowed the presence of religious symbols in schools and other public institutions. For example, the Ontario Human Rights Commission states that a school or organization

⁵² *Ibid.*

⁵³ May a teacher wear clothing not approved by a teacher dress code?, <http://www.firstamendmentschools.org/freedoms/faq.aspx?id=13027> (Last visited on: 21-07-2013).

⁵⁴ *Cooper v. Eugene Sch. Dist. No. 41*, 301 Ore. 358 (1986), app. dismissed, 480 U.S. 942 (1987); *U.S. v. Bd. of Education*, 911 F.2d 882 (3rd Cir. 1990).

⁵⁵ *Supra* note 53.

⁵⁶ *Ibid.*; *Moore v. Bd. of Education*, 212 N.E. 2d 833 (Ohio 1965); *Rawlings v. Butler*, 290 S.W. 2d 801 (Ky. 1956); *Zellers v. Huff*, 236 P.2d 949 (N.M. 1951); *City of New Haven v. Town of Torrington*, 43 A.2d 455 (Conn. 1945); *Johnson v. Boyd*, 28 N.E.2d 256 (Ind. 1940); *Gerhardt v. Heid*, 267 N.W. 127 (N.D. 1936).

⁵⁷ Freedom of Religion and Religious Symbols in the Public Sphere, <http://www.parl.gc.ca/content/lop/researchpublications/2011-60-e.htm> (Last visited on: 21-07-2013).

⁵⁸ *Ibid.*

has a duty to accommodate a person's religious head coverings like turbans⁵⁹ and Sikh kirpans.^{60,61} However, on the controversial issue of full face covering Islamic veils like niqab, the Canadian Supreme Court held that such issues "*must be determined on a case-by-case basis after balancing the sincerity of the witness's beliefs and the deleterious effects of requiring her to remove the veil against the risk to trial fairness*".⁶² The students and staff alike have right to observe their religious observance and to ask for religious holidays.⁶³

IV. CONCLUSION

In conclusion it can be said that Schools are the place where young minds are formed and nurtured. Students in schools are in an impressionable age and are definitely influenced by what they see and hear. This is precisely the reason (apart from the plea that it obstructs education) why many states have feared allowing religious symbols to schools. They fear that they might be influenced or indoctrinated by a certain religion. However, I believe that this apprehension is not true. On the contrary if a child, from early childhood, sees many different religious and cultural symbols then he will grow up to respect them. Diversity will help in creating a sense of tolerance and celebration of diversity in the child's mind. Therefore, the religious symbols should as a matter of principle be allowed to be wore - not only by students but also by teachers. As it is the case in South Africa and Canada religious holidays and observances must be respected by the state. In today's world almost every society is multicultural and in such multicultural societies we cannot afford to ignore diversity of cultures in schools.

In Europe we can see these symbols and clothing are becoming a source of cultural tensions and the aggressive secularism propounded by France,

⁵⁹ Sehdev v. Bayview Glen Junior Schools Ltd. (1988), 9 C.H.R.R. D/4881.

⁶⁰ Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] S.C.J. No. 6.

⁶¹ Ontario Human Rights Commission, *Policy on Creed and the Accommodation of Religious Observances*, 20 October 1996.

⁶² Freedom of Religion and Religious Symbols in the Public Sphere, <http://www.parl.gc.ca/content/lop/researchpublications/2011-60-e.htm> (Last visited on: 21-07-2013).

⁶³ Policy on creed and the accommodation of religious observances, Commission scolaire régionale de Chambly v. Bergevin (1994) 22 C.H.R.R. D/1 (S.C.C.); <http://www.ohrc.on.ca/en/policy-creed-and-accommodation-religious-observances/specific-cases> (Last visited on: 21-07-2013).

Turkey etc. is causing grievance for many religions. In contrast, countries such as U.S., Canada, and South Africa which are based in immigration and are essentially multicultural are accepting these symbols and hence these conflicts are being averted.

So I suggest that the Canadian and South African models are most suitable and ought to be followed by secular countries around the world.

