

## EUROPEAN COURT OF HUMAN RIGHTS

### Lachiri v. Belgium, Application No. 3413/09

#### THIRD PARTY INTERVENTION by HUMAN RIGHTS CENTRE of GHENT UNIVERSITY

These written comments are submitted by the Human Rights Centre of Ghent University (Belgium), pursuant to leave granted by the European Court of Human Rights and in accordance with rule 44 § 3 of the Rules of the Court.

This submission consists of three parts. *In the first part*, the obligation to take off an Islamic headscarf in a Belgian courtroom is situated in the context of the overall de-normalization of the wearing of the Islamic headscarf in Belgium, that is turning headscarf wearers into outlaws. *In the second part*, we report on the background of the legal provision that mandates uncovering the head in the courtroom, as well as on the results of a survey into its application. Finally, *in the third part*, we argue that the Lachiri case offers a fine opportunity for the Court to clarify the limits of States' discretion to ban religious dress/symbols.

#### I. Bans on religious signs<sup>1</sup> in Belgium: A brief state of the art

In this first section, we want to place the banning of a Muslim headscarf from a courtroom in the broader societal context in which bans that affect mainly the Muslim headscarf are popping up in all sorts of environments, to the effect that the headscarf itself is de-normalized and is almost automatically problematized. In any context, a real risk exists that someone will question whether the headscarf can be allowed, and a real risk exists that the answer to such question will be negative. As a result, Muslim women who wear a headscarf gradually become outlaws.

This section will give a brief overview of different spheres in which religious signs are banned in Belgium and the domains in which additional bans are still under discussion.<sup>2</sup> It will also elaborate on the different motivations that are advanced in support of such bans.

##### a) *Bans on religious attire in educational institutions.*

In most Belgian schools, the wearing of religious signs is prohibited both for pupils and for teachers. In Flanders — the Dutch speaking part of Belgium—, the network of public schools (GO!) introduced a general ban on the wearing of religious signs in primary and secondary schools for all pupils and for teachers (with exception for teachers of religious education classes). In the private school network, mainly consisting of the network of Catholic schools, the decision about whether or not to

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<sup>1</sup> The expression “religious signs” refers to both religious dress and religious symbols.

<sup>2</sup> Bans that affect religious signs are sometimes formulated in general terms encompassing all head coverings. Such bans may or may not be intended to mainly target religious headcoverings. In other cases however, regulations explicitly ban religious signs. This intervention will focus on the limitations towards women wearing a hijab. However, the limitations placed on women go much further as Belgium recently enacted a face covering ban, targeting the Islamic face veil. This ban is specifically discussed in our third party intervention in the cases of *SAS v. France* (Application no. 43835/11) and *Dakir v. Belgium* (pending, application no 4619/12)

prohibit religious signs is left to the discretion of the individual school authorities. In practice however, this means that a lot of schools are prohibiting the wearing of religious signs in their premises. In Wallonia —the French speaking part of Belgium— both the public/official school network and the private networks, leave the decision to prohibit religious signs in schools to the individual school authorities. Yet, similar to the situation in Flanders, the majority of schools in Wallonia are de facto prohibiting the wearing of religious signs in schools both for pupils and for members of their personnel.<sup>3</sup> This means that in practice, the majority of primary and secondary schools in Belgium prohibit the wearing of religious signs both for pupils and teachers.

While for a long time the debate on religious signs in schools was limited to primary and secondary education, the debate is now expanding to other fields such as the higher educational institutions and education for adults. Indeed, the Belgian Interfederal Centre for Equal opportunities was confronted with several complaints of adult Muslim students in Brussels and Wallonia, who are prohibited to wear a hijab in institutions of higher education.<sup>4</sup> Another limitation on the wearing of religious signs in the educational field concerns the difficulties experienced by students in finding companies or schools who allow them to conduct an internship while wearing religious signs.

One of the reasons advanced for limitations on the wearing of religious signs in schools, particularly by public schools, is the neutrality of the public service. Additionally, schools also invoke the need to protect pupils from pressure by pupils and teachers who wear religious signs. Further, schools also argue that not banning religious signs would threaten the diversity in their schools, since they fear to attract a large group of pupils who are affected by the bans in other schools. In 2014, the Belgian Council of State ruled that the ban on religious signs imposed on pupils in a Flemish public school (in accordance with the general ban imposed by the public school network) is not compatible with the right to freedom of religion. The Council observed that the arguments of peer pressure and of neutrality advanced by the school are too hypothetical and it concluded amongst others that “*the litigious ban might lead to a denial of access to education for students for the sole reason that they exercise a fundamental right, without it being adequately demonstrated that they disrupt the public order or endanger the rights and freedoms of others*”.<sup>5</sup> Until now however, despite this important judgment of the Council of State, the network of public schools did not change its policy and most of the public schools are upholding their ban. What is more, while until recently most debates on religious signs in the field of education concerned mainly the wearing of a hijab by Muslim girls and the wearing of a turban by Sikh boys; the debate is expanding to other items of clothing. In 2015, several schools both in Wallonia<sup>6</sup> and in Flanders<sup>7</sup> banned long skirts worn by Muslim girls.<sup>8</sup>

<sup>3</sup><http://www.sudinfo.be/1366596/article/2015-09-01/port-du-voile-pas-plus-de-10-des-ecoles-ne-l-autorisent>

<sup>4</sup><http://www.diversite.be/port-des-signes-religieux-dans-lenseignement-superieur-et-dans-lenseignement-de-promotion-sociale>

<sup>5</sup> Belgian Council of State, 14 October 2014, 228.752, §53. See for an elaborate discussion of the case: Yousra Benfquih and Saïla Ouald Chaïb, “Religious signs in public schools: Belgian Council of State shows judicial bravery”, Strasbourg Observers, 4 November 2014 at <http://strasbourgobservers.com/2014/11/04/religious-signs-in-public-schools-belgian-council-of-state-shows-judicial-bravery/>

<sup>6</sup><http://www.rtl.be/info/regions/bruxelles/polemique-a-bruxelles-une-trentaine-de-jeunes-filles-interdites-de-rentre-dans-leur-ecole-pour-cause-de-jupes-trop-longues-727158.aspx>

<sup>7</sup> <http://www.demorgen.be/nieuws/school-in-mechelen-verbiedt-lange-rokken-of-jurken-bf07aa2c/>

<sup>8</sup> In 2014 the Interfederal Centre for Equal Opportunities was confronted with 15 claims of Muslim women/girls in the field of education. 13 of those claims involved the prohibition to wear a hijab in schools, 2 complaints involved the wearing of long skirts in school. Data available at the Interfederal Centre for Equal Opportunities.

*b) Bans on religious attire in the workplace*

Limitations on the wearing of religious signs in the workplace occur both in the public and in the private sector. This is particularly the case for Muslim women who wear a hijab. In the public sector, until now no general ban on the wearing of religious signs exists. Instead, each public authority decides whether or not to allow its employees to wear religious signs. At the local level, several municipalities introduced a ban on the wearing of religious signs for employees, especially for those who have a public function that involves contact with clients. This is for example the case in Antwerp, one of the major Flemish cities.<sup>9</sup> Meanwhile, several initiatives have (unsuccessfully) been taken in the Flemish parliament to introduce a general ban for Flemish public employees.<sup>10</sup> De facto, several public institutions already prohibit the wearing of religious signs by their employees. In a recent judgment of 2015, the Brussels' official state institution that helps unemployed people to find a job was convicted for its internal regulation which prohibits its own employees to wear religious signs.<sup>11</sup>

Also in the private sector religious clothing has led to discussions. In 2009 for example, a lawyer who wanted to practice law as an attorney was not admitted at the Bar of Brussels because she was wearing a hijab.<sup>12</sup> In 2010, a Muslim woman's contract was not renewed because she refused to comply with the new requirements to remove her hijab in the retail shop she was working.<sup>13</sup> In 2012, the CEO of an important shoe firm in Belgium raised a controversy when he announced that he would not hire women wearing a hijab.<sup>14</sup> Other cases of discrimination of Muslim women wearing a hijab were reported by Amnesty International, such as women not allowed to wear a hijab (or alternative such as a sterile cap) in medical laboratories, women wearing a hijab not allowed to work in a call-center or a cleaning company.<sup>15</sup> In 2014 alone, the Interfederal Centre for Equal Opportunities received 23 complaints involving prohibitions on the wearing of a hijab in the workplace.<sup>16</sup>

The reasons advanced for banning religious signs in the workplace are manifold. While some employees refer to the principle of neutrality, which is particularly the case for the public sector, others argue that wearing a hijab goes against the corporate image of the company or they rely on arguments of security and hygiene.

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<sup>9</sup> Other cities in Flanders who are banning the wearing of religious signs by employees include Sint-Niklaas, Lier, Lokeren and Ninove. The city of Ghent also used to ban religious signs for public officials, however it retracted it in 2013 after a citizen initiative collected 10000 signatures asking the abolishment of the ban.

<sup>10</sup> <http://www.knack.be/nieuws/belgie/hoofddoekenverbod-voor-ambtenaren-sneuveld-in-vlaams-parlement/article-normal-96201.html>

<sup>11</sup> <http://www.diversite.be/tribunal-du-travail-bruxelles-16-novembre-2015>

<sup>12</sup> [http://www.rtbf.be/info/regions/detail\\_pas-de-foulard-sur-la-toge?id=5359393](http://www.rtbf.be/info/regions/detail_pas-de-foulard-sur-la-toge?id=5359393)

<sup>13</sup> <http://www.diversite.be/dossier-hema-mettre-fin-%C3%A0-une-collaboration-professionnelle-en-raison-du-port-du-foulard-constitue>

<sup>14</sup> <http://www.gva.be/cnt/aid1115520/torfs-vrouwen-met-hoofddoek-moeten-niet-solliciteren>

<sup>15</sup> Amnesty International, Choice and Prejudice: Discrimination against Muslims in Europe, 2012 available at <http://www.amnesty.eu/content/assets/REPORT.pdf>

<sup>16</sup> Data available with the Interfederal Centre for Equal Opportunities. The statistical information for 2015 is not available yet.

*c) Bans on religious attire in the access to goods and services*

Although most debates concern the wearing of religious signs in the workplace and in schools, several cases are known of women who are refused access to services because of the fact that they are visible Muslims wearing a hijab. In recent cases women were denied access to an ice-cream bar,<sup>17</sup> to the terrace of a restaurant,<sup>18</sup> to gym facilities<sup>19</sup> and they experienced difficulties in the housing market because of the fact that they wear a hijab.<sup>20</sup> The justifications invoked in these cases refer to the incompatibility of the wearing of a hijab with the atmosphere within the establishment (in particular in the case of restaurants) or to reasons of safety and hygiene.

*d) The hijab wearer as an outlaw*

Claims of discrimination on the basis of religious signs make up the majority of cases on religious discrimination reported at the Interfederal Centre for Equal Opportunities.<sup>21</sup> This observation cannot be seen outside the context of the rise of Islamophobia in Western Europe and beyond.<sup>22</sup> We submit that making religious diversity invisible in common societal contexts such as in the workplace, schools and public services will hamper the inclusion of Muslim citizens and Muslim women in particular, and it will not enhance the understanding between different groups. In fact, the paradoxical effect of the increasing number of limitations placed on Muslim women who wear the hijab is that women who try to participate in society through work and education are restricted in their personal development and empowerment. Sadly, the limitations and bans put on Muslim women are still mushrooming. From primary and secondary education, limitations are moving to higher education. From public jobs, they are moving to private back office jobs. From discrimination in the housing market, restrictions are also applied at the entrance of an ice-cream bar and the court room. We respectfully submit that the present case offers an opportunity to the Court to address this problematic trend in Western-Europe, and in Belgium in particular, of the continuously widening sphere in which limitations are placed on Muslim women. It is an opportunity to emphasize that limitations should not be the rule, but the exception; and that they require evidence of necessity as required by human rights law.

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<sup>17</sup> Court of Appeal of Ghent, 8 October 2015, nr. 2014/RK/173.

<sup>18</sup> Rb. Brussel, 22.12.2009, unpublished and Court of First Instance of Huy, 26 May 2010, nr. 09/928/B

<sup>19</sup> <http://www.diversiteit.be/port-du-voile-dans-une-salle-de-fitness>

<sup>20</sup> <http://www.diversiteit.be/tribunal-correctionnel-de-dendermonde-14-f%C3%A9vrier-2011>

<sup>21</sup> Centre for equal Opportunities and Fight Against Racism, Jaarverslag Discriminatie/Diversiteit, 2013, available at [http://www.diversiteit.be/sites/default/files/documents/publication/cgkr\\_00668\\_01\\_jvs\\_discdiv\\_nl.pdf](http://www.diversiteit.be/sites/default/files/documents/publication/cgkr_00668_01_jvs_discdiv_nl.pdf) In 2014 90% of the complaints submitted at the Interfederal Centre for Equal Opportunities concerned Muslims. (268 of the 297 claims) 50 of the dossiers concerned prohibitions on the wearing of religious attire by Muslim women.

<sup>22</sup> See the observations made by the former Commissioner of Human Rights

[http://www.coe.int/t/commissioner/source/prems/HR-Europe-no-grounds-complacency\\_en.pdf](http://www.coe.int/t/commissioner/source/prems/HR-Europe-no-grounds-complacency_en.pdf)

## II. Religious signs in the Belgian courtroom

The case of Hagar Lachiri v Belgium concerns an application of Article 759 of the Belgian Code of Civil Procedure (CCP):

The audience attends the sessions with uncovered heads, reverently and silently; whatever the court ordains to maintain the order is executed punctually and instantly.<sup>23</sup>

The current CCP, which was adopted in 1967, took over this text from Article 88 of the former Code of Civil Procedure, which dated back to the nineteenth century.<sup>24</sup> At that time, it was a cultural convention to take off caps and hats when entering, for instance, a church or someone's home as a sign of respect for and recognition of the authority of a person or institution.<sup>25</sup> This cultural practice did not apply to the headscarves worn by catholic nuns. Hence, the objective of Art. 759 CCP is to safeguard the proper course of judicial proceedings, *id est* serene circumstances and an audience respectful of the office of the judge.<sup>26</sup>

Because there are no data available on the application of Article 759 CCP nor about any other rule on the basis of which judges can request people to take off their head-covering in their courtroom, the Human Rights Centre distributed a brief survey amongst the Dutch speaking judges in Flanders and Brussels. The survey comprises four questions and serves to assess judicial practice in relation to head-coverings in the courtroom.<sup>27</sup> This intervention incorporates the results of the surveys completed between Monday 4 January 2016 and Friday 15 January 2016. Within this time period 246 judges filled out the online questionnaire. Many judges used the option to write an individual comment to explain their answer. These are the main results:

A majority of judges (76,42%) has not (yet) asked individuals to remove head-coverings, and most respondents who have done so in the past, only did so in relation to non-religious head-coverings (79,31%). 47,06% of the respondents stated that they would never ask anyone to remove a head-covering. Yet many respondents who have not yet asked people to take of their head-covering explained in a comment that the only reason they have not done so is that they want to avoid creating a conflict.

Confronted with a hypothetical scenario, most judges stated that they would consider using their power in relation to people who wear a non-religious hat, cap or hoody (52,52%) – which demonstrates that there is still a social expectation to remove these coverings in certain places. However, even then some judges added a caveat in an individual comment: they would not bother unless a person also behaves disruptively (e.g., they sprawl in their seat, smack chewing gums, insult staff or other people etc.). The latter practice demonstrates that a majority of judges are of the opinion that Article 759 CCP is concerned with actual disruptive behaviour. Its application should thus be motivated by the concrete circumstances of the case, the actual behaviour of a person. Such

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<sup>23</sup> Free translation from Dutch.

<sup>24</sup> T. Scheir, 'De politie van de terechtzitting: "Contempt of court" naar Belgisch recht', *Rechtskundig Weekblad* (2009), iss. 9, 346-347. While the Code for Civil Procedure of the Netherlands also originates from the French code, there is currently no legal prohibition in Dutch law to wear any type of hat. As a result, the discussion in the Netherlands rather focuses on attorneys wearing religious head coverings, and proponents argue that this should be allowed, because attorneys do not have to be impartial, as opposed to judges.

<sup>25</sup> K. Lemmens, 'Chapeau voor de Antwerpse correctionele rechtbank', *Nederlands Tijdschrift voor Rechtsfilosofie en Rechts Theorie* (2007), iss. 2, 53; Cf. B. Van Den Broeck, 'Rechter moet neutraal zijn, burger niet', *De Juristenkrant* (2007), iss. 147, 3.

<sup>26</sup> Lemmens, *supra* note 3, at 53; Scheir, *supra* note 2, at 347.

<sup>27</sup> Any questions about methodology and statistical results should be addressed to the HRC.

individual assessment is advisable for all head coverings, as in addition to religious head-coverings, also some non-religious head-coverings are unrelated to infringement of decorum (e.g. a head-covering that hides the effects of illness).<sup>28</sup>

Nevertheless, 12 judges among our respondents stated they had already applied article 759 CCP to religious head-coverings, including 2 judges who had applied the rule *only* to religious head-coverings. These are 6 judges of the courts of first instance, 3 justices of the peace, 1 judge in a labour court, one judge in a court of appeal, and one juvenile court judge. The persons to whom they already applied article 750 CCP included accused parties in civil proceedings, accused persons in criminal proceedings, attorneys, witnesses, an interpreter, and members of the audience. Moreover, the question whether a respondent would ban a given head-covering in a hypothetical scenario, prompted approx. 10% of all respondents to reply that they would require the removal of religious head-coverings. Strikingly, answers differ depending on the religion at stake, to the disadvantage of Muslim women.<sup>29</sup> More judges would ban Islamic headscarves (10,50%) than other religious head coverings, such as a yarmulke (7,98%), a turban (8,82%) or catholic headscarf (7,98%).<sup>30</sup> One individual comment clarified that in the opinion of this judge, Islam is a proselytizing religion, as opposed to Christianity, Judaism and Hinduism. Several other respondents expressed their doubts about the Islamic headscarf being a religious symbol. They also expressed concern that this particular head covering is forced upon its wearers and conveys a message of inequality, or that allowing headscarves would give preference to religious rules over the law in a secular democracy. Such comments make clear that judges' perspectives are not unaffected by the divisive debate in Belgian society about the Islamic headscarf and its contested meanings.

The results of the survey show, moreover, that there is a strong need for a clear rule on head-coverings in court. Several types of confusion exist. Some judges appear to be unaware of the existence of Art. 759 CCP and they believe that reprimanding disruptive people is simply a matter of decorum. Some judges believe that, in order not to be accused of discrimination they should apply the same rule to all types of head-covering. At the same time, some judges are hesitant to decide whether a particular head-covering is religious or not.

The results of the survey thus clearly show that the facts in the *Lachiri* case are not unique. It is far from exceptional that individuals are not admitted to a Belgian courtroom wearing religious headgear.

Yet this application of Art. 759 CCP to religious head-coverings is unrelated to the provision's aim of maintaining order in the courtroom. The rule does not demand neutrality from people who attend court sessions<sup>31</sup> – whether as member of the audience, party in the proceedings or witness.<sup>32</sup> Using

<sup>28</sup> Surprisingly, 4 respondents (1,68%) would still demand people to take off a head-covering that is meant to hide a certain illness.

<sup>29</sup> This was a multiple choice question, which besides "I would never ask" included six options: persons wearing a hat or cap; persons wearing a headscarf to hide baldness due to illness; men wearing a yarmulke; men wearing a turban; women wearing an Islamic headscarf; and women wearing a christian headscarf.

<sup>30</sup> Compare with Lemmens writing that there are no known cases of nuns or beguines being asked to take off their head scarf, and that it is common knowledge that several lawyers wear a yarmulke while pleading. Lemmens, *supra* note 3, at 53-54.

<sup>31</sup> Cf. Lemmens, *supra* note 3, at 54; Van Den Broeck, *supra* note 3, at 3; P. Populier, *Procederen voor het Grondwettelijk Hof*, Mortsel, Intersentia, 2008, 281; R. Verbeke, 'Column: Met ongedekten hoofde,' *De Juristenkrant* (2007), iss. 147, 2.

<sup>32</sup> Some courts even accept that lawyers wear their religious head covering. Mostly, these lawyers are Jewish men wearing a yarmulke, but the HRC knows of at least one Muslim lawyer who wears her veil in court.

Art. 759 CCP as a basis to ask people, who do not behave disruptively, to take off their religious head-covering in court, is tantamount to holding that such religious head-covering is an expression of disrespect. Indeed, there is no indication whatsoever that people who wear religious headgear seek in this manner to ‘express a form of contempt against those they encounter or otherwise to offend against the dignity of others’.<sup>33</sup>

We submit therefore that in such a case, a measure based on Art. 759 CCP is not ‘prescribed by law’ in the meaning of article 9 (2) ECHR.

Even when a person who wears a religious head covering, behaves disruptively, there are fundamental objections against demanding the removal of that head covering as a measure to maintain order in the courtroom. Unequal situations have to be assessed differently, and the difference between religious and non-religious head coverings is precisely the manifestation of religion in the former case, which is protected by the right to freedom of religion.<sup>34</sup> Accordingly, judges have to consider less restrictive alternative measures to restore order in their courtroom. Applying Art. 759 CCP to religious head coverings can even entail indirect discrimination amongst religious manifestations, because other types of religious symbols do not fall under its scope.<sup>35</sup> Accordingly, people are discriminated based on how they manifest their religion – head coverings *versus* religious crosses, bracelets, shawls, rosaries, collars or dresses, or specific haircuts or forehead decorations.

### III. Limits to states’ discretion to ban religious dress?

This part of our submission argues that, regardless of whether the Court finds a violation of article 9 ECHR in *Lachiri*, this case would provide a fine opportunity for the Court to provide guidelines on the limits to states’ discretion under the Convention to ban religious dress or religious symbols worn by individuals, or to tolerate such bans by private actors.

The Court has dealt with a good number of cases in this field. In the very large majority of cases, including two Grand Chamber cases, the Court has held that a ban was within the state’s margin of appreciation. Yet in two cases (*Eweida v UK* and *Ahmet Arslan v Turkey*) the Court has found a violation. The cases in which a violation was found concern the wearing of a cross at work for a private employer in the UK (*Eweida*), and the wearing of a turban and distinctive (male) dress of a small Islamic sect on the street in Turkey (*Arslan*). Taken together, this body of case law provides a large number of indications about the Court’s reasoning in this type of cases, yet it does not as yet allow individuals or state actors to predict the Court’s stance in any case concerning religious dress or symbols that has not yet come before the Court (e.g. concerning a different country, different type of dress, different scope of the ban, or differently motivated ban). With respect to the types of bans that appear to occur most frequently across Europe in a great variety of contexts, i.e. bans on religious headgear affecting mainly Muslim women and Sikh men,<sup>36</sup> the current state of the case law makes it very hard to tell what – if any- are the contexts in which the Court would *not* tolerate such a ban. Yet in a European human rights protection system that is based on subsidiarity, it is vital for the national authorities to have as clear a view as possible about the Convention’s requirements in any

<sup>33</sup> SAS v France, para. 12à.

<sup>34</sup> Lemmens, *supra* note 3, at 55. Cf. Populier, *supra* note 7, at 281.

<sup>35</sup> Lemmens, *supra* note 3, at 57.

<sup>36</sup> In principle such bans affect also Jewish men wearing a kippa, yet in practice this issue does not seem to give rise to a lot of contestation.

particular field. This is arguably even more so in a field that has the proven potential to generate significant societal unrest, as it concerns the harmonious coexistence within a society of different religious communities.

As is shown above, bans targeting Muslim headscarves are spreading to many fields of life, and are motivated by a host of different reasons. The impression arises, both among hijab wearers in Belgium and among the Belgian population in general, that in any possible context, a reason can be found that may justify a headscarf ban.

The *Lachiri* case provides the Court with an opportunity to clarify a number of issues in this respect.

a) *Which rationales are (not) valid in which contexts?*

The first issue concerns the scope and limits of the different rationales for restricting religious dress/symbols that have been mobilized by States parties and accepted by the Court in its case law. It is clear from the case law that not any rationale will hold in any context. Yet there are many open questions.

The Court's case law has shown a dynamic character in this field. In particular, a rationale for banning female Islamic dress that was based on *gender equality* (and the assumption that female Islamic dress was irreconcilable with gender equality), and which has long been emphasized by the Court in this type of cases (including in the Grand Chamber judgment of *Leyla Şahin*), was discredited in *SAS v France* (paras 119-120).

Another rationale, that has regularly been accepted by the Court, is that of protecting –supposedly vulnerable – individuals against *pressure* that would threaten their freedom of conscience. This argument was upheld in the context of fundamentalist pressure upon university students in a Muslim-majority context to wear a headscarf (*Leyla Şahin*). A variant was used also in the context of a teacher in a Swiss primary school who wore a headscarf (*Dahlab*); yet it is not clear whether that rationale still stands in the latter case, as it was tied up with the interpretation of the headscarf as a symbol of gender inequality, which has since been abandoned by the Court.

Yet another rationale is that of *public safety*. Without much scrutiny, the Court has accepted that religious clothing needed to be removed on this ground during safety checks (*Phull v France, El Morsli v France*) and during physical education class (*Dogru v France*), that a Sikh riding a motorcycle needed to replace his turban with a helmet (*X v UK, 1978*), that a nurse needed to remove jewellery (including a Christian cross) during work (*Eweida v UK*), and that a photograph on a driver's license requires a bare head (*Mann Singh v France*). Yet in *SAS v France*, the Court applied a 'less restrictive means reasoning' stating that public safety did not require a general face covering ban, given that 'the objective alluded to by the Government could be attained by a mere obligation to show their face and to identify themselves where a risk for the safety of persons and property has been established' (para. 139). It is possible that, after this Grand Chamber precedent, the Court will in future apply a similar test also to other cases in which a safety rationale is invoked to curb religious freedom. It is also an open question whether the 'less restrictive means' test might also be applied to other rationales.

Another rationale that has been accepted by the Court is that of *secularism and neutrality* of public authorities. This rationale has been accepted in the context of bans on religious dress/symbols worn by students and professors in public educational institutions, as well as by public servants in general



(*Ebrahimian v France*). It is however not clear how broad the potential reach of this rationale is. In particular it is not clear which states may or may not rely on this argument. In *Ebrahimian*, the Court clarified: ‘la Cour souligne qu’elle a déjà approuvé une mise en œuvre stricte des principes de laïcité et de neutralité lorsqu’il s’agit d’un principe fondateur de l’État,’ (para. 37). This suggests that the Court would apply stricter scrutiny to cases in which neutrality arguments are invoked by states in which secularism does not have a similar fundamental constitutional status. The Court has stated that secularism is one of the fundamental principles of the Turkish state (*Leyla Şahin*, para. 114); of Switzerland (*Dahlab*, as interpreted in *Dogru v France*, para. 72) and of the French Republic (*Dogru v France* para. 72, *Ebrahimian v France*, para. 67). It is not at all clear to what extent other states, in which this principle of secularism is less entrenched, can mobilize that same argument as a basis for restrictions of religious freedom. For example in Belgium, there have been voices to constitutionally entrench secularism or state neutrality, yet these have failed to gather sufficient political support.

Moreover, it is not clear in which circumstances the neutrality rationale can be applied beyond the providers of public services to include the users of public services. Apart from students in public schools, are there other cases in which the neutrality rationale justifies restrictions of the religious freedom of the users of public services?

Finally, there is the ‘*living together*’ rationale that was accepted by the Court in *SAS v France*. Yet as this argument is strongly tied up with an argument about the importance of the face in human interaction (para. 141), it seems that this would not likely apply to other types of religious dress, that do not cover the face. Yet it would be useful if the Court could confirm this.

The obligation to uncover one’s head in the courtroom, that is at stake in *Lachiri*, is based on an idea of respect for the court and for the course of justice<sup>37</sup> (*cf. supra*). This does not fit easily within any of the above-mentioned rationales. Hence the case provides the Court with an opportunity to clarify the scope and limits of each of these rationales. To the extent that the Court accepts that ‘respect for the court’ can in principle justify a restriction of religious freedom, it is submitted that this might be an appropriate case to apply a ‘less restrictive means’ standard, as the Court has done in the context of the safety rationale.

*b) Is evidence required of a concrete threat to the goal that is pursued?*

It seems that when the Court has found that a restriction on religious dress or symbols violates the Convention or when it has rejected a particular rationale supporting such a restriction, this was almost<sup>38</sup> always linked to reasoning that critically examined the link between the facts of the case and the aim of the restriction, requiring evidence that the interest that was at stake was indeed threatened by the wearing of religious dress or symbols.

- In *Ahmet Arslan v Turkey*, the Court held that ‘il ne ressort pas du dossier que le façon dont les requérants ont manifesté leurs croyances par une tenue spécifique constituait ou risquait de constituer une menace pour l’ordre public ou une pression sur autrui’ and that ‘aucun

<sup>37</sup> In *Ahmet Arslan*, this rationale may have played a role at the domestic level, yet it was not withheld by the Court, which stated that the Turkish courts ‘ont fondé leurs décisions non pas sur un éventuel manqué de respect à l’égard de la cour, mais sur les dispositions des lois nos 671 et 2596, qui répriment, selon ces juridictions, le port de certaines tenues dans les lieux publics ouverts à tous’ (para. 32).

<sup>38</sup> The exception is the rejection of the safety rationale for the face covering ban in *SAS*, which was based on ‘less restrictive means’ reasoning in the proportionality test, as described *supra*.

élément du dossier ne montre que les requérants avaient de faire subir des pressions abusives aux passants dans les voies et places publiques’ (para. 50-51)

- In *Eweida v UK*, the Court found a violation because ‘there is no evidence of any real encroachment on the interests of others’ (para. 33).
- In *SAS v France*, the Court ruled that the rationale of ‘respect for human dignity’ could not be accepted for lack of ‘any evidence capable of leading it to consider that women who wear the full-face veil seek to express a form of contempt against those they encounter or otherwise to offend against the dignity of others.’ (para. 120) The Court thus rejects automatic assumptions of a certain meaning of a symbol; it refers instead to the intentions of the wearers and requires evidence before accepting that these would be problematic.

On the other hand, in the cases in which no violation was found, the Court seemed content to accept a theoretical link between the wearing of religious dress or symbol and the interest that the restriction seeks to protect, without critically examining the existence of any real encroachment upon such interest. This is in particular the case under the rationales of pressure, neutrality and living together (*cf. supra*). The fact that both approaches can coexist within a single case, applying to different rationales (as in *SAS v France*, where the evidence-based approach is not extended to the ‘living together’ argument) does not help the interpreter trying to understand when evidence-based reasoning is due and when it is not.

The *Lachiri* case provides the Court with an opportunity to clarify this matter.

c) *Can states still assign a priori negative meaning to the headscarf?*

In a discussion on whether, in the application of a rule that mandates the uncovering of the head as a sign of respect, an exception should be made for the wearing of an Islamic headscarf, it is important to discuss whether states are allowed to assign a negative meaning to the headscarf as such.

Such negative meaning was explicitly endorsed by the Court in *Dahlab v Switzerland*, in which the Court described the Islamic headscarf as ‘a powerful external symbol’ which is ‘hard to square with the principle of gender equality’, and ‘difficult to reconcile ...with the message of tolerance, respect for others and, above all, equality and non-discrimination’. This language was confirmed by the Grand Chamber in *Leyla Şahin v France* in 2005, yet it was silently abandoned in later cases. Moreover, in *SAS*, as mentioned *supra*, the Court firmly rejected externally imposed negative meanings as pertaining to the Islamic full-face veil, and referred instead to the intentions of the wearers. It is submitted that the same reasoning should logically apply to the Islamic headscarf, and that the Court should therefore critically deconstruct any state reasoning that *a priori* assigns negative meaning to the wearing of an Islamic headscarf.<sup>39</sup>

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<sup>39</sup> Cf. Also the Court’s positive approach to the wearing of a Christian cross in *Eweida*, where it emphasized ‘the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others’.