



University of Edinburgh
School of Law

Working Paper Series

2009/23

Religious Pluralism versus Social Cohesion?

Normative Fault Lines of Human Rights Jurisprudence in Europe

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**RELIGIOUS PLURALISM VERSUS SOCIAL COHESION?
NORMATIVE FAULT LINES OF HUMAN RIGHTS JURISPRUDENCE
IN EUROPE**

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Edinburgh School of Law Working Paper Series
General Editor: Daniel Augenstein
University of Edinburgh

Abstract: This essay explores the tension between religious pluralism and social cohesion in European human rights jurisprudence. Comparing the German, French, and British interpretation of the 'social cohesion limitation' of freedom of religion I argue that, at the national level, concerns for social cohesion stem from negative and defensive societal attitudes towards religious diversity that are difficult to reconcile with the normative premises of religious pluralism in a democratic society. The essay proceeds by analysing how two trans-national European courts, the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ), address the tension between religious pluralism and social cohesion identified at the national levels. While the ECtHR pursues a strategy of avoidance that fails to effectively scrutinise national social cohesion limitations of freedom of religion in the light of its own appraisal of religious pluralism, the ECJ must pursue a strategy of integration that confronts this tension in an autonomous way on the basis of the supra-national EU legal order. By way of conclusion, I outline such a strategy of integration that re-interprets the relationship between religious pluralism and social cohesion in European human rights jurisprudence through challenging the association of social cohesion with the containment or suppression of religious diversity.

Keywords: religion, pluralism, human rights, social cohesion, ECHR, EU

Religious Pluralism versus Social Cohesion? Normative Fault Lines of Human Rights Jurisprudence in Europe

1. Introduction: Religious Pluralism versus Social Cohesion

Freedom of religion, in the words of the European Court of Human Rights (ECtHR), is ‘one of the foundations of a democratic society’.¹ From the perspective of the individual, it embodies ‘one of the most vital elements that go to make up the identity of believers and their conceptions of life’; from the perspective of society as a whole, it avouches ‘the pluralism indissociable from a democratic society, which has been dearly won over the centuries’.² In this essay, my primary concern will be with the latter, *societal* significance of freedom of religion. Here, the emphasis is on its communicative and public function in a pluralist society, rather than its personal and private function of protecting a space for individual self-fulfilment.³ Accordingly, the constitutional protection of the individual’s right to hold and manifest her beliefs is instrumental to sustaining a plurality of religious worldviews in the democratic state. The ECtHR’s treatment of religious pluralism has a descriptive and a normative dimension: it acknowledges the fact that European societies have become increasingly religiously diverse; but it also portrays religious diversity as something valuable and precious: religious diversity lies at the heart of pluralism that, in turn, is intrinsically tied to democracy.

¹ *Kokkinakis v. Greece*, Application No 14307/88 (1993), para 31

² *Ibid.*, para 31

³ See A. Pedain, ‘Do headscarves bite?’ 63 *Cambridge Law Journal* (2004), 537 at 539

However, the freedom to manifest one's beliefs, and therewith the extent to which religious diversity may manifest itself in society, is not unlimited. To borrow once again from *Kokkinakis v Greece*,

in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.⁴

Yet what exactly does 'respecting' everyone's beliefs' connote (the end of restricting freedom of religion), and how can it be 'ensured' (the means for restricting freedom of religion)? I shall pursue these questions by focussing on one particular limitation of freedom of religion that is often justified on grounds of protecting 'public order' and 'the rights and freedoms of others': social cohesion.⁵ I contend that the way human rights jurisprudence in Europe has traditionally interpreted social cohesion limitations of freedom of religion is at odds with the ECtHR's appraisal of religious pluralism. Delimiting freedom of religion on grounds of social cohesion exhibits negative and defensive societal attitudes towards religious diversity as something undesirable and disruptive that needs to be contained. Accordingly, 'respect' for everyone's belief is ensured through strategies of disaffirmation of religious diversity that range from (passive) disregard and discouragement to (active) assimilation and suppression.

I set out by analysing three different national models of social cohesion. Comparing the regulation of the display of religious symbols in educational institutions in Germany, France, and the United Kingdom I show how, at the national level, social cohesion limitations of freedom of religion stem

⁴ *Kokkinakis v. Greece*, above n 1 para 33

⁵ Compare Article 9.2 ECHR

from negative and defensive societal attitudes towards religious diversity (2). Subsequently, I consider how two trans-national courts, the ECtHR and the European Court of Justice (ECJ), engage with these national models of social cohesion in the light of religious pluralism. The ECtHR tackles the problem by avoiding it, emphasising its limited role in implementing a minimum standard of human rights protection as correlative to a wide national margin of appreciation of national authorities in dealing with religious diversity. Such a strategy of avoidance is not available to the ECJ. Rather, it must pursue a strategy of integration that confronts the tension between religious pluralism and social cohesion on the basis of the supra-national EU legal order and in the light of the normative telos of European integration (3). By way of conclusion, I sketch out such a strategy of integration regarding the display of religious symbols in educational institutions that re-interprets the relationship between religious pluralism and social cohesion against the background of intersecting national and European human rights regimes. This re-interpretation challenges the association of social cohesion with the suppression of religious diversity that informs the jurisprudence of national courts and the ECtHR (4).

2. Three National Models of Social Cohesion

This section compares social cohesion limitations of freedom of religion in Germany, France, and the United Kingdom. My focus will be on cases concerning the national regulation of the display of religious symbols in educational institutions. I distinguish, in a rather stylised and ideal-type fashion, three different national models of social cohesion: Christian communitarianism as associated with the German tradition; laic republicanism as associated with the French tradition;

and pragmatic multiculturalism as associated with the British tradition.⁶ Crucially, the display of religious symbols in educational institutions is a highly contested issue *within* each of these national traditions. Moreover, their ban or limitation has been defended on a variety of grounds, ranging from the protection of individual autonomy and gender equality to health, safety and security concerns. Against this background, my aim in this essay is not to offer a comprehensive treatise of the issues at stake, nor is my claim that social cohesion is the only or even the decisive factor in resolving them. All I want to establish is that the national models under consideration, for different reasons and to different degrees, perceive religious diversity as a threat to social cohesion that needs to be contained or suppressed.

a) Christian Communitarianism in Germany

In Germany, the social cohesion limitation of freedom of religion operates on the basis of a twofold distinction: first, between Christianity as a distinctive religion, and Christianity as a general national culture; secondly, between freedom of religion as a positive right to express one's beliefs, and freedom of religion as a negative right to be free from undue religious influence. In conjunction, these distinctions are geared towards the perpetuation of a majoritarian national culture permeated by Christian values.

⁶ I use the term 'communitarian' in the loose sense of connoting a community founded in common values. Thus, when contrasting the German and the French approach to social cohesion, I do not posit communitarianism and liberalism as antipodes but rather compare communitarian and secular-republican interpretations of liberalism. 'Pragmatic multiculturalism' connotes a form of de facto recognition of religious diversity that is not *a priori* tied up with a normative claim for either accommodation or assimilation.

During what has become known as the ‘crucifix debate’ in Germany,⁷ a Bavarian administrative court distinguished between the Christian faith (as *distinctive* religion) and the Christian culture (as merely religiously permeated *common* culture). On this basis it held that the display of crucifixes in classrooms was not the (in this context illegitimate) expression of a commitment to a particular religious faith but the (legitimate) affirmation of an essential component of the general Christian-occidental tradition and common property of its cultural realm.⁸ The Federal Constitutional Court squashed this decision, amongst others because it *did* consider the crucifix a specific symbol of the Christian faith which, when displayed in classrooms of public schools, violated the children’s negative freedom of religion as protected by Article 4 of the German Constitution.⁹ The dissenting judges aligned with the reasoning of the Bavarian administrative court and held that such interference with non-Christian denominations was justified having regard to the state’s mandate to impart Christian values through education:

The affirmation of Christianity does not bear on the content of its beliefs but on the appreciation of its formative cultural and educational components, and is therefore also justified towards non-Christians by virtue of the history of the occidental cultural realm.¹⁰

In the subsequent ‘headscarf controversy’, a German school board rejected the application of a Muslim teacher unwilling to refrain from wearing her headscarf in school. It argued that the wearing of a headscarf in public schools would contravene the principle of state neutrality.

⁷ That is, the question of whether German school laws can require displaying a cross or crucifix in classrooms of public schools.

⁸ Beschluss des Bayrischen Verwaltungsgerichtshof vom 03. Juni 1991 as cited by the German Federal Constitutional Court, BVerfG, 1 BvR 1087/91 vom 16.05.2995 (Kruzifix), para 10: ‘*nicht Ausdruck eines Bekenntnisses zu einem konfessionell gebundenen Glauben, sondern wesentlicher Gegenstand der allgemein christlich-abendländischen Tradition und Gemeingut dieses Kulturkreises*’.

⁹ BVerfG, 1 BvR 1087/91, para 44

¹⁰ *Ibid.*, para 72, my translation

Moreover, it considered the headscarf a symbol of cultural disintegration that would endanger social cohesion and school peace. The decision of the school board was upheld by two lower instance administrative courts and the Federal Administrative Court.¹¹ The latter considered that wearing a headscarf in public schools was not reconcilable with the principle of state neutrality that, given increasing religious diversity in Germany, had to be interpreted in a restrictive way.¹² It went on to argue that because young children were not yet sufficiently educated in mutual respect and tolerance, a negative impact of Islam as 'symbolised' by the headscarf 'could not be excluded'.¹³

The German Federal Constitutional Court, distinguishing between the crucifix in classrooms as a symbol associated with the state and the headscarf as an individual statement of the person concerned, held that the latter was in principle covered by the teacher's fundamental right to freedom of religion. Accordingly, it ruled that the headscarf could not be prohibited through an administrative decree but only by means of a parliamentary statute.¹⁴ The dissenting judges drew a different distinction. On the one hand, they considered the crucifix a (merely) cultural symbol that, while 'stemming from' and 'being bound by' Judeo-Christian values, also stood also for 'openness' and 'tolerance'.¹⁵ On the other hand, they stressed that such openness and tolerance could not extend to symbols such as the headscarf that challenged dominant value standards and

¹¹ VG Stuttgart, 15 K 532/99, *Neue Zeitschrift für Verwaltungsrecht* (2000) 959; VGH Baden-Wuerttemberg, 4 S 1439/00, *Neue Juristische Wochenschrift* (2001) 2899; BVerwG, 2 C 21.01, *Juristenzeitung* (2002) 254, also available at <http://www.bverwg.de/media/archive/727.pdf>

¹² BVerwG, above n 11, at 7, 8

¹³ *Ibid.*, at 8

¹⁴ BVerfG, 2 BvR 1436/02 vom 03.06.2003 (Kopftuch Ludin). According to German constitutional law, decisions that have an essential impact on fundamental rights require a parliamentary statute (so-called *Wesentlichkeitstheorie*). Because in the federal German system the *Länder* have competence for school legislation it was their responsibility to draft the respective legislation.

¹⁵ *Ibid.*, para 113

were therefore prone to provoking conflicts.¹⁶ The majority of judges took a less communitarian stance, and suggested two possible interpretations of the relationship between religious diversity and social cohesion under the umbrella of state neutrality: a negative one that bans the display of religious symbols in state schools to minimise the ‘potential of possible conflicts’ in an increasingly religiously diverse society; and a positive one that permits the display of such symbols in order to foster mutual tolerance and integration through the active encounter of religious difference.¹⁷

By now, many of the German *Länder* have enacted legislation banning the headscarf while still sanctioning nuns teaching in their traditional costume. The laws of Hesse and Baden-Württemberg, for instance, provide that teachers shall not demonstrate any religious convictions that would contravene the principle of state neutrality. Manifestations of Christianity, however, are taken to be compatible with this requirement because they reflect the *Länder*’ Christian and humanistic occidental traditions and fulfil the educational mandate conferred upon the state.¹⁸ Similar laws have been passed in Lower Saxony, Saarland, and Bavaria.¹⁹ In two recent decisions, the *Verwaltungsgerichtshof* Baden-Württemberg and the Bavarian Constitutional Court confirmed that the preferential treatment of Christian symbols was compatible with the principle of state neutrality because a Muslim teacher could not credibly convey to her pupils the Christian values and traditions anchored in the *Länder* constitutions and the respective school laws.²⁰

¹⁶ *Ibid.*, para 125

¹⁷ *Ibid.*, para 65

¹⁸ See § 86 (3) Hessisches Schulgesetz and § 38 (2) Schulgesetz Baden-Württemberg

¹⁹ For an overview see the website of the *Deutsche Islam Konferenz*, available at <http://www.deutsche-islam-konferenz.de>; for an English translation of the respective legal provisions see D. McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (2006) 115-117

²⁰ Judgement of the *Verwaltungsgerichtshof* Baden-Württemberg of March 14 2007, 4 S 516/07 and Judgement of the *Bayerischer Verfassungsgerichtshof* of January 15 2007, Vf. 11-VII-05

The German model of social cohesion builds on the normative vision of a relatively homogenous national culture permeated by Christian values. This manifests itself in a twofold way. On the one hand, the state is required to protect children's negative freedom of religion which, by implication, justifies the ban of headscarves from school. On the other hand, the state is encouraged to actively promote Germany's majoritarian Christian culture and tradition so that it may justifiably discriminate between the Muslim headscarf and the Christian habit. While, as Gerstenberg says,

a distinctive feature of the German approach is the emphasis of freedom of conscience as a principle, another feature of the German approach is the assumption that Christian culture occupies a privileged place in German public life and is, indeed, a postulate of German political identity and social cohesion.²¹

Accordingly, while not hostile towards religion *per se*, the German social cohesion limitation of freedom of religion portrays religious *diversity* as something unwelcome and disruptive that needs to be concealed, if not assimilated to the majoritarian Christian tradition.

b) Laic Republicanism in France

In France, social cohesion is interpreted in the light of a laic-republican tradition that emphasises French national identity and secular state neutrality over and above the recognition of religious diversity.²² The French nation-state assimilates the *citoyen* to its *republican* identity, while leaving

²¹ O. Gerstenberg, 'Freedom of Conscience in Public Schools' 3 *International Journal of Constitutional Law* (2005) 94 at 96

²² See Article 1 of the French 1958 Constitution which states that France shall be an indivisible *laïque*, democratic and social Republic that ensures equality of all citizens before the law with no distinction made on the basis of origin, race or religion.

her free to pursue her religious beliefs as a private individual. This separation of citizens public and private 'selves' is reflected in a broader societal distinction between a secular public sphere and a religious private sphere. It is legally entrenched through a rigid interpretation of *laïque* state neutrality that reacts with institutional blindness to the fact of religious and cultural diversity. As Poulter says:

The principle of secularity (*laïcité*) is applied with particular fervour in France because the notion of modern citizenship as a status quite separate from distinctive ethnic identities and religious differences has become firmly entrenched in the public mind ever since the days of the Revolution, as corollary of the classical republican principles of equality and fraternity.²³

The French principle of *laïcité* that commits French public schools to a strictly secular education was challenged in 1989 when three school girls insisted on wearing headscarves in class. The headmaster suspended the girls, claiming to apply a well-established rule of French republicanism prohibiting the display of religious symbols in public schools. Indeed, a strictly *laïque* education appears of crucial importance to the French model of social cohesion. If, as Laborde notes,

the republic was to create 'citizens' out of 'believers', it had to engage in a strong formative project, aimed at the inculcation of the public values of democracy and egalitarian citizenship ... so as to lead citizens to endorse a robust public identity capable of transcending more particular religious, cultural and class loyalties.²⁴

²³ S. Poulter, 'Muslim Headscarves in School: Contrasting Legal Approaches in England and France' 17 *Oxford Journal of Legal Studies* (1997) 43 at 50

²⁴ C. Laborde, 'Secular Philosophy and Muslim Headscarves in School', 132 *Journal of Political Philosophy* (2005) 305 at 316

Also in 1989, however, the *Conseil d'État* gave a legal opinion (*avis*) holding that the display of religious symbols in public schools was not *per se* incompatible with the principle of *laïcité*, and could only be restricted in case it (among others) constituted an act of pressure or provocation, perturbed the school order or the peaceful running of schools.²⁵ In the following years, the *Conseil d'État* reversed a number of school decisions suspending or excluding students who had refused to remove their headscarves.²⁶ In *Kehrouaa*, for example, the court struck down a school regulation on the basis that it was too general and indiscriminate, thus violating the students freedom of religion.²⁷ In *Aoukili*, in contrast, it upheld the exclusion of students in the more specific context of physical education activities.²⁸

On occasion of the publication of the *Stasi Report* in December 2003,²⁹ Jacques Chirac called in a controversial speech for a 'national mobilization in defence of the republic's secular values'.³⁰ The Stasi Report, after asserting that the principle of *laïcité* required a complete neutrality of the state in religious matters, had concluded that the headscarf controversy was no longer a matter of freedom of conscience but of public order.³¹ It recommended that educational institutions should provide better instruction on the values of republicanism and *laïcité*, and that 'ostentatious' symbols manifesting a religious or political affiliation should be banned from public schools.³² These measures were deemed necessary to prevent 'identity conflicts' that could trigger violence,

²⁵ Conseil d'État, No 346893, 27 novembre 1989, available at <http://www.rajf.org/>, English summary in [1990] *Public Law* 434-35

²⁶ For an overview see McGoldrick, above n 19, at 70-73

²⁷ Conseil d'État, *Kherouaa, Kachour, Balo, Kizic*, No 130.394, 2 novembre 1992

²⁸ Conseil d'État, *Aoukili*, No 159.981, 10 mars 1995

²⁹ *Commission de Réflexion sur l'application du principe de la laïcité dans la République*, available at <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf>

³⁰ McGoldrick, above n 19 at 82

³¹ Stasi Report, above n 29 at 13, 58

³² *Ibid.*, at 51, 58.

endanger individual liberties, and threaten the public order.³³ In 1994 François Bayrou, the then Minister of National Education, issued a circular in which he urged the heads of educational institutions to ban ‘ostentatious’ religious symbols. In particular, he stressed that the French republican project builds on a vision of citizenship that construes the nation not simply as an aggregation of individual rights bearers but as a ‘community of destiny’.³⁴ One decade later, the French parliament eventually passed a law prohibiting the wearing of any signs manifesting a religious affiliation in public schools.³⁵ Whatever other concerns eventually motivated the ban, considerations of social cohesion played a significant role. As Gilbert Le Bris, member of the *Assemblée Nationale* explained using his ‘*bon sens paysan*’: ‘Islam has settled rather recently in our country. Its faith is absolutely respectable. But its adherents, as everybody else, have to adapt to our values and traditions, not the other way around.’³⁶

Still, it may be thought that the laic-republican social cohesion limitation of freedom of religion was more accommodating of religious diversity than the German model. After all, limits on the exercise of religion in the public sphere are justified on the basis of laic state neutrality that, in turn, is meant to ensure the equal protection of religious freedom in the private sphere. However, such argument overlooks that *laïcité* proves far less neutral, and consequently the republican assimilationist project far more pervasive, than they purport. *Laïcité* is a non-neutral principle in a twofold sense: most obviously, while it claims to treat different religions equally it cannot be

³³ *Ibid.*, at 56-7: ‘Or dans de trop nombreuses écoles, les témoignages ont montré que les conflits identitaires peuvent devenir un facteur de violences, entraîner des atteintes aux libertés individuelles et provoquer des troubles à l’ordre public.’

³⁴ Circulaire du 20 septembre 1994 relative au port de signes ostentatoires dans les établissements scolaires, available at http://www.crdp-nice.net/editions/supplements/2-86629-399-1/F6_4_CircBayrou.pdf

³⁵ Loi no 2004-225 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes manifestant une appartenance religieuse dans les écoles, collèges et lycées public, available at <http://www.legifrance.gouv.fr>

³⁶ Journal Officiel de la République Française, Année 2004. – No 17 [2] A.N. (C.R.), p. 1463 ; ‘*L’islam est d’implantation relativement récente chez nous. Sa croyance est parfaitement respectable. Mais, comme pour toutes les autres, c’est aux tenants de cette religion de s’adapter à nos valeurs et traditions et non l’inverse.*’

neutral with regard to religious and secular doctrines as such. Yet insomuch as the rationale for *laïcité* is to secure a neutral and non-sectarian public sphere, it is seriously flawed once secular neutrality appears just another sectarian doctrine. But *laïcité* even fails on the weaker claim of neutrality between different religions. Put crudely, European Christians will find it much easier to accept the public-private divide with its privatization of religious faith than other religious communities simply because they contributed to its creation in the first place.³⁷ Hence today the awkward alliance against the headscarf between French left-wing secular Republicanism and right-wing Christian Catholicism:

The Right and the Left can define the prohibition on Islamic headscarves in the classroom as a defence of either French Christian or French secular culture, because the two are not at all mutually exclusive. Current Western Christian religious practice defines that women and men bare their heads in public, non-sacred buildings, and that convention – the absence of a religious marker – has been accepted as a secular practise. But the absence is also a marker, and for other religious traditions with other religious practices, going bareheaded may be seen as an overtly Christian practice, or at the least one in weak disguise, especially if that practice is legislated in a dominantly Christian country.³⁸

It is crucial to understand how the two senses in which *laïcité* is non-neutral are connected: its ‘indirect’ Christian bias is reinforced through its ‘direct’ secular bias. As a consequence, the laic-republican model of social cohesion is not restricted to the ‘secular’ public sphere, but extends deep into the ‘religious’ private sphere. In both spheres, it exhibits a negative and defensive attitude towards religious diversity: the laic interpretation of state neutrality (passively) ignores

³⁷ See S. Ferrari, ‘The New Wine and the Old Cask: Tolerance, Religion and the Law in Contemporary Europe 10 *Ratio Juris* (1997) 75-90

³⁸ N. Moruzzi, ‘A Problem with Headscarves. Contemporary Complexities of Political and Social Identity’ (1994) 4 *Political Theory* 653 at 664

religious claims for recognition in the public sphere; and '*la République une et indivisible*' (actively) assimilates private religious difference to the French republican identity.

c) Pragmatic Multiculturalism in the United Kingdom

The British interpretation of the social cohesion limitation of freedom of religion differs from the German and the French model in two main regards. First, while the legal protection of freedom of religion prior to the Human Rights Act 1998 was comparatively weak, British society has traditionally been relatively open and tolerant towards expressions of religious diversity.³⁹ Accordingly, the wearing of headscarves is, by convention, generally permitted in public schools. Secondly, to date the display of religious symbols in educational institutions is not regulated through national legislation but through the individual schools uniform policies. The ensuing diversity of approaches is reflected in a case-sensitive approach of the British courts.⁴⁰ Both factors elucidate that the British model of social cohesion is not premised on the assimilation of religious minorities to a majoritarian national culture, be it Christian or secular. But it is not geared towards the accommodation of religious diversity, either. Rather than embracing religious pluralism, the British social cohesion limitation of freedom of religion espouses a negative 'live and let live' attitude that expresses itself through a disinterested, if not defensive, stance towards religious diversity.

³⁹ See Poulter, above n 23, at 73-4

⁴⁰ Lord Bingham's dictum in *Regina (SB) v Governors of Denbigh High School* [2006] UKHL 15 (Begum) is paradigmatic in this regard: 'It is important to stress at the outset that this case concerns a particular pupil in a particular school in a particular place at a particular time. ... The House is not, and could not be, invited to rule whether Islamic dress, or any feature of Islamic dress, should or should not be permitted in the schools of this country' (para 2).

In 2004, the Muslim pupil Shabina Begum challenged the refusal of a state-funded secondary school to allow her wearing a *jihab* in class, and her subsequent exclusion from school.⁴¹ The school's uniform policy permitted the wearing of the *shalwar kameeze* and the headscarf in school colours. However, Begum maintained that the *jihab* was the only garment that met her religious requirements, and that its ban therefore violated her rights under Article 9 ECHR. Bennet J. stressed the importance of school uniforms in enhancing 'social cohesion and harmony amongst the pupils who are from a wide range of faiths and backgrounds'.⁴² On this basis, he held that there was no 'breach' of Article 9 (1) ECHR because Begum was excluded for her refusal to abide by the school uniform policy, rather than for her religious beliefs.⁴³ This is tantamount to saying that because the purpose of the school uniform was to enhance social cohesion (and not to curtail religious freedom) it could not possibly interfere with Begum's right to manifest her religious beliefs! *Obiter* Bennet J held that had there been an interference with Article 9 ECHR it would have been justified because the school uniform policy, and its enforcement, pursued the legitimate aim of enhancing inclusion and social cohesion by reducing 'the potential for the forming of groups and cliques who would be identified by the clothes that they wear'.⁴⁴ The Court of Appeal reversed this decision, holding that the school uniform policy interfered with the claimant's right to manifest her religion, and that the school had failed to justify such interference in the light of Article 9 (2) ECHR.⁴⁵ Brooke LJ interpreted the social cohesion limitation of freedom of religion in a slightly more nuanced way. Given that the school already indulged Muslim girls being 'identified' by virtue of their wearing a headscarf, he questioned whether it was

⁴¹ [2004] EWHC 1389 (Admin)

⁴² *Ibid.*, para 43

⁴³ *Ibid.*, para 74

⁴⁴ *Ibid.*, para 42

⁴⁵ [2005] EWCA Civ 199

necessary in a democratic society to place a particular restriction on those Muslim girls at this school who sincerely believe that when they arrive at the age of puberty they should cover themselves more comprehensively than is permitted by the school uniform policy.⁴⁶

However, this merely challenges the effectiveness of the school's approach to social cohesion, rather than the agnostic-to-defensive attitude towards religious diversity that motivates it.

The House of Lords unanimously allowed the appeal.⁴⁷ Allegedly drawing on 'strong' authority from Strasbourg,⁴⁸ the majority of judges held that the school uniform policy had not interfered with Article 9 (1) ECHR because, *per* Lord Hoffmann,

there was nothing to stop her [Begum] from going to a school where her religion did not require a jibab or where she was allowed to wear one. Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing. Common civility also has a place in religious life.⁴⁹

Whatever precisely the notion of 'common civility' may entail, it nicely illustrates the British pragmatic-multicultural approach to social cohesion. Premising their judgement on Begum's

⁴⁶ *Ibid.*, para 74

⁴⁷ Begum, above n 40

⁴⁸ In *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France*, Application no 27417/95 (2000), the ECtHR held that the regulation of ritual slaughter in France did not interfere with the applicants freedom of religion because it was 'not impossible' for them to obtain supplies of such meat from Belgium (para 80-1). In *Karaduman v Turkey*, Application no 16278/90 (1993), the Commission declared an Article 9 ECHR application inadmissible because 'the fact that a secular university has regulations on students' dress and that its administrative services are subject to compliance with those regulations does not constitute an interference with the right to freedom of religion and belief' (p. 93). However, the ECtHR does not apply this rigid interference test in its more recent headscarf jurisprudence, see below section 3.

⁴⁹ Begum, above n 40, para 50

obligation to obey the uniform policy, rather than her right to manifest her religion,⁵⁰ the judges concluded that there had been no interference with Article 9 (1) ECHR because the applicant could choose to ‘compromise and, if necessarily sacrifice’⁵¹ the expression of her beliefs, or to move to another school whose uniform policy would accommodate her religious dress requirements. Thus delimiting freedom of religion at the interference stage, the majority relieved the school from the onus of justifying its uniform policy, and steered clear of scrutinising the proportionality of this policy in the light of the applicant’s right to manifest her religion.⁵² Assuming there had been an interference, all judges concurred that it was justified in the light of Article 9 (2) ECHR because the school uniform policy pursued the legitimate aim of protecting the rights and freedoms of others by promoting social cohesion and religious harmony among opposing groups. According to Baroness Hale of Richmond who delivered the most balanced and considerate opinion, schools must

promote the ability of people of diverse races, religions and cultures to live together in harmony. Fostering a sense of community and cohesion within the school is an important part of that. A uniform dress code can play this role in smoothing over ethnic, religious and social divisions.⁵³

Despite its explicitly case-sensitive approach, *Begum* has left significant traces in subsequent British case law. In *R. (on the application of X) v Headteacher of Y School* the claimant, a 12-year old Muslim girl, refused to attend school because she was not permitted to wear a *niqab* veil.⁵⁴ The judge did not find an interference with Article 9 (1) ECHR because the claimant had the option

⁵⁰ *Per* Lord Scott of Foscote, ‘there is not much point in having a school uniform policy if individual pupils can decide for themselves what they will wear’, *ibid.*, para 84

⁵¹ *Ibid.*, para 54

⁵² See the excellent analysis of N. Gibson, ‘Faith in the Courts: Religious Dress and Human Rights’, 66 *Cambridge Law Journal* (2007) 657 at 660-7

⁵³ *Begum*, above n 40 para 97, see also *per* Lord Bingham, para 32

⁵⁴ [2007] EWHC 298 (Admin)

of wearing the *niqab* in a different suitable school. *Obiter*, he held that such interference would have been justified because of the importance of school uniforms in ‘promoting uniformity and an ethos of equality and cohesion’.⁵⁵ In *R (on the application of Playfoot) v Governing Body of Millais School*, a Christian girl complained that the uniform policy against jewellery violated her freedom of religion because it prevented her from wearing a ‘purity ring’ that expressed her Christian commitment to pre-marital sexual abstinence. The challenge was unsuccessful, amongst others because the school’s uniform policy aimed at enhancing school identity, minimising differences of appearances, preventing bullying and promoting high standards of conduct.⁵⁶ The noteworthy exception is *R. (on the application of Watkins-Singh) v Aberdare Girls’ High School Governors*, a case that was, however, decided on grounds of anti-discrimination law rather than human rights law. The applicant, a 14-year old Sikh girl, challenged a uniform policy that prevented her from wearing a *Kara* at school. Silber J. found that the school’s decision not to grant a waiver from the uniform rules constituted an indirect religious discrimination under the Equality Act 2006.⁵⁷ Stressing the obligation of schools to partake in building a cohesive and tolerant multicultural society, the judge arrived at a rather different conclusion as to how this aim should be achieved:

This shows clearly first that the defendant and the school should not have sought to remove the potential cause of tension by refusing to allow the claimant to wear the *Kara* but second that instead it should have taken steps to ensure that the other pupils understood the importance of wearing the *Kara* to the claimant and to other Sikhs so that they would then tolerate and accept the claimant when wearing the *Kara*.⁵⁸

⁵⁵ *Ibid.*, para 65

⁵⁶ [2007] EWHC 1698 (Admin)

⁵⁷ [2008] EWHC 1865 (Admin)

⁵⁸ *Ibid.*, para 85

On the whole, also the British pragmatic-multicultural interpretation of the social cohesion limitation of freedom of religion espouses an agnostic-to-defensive attitude towards religious diversity. Social cohesion is achieved through school uniforms whose purpose is to foster religious harmony by concealing religious difference. This effectively subordinates the importance of children manifesting their religious beliefs under the importance of maintaining uniform dress codes in school. Moreover, it does not foster an appreciative societal attitude towards religious diversity 'since future citizens (i.e. children) are not necessarily encouraged in school to embrace or even experience communities and values other than their own.'⁵⁹ Instead, it easily lends itself to segregation, ignorance, alienation, and mutual hostilities such as overshadowed recent public controversies about whether a Christian employee of British Airways must conceal her cross under her uniform,⁶⁰ whether natural cremation grounds for Hindus upset public decency,⁶¹ or whether the Queen's Trinity Cross should be abolished because it is offensive to Muslims and Hindus.⁶²

3. Two Normative Responses of European Courts

This section analyses how two trans-national courts, the ECtHR and the ECJ, posit themselves towards the tension between religious pluralism and social cohesion identified at the national levels. The ECtHR, despite its lip-serving endorsement of the former, pursues a strategy of avoidance that de facto endorses the latter. The court uses the absence of a uniform European conception of the role of religion in the public sphere as a pretext for granting national authorities

⁵⁹ M. Levinson, 'Liberalism versus Democracy? Schooling Private Citizens in the Public Square', 27 *British Journal of Political Science* (1997) 333, at 340

⁶⁰ BBC News, 'Christian appeals in BA cross ban' (14 Oct 2008), available at <http://news.bbc.co.uk/1/hi/england/london/7669695.stm>

⁶¹ BBC News, 'Devout Hindu loses cremation bid' (8 May 2009), available at <http://news.bbc.co.uk/1/hi/england/tyne/8039630.stm>

⁶² Times Online, 'Queen's Trinity Cross honour deemed unlawful by Privy Council' (8 May 2009), available at <http://business.timesonline.co.uk/tol/business/law/article6245144.ece>

a particularly wide margin of appreciation, therewith effectively abdicating its supervisory responsibility. My assessment of the normative response of the ECJ is more speculative as the court has not yet come to decide a case involving the display of religious symbols in educational institutions. Yet I shall argue that, for systemic and normative reasons, the ECJ cannot contend itself with adopting an ECtHR-type minimum approach that leaves the national social cohesion limitations of freedom of religion largely unscathed. Rather, it must pursue a strategy of integration that addresses the tension between religious pluralism and social cohesion at the supra-national level, on the basis of autonomous human rights standards as general principles of Community law.

a) A Strategy of Avoidance

The most authoritative ECtHR case on freedom of religion and the Islamic headscarf is *Şahin v Turkey*, decided in a split judgement of the Grand Chamber in 2005.⁶³ Ms Şahin, a medical student at Istanbul University, was refused permission to attend lectures and sit examinations because she insisted on wearing a headscarf. The refusal was based on a circular the Vice Chancellor of Istanbul University had issued in 1998, which provided that 'students whose heads are covered (who wear the Islamic headscarf) and students (including overseas students) with beards must not be admitted to lectures, courses or tutorials'.⁶⁴ After having left Istanbul to continue her studies in Vienna, Ms Şahin brought a case against the Government of Turkey before the ECtHR, arguing that her exclusion from university for reasons of wearing the headscarf violated her freedom of religion. All judges of the Chamber, and all but one judge of the Grand Chamber, while accepting

⁶³ *Leyla Şahin v. Turkey*, Application no. 44774/98 (2005), following on from the Chamber Judgement (Fourth Section) *Şahin and Others v. Turkey*, Application no. 44774/98 (2004)

⁶⁴ Reproduced in *Şahin* (2005), above n 63, para 16

that the applicant's exclusion from university interfered with Article 9 (1) ECHR, found that this interference was justified and proportionate to the aims pursued.

What is most remarkable about both the Chamber and the Grand Chamber decision is how the judges fail to critically engage with the concrete submissions of the parties. Both judgements suffer from want of evidence and balance in the Courts' proportionality test. The Grand Chamber, after reiterating its appraisal of pluralism, tolerance and broadmindedness as 'hallmarks of a democratic society' flatly states that

pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society.⁶⁵

This circular reasoning – pluralism, while being a prerequisite of a democratic society, is also delimited in the name of maintaining and promoting democratic values – serves to alleviate the court from scrutinising Turkey's submission that the headscarf ban was necessary and proportionate in the light of Article 9 (2) ECHR. The judges uncritically accept the government's association of the headscarf with proselytism and political Islam,⁶⁶ despite the fact that there was no evidence of Ms Şahin trying to pressure or even influence others, or of her being connected to extremist political movements. The Chamber, instead of focussing on the applicant's concrete behaviour, endorses the government's view that the headscarf ban was justified as general 'preventive' measure.⁶⁷ Such rubber-stamping of pre-emptive measures not warranted by tangible evidence effectively reverses the burden of proof at the expense of the applicant and comes

⁶⁵ *Ibid.*, para 108

⁶⁶ *Ibid.*, para 115

⁶⁷ *Şahin* (2004), above n 63 para 96

dangerously close to granting the government a *carte blanche* for unbuffered interference. While the court heavily relies on the unsubstantiated assumption that Muslim women wearing the headscarf are prone to force their views on others, it appears oblivious to the coercive nature of state intervention.⁶⁸ The Grand Chamber's approach does not fare any better. After cursorily observing that 'the impugned interference primarily pursued the legitimate aim of protecting the rights and freedoms of others and of protecting public order',⁶⁹ the majority asserts that 'having found that the regulations pursued a legitimate aim, it is not open to the Court to apply the criterion of proportionality in a way that would make the notion of an institution's "internal rules" devoid of purpose'.⁷⁰ Such twofold deference to the views of the national government and the educational institution undermines the supervisory role of the ECtHR. Both the approach of the Chamber and the Grand Chamber render a meaningful proportionality test impossible, and an effective protection of the applicant's right to manifest her religious belief illusory.

The ECtHR's earlier *Dahlab* decision is even more problematic in this regard.⁷¹ Ms Dahlab was a Swiss primary school teacher who converted to Islam and began wearing the headscarf in class in 1991. In 1996, she was requested to take off the headgear while carrying out her professional duties as such conduct was deemed incompatible with section 6 of the Canton of Geneva Public Education Act which states that 'the public education system shall ensure that the political and religious beliefs of pupils and parents are respected'.⁷² Ms Dahlab's appeal to the Geneva cantonal government and the Swiss Federal Court were unsuccessful. The ECtHR agreed with the Swiss government's contention that Ms Dahlab's case was manifestly ill-founded. 'Weighing' the right of

⁶⁸ C. Evans, 'The "Islamic Scarf" in the European Court of Human Rights', 7 *Melbourne Journal of International Law* (2006) 52, at 65

⁶⁹ *Şahin* (2005), above n 63 para 99

⁷⁰ *Şahin* (2005), above n 63, para 121

⁷¹ *Dahlab v. Switzerland*, Application no 42393/98 (2001)

⁷² Reproduced in *Dahlab*, above n 71, at 4

the teacher to manifest her religion against the need to protect pupils by 'preserving religious harmony', the judges concluded that it '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'.⁷³

This is a surprisingly bold statement for a court that has repeatedly stressed that 'the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed'.⁷⁴ What is more, the court's analysis of the symbolic significance and impact of the headscarf is entirely detached from the concrete person and behaviour of the wearer. Such an approach is problematic for two reasons. First, the court's association of the headscarf with intolerance and gender discrimination is rather perfunctory and stereotypical, and could without great difficulty be applied to Christian symbols as well.⁷⁵ Secondly, the assessment of the impact of the headscarf in the abstract leads the court to ignore the concrete evidence before it. It was uncontested between the parties that Ms Sahin had been wearing the headscarf in class for more than five years without causing any obvious disturbance or complaints from pupils or parents. The Swiss government did not contest that Ms Sahin never tried to influence or 'proselytise' her pupils. In contrast, the government's own submission that that the headscarf was a 'powerful religious symbol' likely to influence the children's beliefs remained unsubstantiated and in want of evidence.

⁷³ *Ibid.*, at 8

⁷⁴ *Şahin* (2005), above n 63 para 107; see also *Hasan and Chaush v. Bulgaria*, Application no 30985/96 (2000) para 78, and *Manoussakis and Others v. Greece*, Application no 18748/91 (1996) para 47.

⁷⁵ For instance, to appreciate the dubious nature and implications of the court's claim that the wearing of the headscarf 'appears to be imposed on women by a precept which is laid down in the Koran' (*Dahlab*, above n 71, at 8), contrast this statement with 1 Corinthians 11:5, 6: 'But every woman that prays or prophesies with her head uncovered dishonours her head'. For a sociologically informed analysis of Muslim women's reasons for wearing a headscarf see W. Shadid & P.S. Van Koningsveld, 'Muslim Dress in Europe: Debates on the Headscarf', 16 *Journal of Islamic Studies* (2005) 35-61.

In two recent judgements, *Dogru v. France* and *Kervanci v. France*,⁷⁶ the court adopts a slightly more case-sensitive approach, possibly encouraged by the jurisprudence of the French *Conseil d'État*.⁷⁷ The applicants had refused to remove their headscarves during physical education and sports classes. In February 1999, the school's discipline committee decided to expel them for breaching the duty of assiduity by failing to actively participate in classes. The applicants' appeals to the Caen Administrative Court, the Nantes Administrative Court of Appeal and the *Conseil d'État* were unsuccessful. Given that the case centred on the limited issue whether the headscarf could be banned in physical education and sports classes, the ECtHR's consideration of Article 9 (2) ECHR focused on the school's internal rules on health and safety.⁷⁸ In this context, the court notes that

it transpires from these various sources that the wearing of religious signs was not inherently incompatible with the principle of secularism in schools, but became so according to the conditions in which they were worn and the consequences that the wearing of a sign might have.⁷⁹

However, this promise of a more differentiated approach is immediately mitigated by the court's statement that because 'the ban was limited to the physical education class, [it] cannot be regarded as a ban in the strict sense of the term'.⁸⁰ Accordingly, rather than scrutinising the proportionality of the ban in the light of the alleged health and safety concerns, the ECtHR contended itself with noting that it was 'not unreasonable'.⁸¹ Having stressed that the headscarf controversy had created a 'general atmosphere of tension' within the school, the court failed to

⁷⁶ *Dogru v France*, Application no 27058/05 (2008); *Kervanci v. France*, Application no 31645/04 (2008)

⁷⁷ See above, section II b)

⁷⁸ *Dogru*, above n 76 paras 68, 73

⁷⁹ *Ibid.*, para 70

⁸⁰ *Ibid.*, para 74

⁸¹ *Ibid.*, para 73

inquire the proper source of this tension.⁸² Instead, it jumped to the conclusion that the ‘principle of *pluralism*’ is an entirely legitimate ground for justifying the exclusion of pupils wearing headscarves from school.⁸³

The ECtHR’s supervisory role is limited to ensuring a common minimum standard of human rights protection in Europe, leaving its member states free to provide higher levels of protection at the national level.⁸⁴ Where national models diverge on a contentious issue such as the headscarf, this minimum approach results in the court granting its member states a wide margin of appreciation. The ECtHR’s dictum in *Dogru* is representative in this regard, and worth citing at length:

Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance. This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions, in respect of which the approaches in Europe are diverse. Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order.⁸⁵

The way the court applies these principles in its headscarf jurisprudence undermines its supervisory role in protecting freedom of religion across Europe. The margin of appreciation doctrine is used to water down the high burden of ‘necessity’ of interference to be discharged by the state. As Judge Tulkens notes in her lone dissent to *Şahin*, ‘only indisputable facts and reasons

⁸² *Ibid.*, para 74. The applicant had submitted the unrest and disruption started with a teachers’ strike action against the headscarf on the pretext of defending secularism (para 44), and that her proposal to wear a hat or balaclava instead of the headscarf was indicative of her conciliatory attitude and willingness to compromise (paras 44, 75).

⁸³ *Ibid.*, para 67, with reference to *Köse and 93 Others v Turkey*, Application no 26625/02 (2006), my emphasis

⁸⁴ See Article 60 ECHR

⁸⁵ *Dogru*, above n 76, para 63; see also *Kervanci*, above n 76, para 63 and *Şahin* (2005), above n 63 para 108-9

whose legitimacy is beyond doubt – not mere worries or fears – are capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention’.⁸⁶ The ECtHR’s failure to scrutinise the submissions of the parties in this light leads to an uncritical endorsement of the national cohesion limitations of freedom of religion, cutting across the court’s professed commitment to religious pluralism. The judges idly remark that the ‘State’s role as the neutral and impartial organiser of the exercise of various religions’ should not be discharged by way of removing ‘the cause of tension by eliminating pluralism’ but through ensuring that ‘the competing groups tolerate each other’.⁸⁷ Yet the actual headscarf jurisprudence of the court speaks to different concerns.

b) A Strategy of Integration

The ECJ has not yet had to decide a case involving the display of religious symbols in educational institutions. However, freedom of religion has long been recognised as a general principle of Community law and receives the broad protection of Article 10 of the EU Charter of Fundamental Rights. Furthermore, Member States are bound by EU fundamental rights when acting within the field of Community law.⁸⁸ Thus, and in the light of the increasingly dense web of European anti-discrimination legislation, it seems likely that Member State measures affecting the manifestation of religious beliefs in educational institutions will come under the scrutiny of the ECJ.⁸⁹ Certain religious groups can profit from the protection of Council Directive 2000/43/EC implementing the

⁸⁶ *Şahin* (2005), above n 63 para 5 (Dissenting Opinion of Judge Tulkens)

⁸⁷ *Şahin* (2005), above n 63 para 107

⁸⁸ Case 5/88 *Wachauf v Germany* [1989] ECR 2609, para 19; on the nature of the connection between national measures and Community law necessary to trigger the application of EU fundamental rights see S. Douglas-Scott, *Constitutional Law of the European Union* (1st ed, 2002), ch 13

⁸⁹ See S. Knights, ‘Religious Symbols in the School: Freedom of Religion, Minorities and Education’, 5 *European Human Rights Law Review* (2005) 449, at 515; A. Riley, ‘Headscarves, Scull Caps and Crosses: Is the proposed French ban safe from European legal challenge?’, *CEPS Policy Brief No 49* 2004); J. Rivers, ‘In the pursuit of pluralism: the ecclesiastical policy of the European Union’, 7 *Ecclesiastical Law Journal* (2004) 267-291

principle of equal treatment between persons irrespective of racial or ethnic origin.⁹⁰ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation covers both conditions for access to employment and occupation, and access to all types and levels of vocational training.⁹¹ The European Commission's proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation states in Article 3 that the Directive shall be 'without prejudice to national legislation ensuring the secular nature of the State, State institutions or bodies, or education'.⁹² It remains to be seen whether this will prevent the ECJ from scrutinising the alleged link between the ban of religious symbols and the 'secular nature of the State', in particular with regard to countries that do not adhere to a strictly secular model of education.⁹³

If the ECJ comes to decide a case concerning the display of religious symbols in educational institutions, how is it to address the tension between religious pluralism and social cohesion against the backdrop of diverse national traditions and a highly deferential jurisprudence of the ECtHR? Having introduced fundamental rights as part of the general principles of EC law,⁹⁴ the ECJ developed two guiding principles for interpreting them. On the one hand, the court has consistently held that EU fundamental rights must be interpreted in an autonomous way, in the

⁹⁰ Council Directive 2000/43/EC of 29 June 2000. The impact of the Directive on religious groups will depend on the ECJ's interpretation of 'racial and ethnic origin'. Under British law, for example, Sikhs and Jews are considered racial or ethnic groups, see *Mandla v Dowell Lee* [1983] 2 A.C. 548 and *R. (on the application of Watkins-Singh) v Aberdare Girls' High School Governors* [2008] EWHC 1865 (Admin). In *J.H. Walker Ltd v Hussein* [1996] I.C.R. 291, Muslims were provided protection as a matter of indirect race discrimination under section 1 (1)(b) of the Race Relations Act 1976.

⁹¹ Council Directive 2000/78/EC of 27 November 2000

⁹² COM (2008) 426 final

⁹³ According to the Commission's explanatory memorandum, Article 3 should exclude from the scope of the Directive Member State decisions to allow or prohibit the wearing of religious clothing in state schools. However, the pertinent case law of the German Bundesverfassungsgericht, the French Conseil d'État, and the British House of Lords considered in section 2 above does not warrant the conclusion that the display of religious symbols is *per se* incompatible with the secular nature of the state or, indeed, of secular state education, see, respectively, BVerfG, *Ludin*, above n 14, Conseil d'État, *Avis no 346893*, above n 25, and House of Lords, *Begum*, above n 40.

⁹⁴ Case 29/69 *Stauder v City of Ulm* [1969] ECR 419

light of the Community legal order as an 'independent source of law'.⁹⁵ On the other hand, it has stressed that such interpretation 'is inspired by the constitutional traditions common to the Member States' and their obligations under international law.⁹⁶ As the Court says in its ERT ruling:

Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance.⁹⁷

At first sight, the 'special significance' the ECJ accords to the ECHR may suggest that the court should endorse the ECtHR's minimum approach. Indeed, facing diverging national standards, it seems tempting to retreat to the lowest common denominator of human rights protection as distilled in the jurisprudence of the ECtHR. This would effectively leave the task of equilibrating religious pluralism and social cohesion to the EU Member States, with the ECJ refraining from scrutinising the national social cohesion limitations of freedom of religion. However, such an approach proves unsatisfactory for a number of systemic and normative reasons.

First, and regardless of a potential accession of the EU to the ECHR, the special significance accorded to the latter can only provide a *negative* reference point for the ECJ, disqualifying measures in the Community 'which are incompatible with observance of the human rights thus

⁹⁵ See, e.g., Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle fuer Getreide und Futtermittel* [1970] ECR 1125, para 3

⁹⁶ *Ibid.*, para 4; since Maastricht, Article 6 (2) TEU obliges the EU to respect fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

⁹⁷ Case C-260/89 *Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Etaria Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925, para 41

recognised and guaranteed'.⁹⁸ To mistake this 'floor' of European human rights protection for its 'ceiling'⁹⁹ not only runs counter the self-understanding of the Convention system, but also renders the proclaimed autonomous interpretation of general principles of EC law void of meaning. Secondly, adopting a common minimum standard would disregard the systemic differences between human rights protection under the umbrella of the Council of Europe on the one hand and the European Union on the other. The ECtHR uses the absence of a common European approach to freedom of religion in the public sphere as a pretext for granting member states a wide margin of appreciation, therewith effectively endorsing national *diversity* as a matter of ECHR law. The ECJ, in contrast, builds its fundamental rights jurisprudence on constitutional traditions *common* to the member states, which is antagonistic to recognising national differences for the purpose of defining human rights standards as a matter of EU law.¹⁰⁰ Since the early days of its human rights jurisprudence, the ECJ has stressed that a high level of convergence among Member States' constitutional traditions is a functional imperative of European legal integration. Deference to national diversity would compromise the doctrinal supremacy and damage the coherence and efficacy of Community law, effectively leading 'to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community'.¹⁰¹ Hence, the ECJ will find it difficult to avoid scrutinising Member States justifications for banning religious symbols from educational institutions simply by allowing an ECtHR-type margin of appreciation.¹⁰² Finally, the ECJ's endorsement of the ECHR minimum standard risks engaging a European 'race to the bottom' of human rights protection. There is already a tendency among some national courts to treat the

⁹⁸ *Ibid.*, para 41

⁹⁹ For this terminology see P. Craig & G. de Búrca, *EU Law* (4th edition, 2008), at 385-6

¹⁰⁰ The problem of defining common *EU* human rights standards should not be confused with the ECJ's practice to grant member states exceptions from Community law on the basis of conflicting *national* human rights law, see e.g. Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbuergermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

¹⁰¹ Case 44/79 *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727

¹⁰² Compare *Knights*, above n 89 at 515

ECtHR jurisprudence as an authoritative and exclusive, rather than merely a minimum standard.¹⁰³

If the ECJ were to adopt the same approach, the Strasbourg floor of human rights protection would become binding on the Member States as a matter of European law. At the same time, the ECtHR has accorded the European Union a rebuttable presumption of compliance with the ECHR, accepting that the protection of fundamental rights under EU law is 'equivalent' to that of the Convention system.¹⁰⁴ If, on the basis of a similar presumption of EU compliance with national human rights law,¹⁰⁵ national courts refrain from reviewing acts of public authorities in the sphere of Community law, the mutual deference between national and European courts will seriously impede an effective human rights protection at the national and the European levels.

The obvious alternative for the ECJ to adopting the ECtHR minimum approach is to derive a high standard of protection from the 'constitutional traditions common to the member states'. In this vein, Leonard Besselink advocates a 'universalised maximum standard approach' that functions as a 'decisional principle for the Court to apply the standard which offers the best protection in a concrete case'.¹⁰⁶ In a nutshell, the ECJ should adopt, on a case-by-case basis, the respectively highest national standard and apply it across the European Union. According to Besselink, such an approach would both ensure the uniform and full effect of Community law and a high standard of human rights protection across the European Union. Applied to the display of religious symbols in educational institutions, this would require the ECJ to scrutinise national social cohesion limitations of freedom of religion against the benchmark of the most liberal and pluralistic national

¹⁰³ See, for example, *Begum*, above n 40, and the critique of Gibson, above n 52 at 665

¹⁰⁴ *M & Co v Federal Republic*, Application no 13258/87 (1990); *Bosphorus v Ireland*, Application no 45036/98 (2005), para 165, critical G. Gaja, 'The Review by the European Court of Human Rights of Member States' Acts Implementing European Union law: "Solange" Yet Again?' in P-M Dupuy, B. Fassbender, M. Shaw & K-P Sommermann (eds), *Common Values in International Law* (2006) 517-526.

¹⁰⁵ See, for example, BVerfG, 2 BvR 197/83 vom 22. Oktober 1986 (Wuensche Handelsgesellschaft)

¹⁰⁶ L. Besselink, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union', 35 *Common Market Law Review* (1998) 629, at 671

model. Attractive as it may seem as regards an effective EU fundamental rights protection, also the adoption of such a maximum approach faces a number of objections.

First of all, it is difficult to explain how fundamental rights as part of the *general* principles of Community law can be induced from *one particular* national tradition. As regards the existence of particular rights not 'common' to the member states, the ECJ has either refused to recognise them as a matter of Community law,¹⁰⁷ or has reinterpreted them as general rights that could be said to be shared among the Member States.¹⁰⁸ The latter approach – an induction from the particular to the general – is simply not feasible once what is at stake is not merely the abstract recognition of a right but its concrete scope and interpretation as a matter of Community law.¹⁰⁹ Secondly, also Besselink's universalised maximum standard is incompatible with the principle of autonomous interpretation. Rather than developing a genuine EU human rights standard 'within the framework of the structure and objectives of the Community',¹¹⁰ it merely selectively incorporates particular national human rights standards into European law, and then imposes them on all Member States *qua* European law. Finally, Besselink rightly insists that an EU approach to human rights that effectively lowers national standards of protection risks stirring up anti-European feeling and jeopardizing the integration process.¹¹¹ However, the imposition of one particular national standard on other Member States in European disguise is likely to have the same effect.

¹⁰⁷ E.g. Cases 46/87 and 227/88, *Hoechst v Commission* [1989] ECR 2859, para 17

¹⁰⁸ E.g. Case 155/79 *AM & S Europe Ltd v Commission* (1982) ECR 1575, 1587 paras 18-28 and *Omega*, above n 100 paras 34-8, see also P. Craig & G. de Búrca, above n 99 at 388-89

¹⁰⁹ For example, in the joint cases C-122/99 and C-125/99 *D and Sweden v. Council* (2001) ECR I-4319 the ECJ took the view that the meaning of the term 'married official' in the Staff Regulations could not be derived from the law of singular Member States but was a matter for independent Community interpretation. For a convincing elaboration of the challenge different national *interpretations* of fundamental rights pose for a European 'maximalist' approach see J. Weiler, 'Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space' in his *The Constitution of Europe* (1999) 102-129.

¹¹⁰ *Internationale Handelsgesellschaft*, above n 95 para 4

¹¹¹ See Besselink, above n 106, at 670

Hence, on the one hand, the ECJ cannot pursue an ECtHR-type strategy of avoidance that contends itself with implementing a European minimum standard of freedom of religion, effectively deferring the responsibility for equilibrating the tension between religious pluralism and social cohesion to national authorities. Instead, it must pursue a strategy of integration that scrutinises Member States social cohesion limitations of freedom of religion against the background of autonomous EU human rights standards inherent in the general principles of Community law. On the other hand, such a strategy of integration cannot succeed through the selective incorporation of particular national models of freedom of religion into European law. Rather, the ECJ must *re-interpret* the relationship between religious pluralism and social cohesion in the European Union on the basis of the supra-national EU legal order and in the light of the normative telos of European integration.

4. Concluding Remarks: Autonomous Re-interpretation

A European Union human rights jurisprudence cannot operate in a normative vacuum. Most significantly, the EU legal order lacks a relatively homogenous socio-cultural pedigree such as gives contour and content to the social cohesion limitations of freedom of religion in the Member States.¹¹² However, it would be premature to conclude that the notion of an autonomous EU human rights jurisprudence is void of meaning, so that the ECJ is forced to fall back on national human rights standards.¹¹³ Such argument fails to appreciate the particular nature of the European Union as a *supra*-national polity. European supra-nationalism dwells on the notion of a ‘community as a transnational regime’ that is ‘not meant to eliminate the national state but to

¹¹² See N. Walker, ‘Legal Theory and the European Union: A 25th Anniversary Essay’, 25 *Oxford Journal of Legal Studies* (2005) 581 at 590, and my analysis of the German, French and British model of social cohesion, above section 2.

¹¹³ This is Besselink’s main objection to Weiler’s proposal for a pluralist regime of European human rights protection, see Besselink, above n 106 and Weiler, above n 108

create a regime which seeks to tame the national interest with a new discipline'.¹¹⁴ It assumes a complementary role to the nation-state in that it does not 'redraw the actual political boundaries of the polity within the existing nation-state conceptual framework' but 'redefines the very notion of boundaries of the state, between the nation and the state, and within the nation itself'.¹¹⁵ Considered this way, the absence of a nation-state-type socio-cultural pedigree, rather than a shortcoming of the European polity, appears the rationale of European integration. Accordingly, supra-national human rights jurisprudence is neither contingent on, nor geared towards the replication of, national models of social cohesion at the European level. At the same time, the ECJ's reference to the ECHR and the constitutional traditions of the Member States provides a sufficiently robust normative framework for developing autonomous EU human rights standards as general principles of Community law. The ECtHR supplies a common 'floor' of European human rights protection below which the European Union and its Member States may not fall. As regards its 'ceiling', the ECJ can draw on the constitutional traditions of the Member States for the purpose of *re-interpreting* them 'within the framework of the structure and objectives of the Community'.¹¹⁶

One particularly compelling option of autonomous re-interpretation regarding the relationship between religious pluralism and social cohesion in the European Union consists of challenging the association of social cohesion with the containment or suppression of religious diversity. As Evans notes regarding the ECtHR's *Dahlab* decision, it may not be the headscarf but its ban that sends a message of intolerance and discrimination:

¹¹⁴ J. Weiler, 'To be a European citizen: Eros and civilization' in his *The Constitution of Europe* (1999) 324 at 351

¹¹⁵ *Ibid* at 350

¹¹⁶ *Internationale Handelsgesellschaft*, above n 95 para 4

The Court's judgement makes clear that there were Muslim children in the school who wore traditional Muslim clothing and they might well wonder why dressing as they do or as their mothers do is so terrible that it requires an otherwise good teacher to be forced out of the school community. In addition, children who are already inclined towards mistrust, religious hatred or racial discrimination could be sent the message that their fears are justified and their stereotypes valid.¹¹⁷

The suppression of religious diversity proves detrimental to social cohesion because it lends itself to reciprocal segregation and misrecognition: on the part of national majorities because it ascertains the majoritarian 'way of life' as a legitimate criterion for distinction and discrimination; on the part of religious minorities because it invites them to withdraw into angry and cynical indifference towards their society.¹¹⁸

The proposed re-interpretation of the relationship between religious pluralism and social cohesion in the European polity commends itself for a number of reasons. First, it pays tribute to the ECtHR's appraisal of religious diversity as a foundation of a democratic society. Secondly, it can 'draw inspiration' from the constitutional traditions of the Member States, without collapsing into any particular (Christian-communitarian; laic-republican; pragmatic-multicultural) national model. A number of European and national court decisions considered in the previous sections recognise that in pluralistic societies, the societal conditions for the peaceful coexistence of competing religious groups shall not be created through suppressing religious diversity, but through ensuring

¹¹⁷ Evans, above n 68, at 64-5

¹¹⁸ To be sure, contesting the linkage between social cohesion and the suppression of religious diversity may contribute to, but is not premised on, individual citizens developing an appreciative attitude towards religious diversity. Rather, and more modestly, it creates the *societal* conditions for citizens to peacefully co-exist with each other on equal terms despite persisting disagreement.

that these groups tolerate each other.¹¹⁹ None of the discussed court decisions stipulates the suppression of religious diversity in educational institutions as a constitutional requirement *per se*.¹²⁰ Thus, the association of social cohesion with the suppression of religious diversity is neither prevented nor prescribed by Europe's national constitutions. Against this background, and thirdly, the proposed autonomous re-interpretation functions as a normative guideline for the ECJ to scrutinise Member States justifications for delimiting freedom of religion in a pluralistic society. As such, it does not preclude the ban of religious symbols in educational institutions in cases where there is concrete evidence that their display or the manner in which they are displayed poses a threat to the 'rights and freedoms of others' or the 'public order' that cannot be otherwise mitigated.

Finally, proposed re-interpretation is supported by the normative telos of European integration. The contestation of the correlation between social cohesion and the suppression of religious diversity draws on a long and troublesome European experience of religious conflict. Already John Locke noted in his *Epistola de Tolerantia* of 1689 that 'it is not the diversity of opinion, which cannot be avoided, but the refusal of toleration to those that are of different opinions, which might have been granted, that has produced all the bustles and wars, that have been in the Christian world upon account of religion.'¹²¹ According to Habermas and Derrida, such a conflictive experience of living together in difference lies at the heart of the European identity. A European culture

¹¹⁹ Şahin (2005), above n 63, para 107; similarly BVerfG, *Ludin*, above n 14 and *R. v Aberdare Girls' High School Governors*, above n 57

¹²⁰ See, in particular, Conseil d'État, Avis No 346893, above n 25

¹²¹ The *Epistola de Tolerantia* was first published anonymously in Latin in 1689, and translated into English by William Popple, as reprinted in S. Mendus and J. Horton (eds), *A Letter Concerning Toleration in Focus* (1991) 12, at 52

which for centuries has been beset more than any other by conflicts between ... sacred and secular authorities [and] by the competition between faith and knowledge ... has had to painfully learn how differences can be communicated, contradictions institutionalised, and tensions stabilised. The acknowledgement of differences – the reciprocal acknowledgement of the Other in his otherness – can also become the feature of a common identity.¹²²

A European Union that continues to re-negotiate its multi-national roots under the umbrella of European supra-nationalism constitutes a predestined vessel for overcoming defensive attitudes towards diversity that evolved in the shadow of the formation of the nation-state. The experience of living together in national diversities decentres socio-cultural parochialisms and can function as a catalyst for giving voice and recognition to religious diversity beyond the normative corset of the nation-state. It bears the hope, as Charles Taylor notes, of creating societies with an unprecedented degree of openness and inclusion: 'In its finest moments, Europe is blazing a trail for all of us.'¹²³

¹²² J. Habermas and J. Derrida, 'February 15, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe', 10 *Constellations* (2003) 291, at 294

¹²³ C. Taylor, 'Religion and European Integration', in K. Michalski (ed), *Religion in the New Europe* (2006) 1 at 21