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### Introduction

By Julie Maher

How a state treats its religious minorities is often a strong indicator of the general level of tolerance and respect for individual freedoms within that state. From the collection of posts on freedom of religion in this chapter we can see that the diversity in the debates surrounding protection of freedom of religion to a large extent maps onto the distinct responses which a state may take towards the religious diversity in its population. This chapter is divided into three distinct sections: the first considering the protection of freedom of religion as an aspect of international human rights law; the second focusing on protection of freedom of religion under the European Convention on Human Rights; and the last section looking towards North America and some of the recent additions to domestic Canadian jurisprudence on freedom of religion.

In recent years the debate in Britain has focused on issues such as the extent to which there should be accommodation of religious belief within the workplace and the challenges inherent to religiously motivated expression that conflicts with non-discrimination norms. In the context of recent domestic debates, some commentators have decried the 'persecution' of Christians in Britain. The contributions of Jon Yorke ('Meriam Ibrahim is Freed: Weaving together Law, Politics and Civil Society' p 147), Stephanie Berry ('International Law and the Denial of Minority Status to Indian Muslims' p 147), and Shantanu Dey ('Translating Questions Of Religion Conversions to Issues of Human Rights: The Proposed Ban on Religious Conversions in a Secular Indian State' p 149) in the first part of this chapter serve as a timely reminder of the wider context of freedom of religion and the extreme challenges faced by religious minorities across the globe. Indeed, in countries where international human rights standards have little impact, alternative approaches may be required. Nazilla Ghanea's post explores how appeals for tolerance based on religion, cultural traditions, and domestic history, can be more effective by looking at the effect of an Islamic cleric's gesture towards the persecuted Bahá'í community in Iran ('Using faith to reinforce human rights of Bahá'ís in Iran' p 150).

The trends and case law from the ECHR contracting states, discussed in the second section of this chapter, illustrate how the mere fact that a country defines itself as secular rather than as aligned with a particular religious tradition is no certain indication of a greater extent of religious freedom. This chapter includes contributions focusing on the limitation of religious practice within two oft-cited examples of secular states within the Convention system, Turkey and France. The second section of the chapter focuses on one of the most anticipated ECtHR judgments in recent years. Following the enactment in France in 2010 of legislation restricting the wearing of the burqa (or voile intégral, as it is typified in French debates) commentators and academics alike questioned how Strasbourg might react, with many predicting an end to the ECtHR's past latitude towards French secularism. Such assumptions ultimately proved incorrect, with the SAS judgement serving to further complicate the Court's case law on the appropriate limits of State action under Article 9. Three contributions in this chapter, Lucy Vickers' ('Conform or be confined: S.A.S. v France' p 151), Frances Raday's ('Comments on SAS v France' p 152), and my own ('SAS v France in Context: the margin of appreciation doctrine and protection of minorities' p 154), probe the reasoning and ramifications of the Grand Chamber's judgment.

The chapter closes with a consideration of two cases from Canada which illustrate the difficulties in determining the appropriate limitations of religious freedom according to domestic human rights standards. Ravi Amarnath ('Clash of Rights at Centre of Canadian Law School Controversy' p 155) and Stephanie Tsang ('Navigating the Troubled Waters of Religious Accommodation' p 157) both consider how religious freedom can be balanced against protection from gender discrimination and sexual orientation discrimination. The challenge of aligning society's dual commitment to non-discrimination and protection of religious freedom will undoubtedly continue to prove controversial within our own domestic debate. Accordingly, it is certainly worthwhile to consider how Canadian courts have responded to such clashes of rights within their jurisprudence.

*Dr Julie Maher is a barrister in Ireland.*

### **Meriam Ibrahim is Freed: Weaving together Law, Politics and Civil Society**

By Jon Yorke | 5th August 2014

On 22 June 2014, the Court of Appeal, Khartoum North and Sharg-el-nil Criminal Circuit, quashed the 11 May Al-Haj Yousif Criminal Court sentence of 100 lashes and the death penalty for Meriam Ibrahim for the crimes of sexual immorality and apostasy from Islam.

Following her release from prison on 23 June, Meriam, her husband, Daniel Wadi, and their two children sought refuge in the US Embassy in Khartoum. On 24 June, she obtained an official visa, and the family attempted to fly to the United States but were detained by the National Intelligence Security Services at Khartoum airport. Meriam was charged with falsifying a South Sudan emergency travel document. If convicted she faced a prison sentence of up to seven years.

The global media campaign intensified against this apparent grave injustice. On twitter and facebook, '#savemeriam' and '#freemeriam' were 'trending.' There were many 'Free Meriam' campaigns initiated, including by Amnesty International and Emily Clarke's Change.org petition, which both gained over 1 million signatures.

This significant civil society pressure helped strengthen political diplomacy. Many individual governments spoke out against the initial sentence and her re-arrest. For example, Mark Simmonds, Parliamentary Under Secretary of State for Foreign and Commonwealth Affairs, called for Sudan to respect Meriam's human rights. Then the FCO and the British Embassy in Khartoum closely monitored the situation and provided advice to Meriam's lawyers.

In the United Nations, Rupert Colville, the spokesperson for the UN High Commissioner for Human Rights, voiced the UN's, 'deep concern about the situation of Meriam Ibrahim.' In the EU, following the EU Presidency's of the Parliament, Council and Commission, expressed their 'deepest dismay,' at Meriam's inhumane treatment, the EU's European External Action Service raised Meriam's plight in the UN Human Rights Council. The European Parliament then adopted a resolution on the case on 17 July.

During the bilateral and multilateral initiatives, Lapo Pistelli, the Italian Deputy Foreign Minister visited the region, and it is now clear that the Italian government performed a very significant role in the subsequent quashing of the charges, the family obtaining new visas and flying out of Khartoum late on Wednesday 23 July. Their plane landed at Rome's Ciampino airport on Thursday 24 July, and the Ibrahim-Wadi family had a meeting with Pope Francis at his Santa Marta residence.

Lapo Pistelli told Vatican Radio's Susy Hodges, that the dialogue with the political authorities in Khartoum had been very fair and that President al-Bashir had stated Sudan had to 'rethink the Constitution and the Penal Code, and it is highly likely that the issue of apostasy will be modified and deleted.'

Susy Hodges asked, 'Presumably...we have to thank the international outcry that broke out after the death sentence?' Pistelli answered, 'Yes...the international attention given by the media has helped all the efforts of the international community or the American government or the Italian government, to be successful.'

On 1 August, Meriam and her family arrived in New Hampshire to begin a new life, and whilst welcoming her on a brief stopover in Philadelphia, Mayor Michael Nutter described her as a "world freedom fighter."

This human rights success story cannot be attributed to one forum of power or one single discourse. It is the weaving together of legal activism, political diplomacy and a unified civil society voice.

The global support for Meriam's lawyers, the personal safety of the family provided by the US Embassy, the regional, and governmental diplomacy, with the important role of Italy, all came together to ensure that further gross human rights violations did not befall the Ibrahim-Wadi family in Sudan.

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### **International Law and the Denial of Minority Status to Indian Muslims**

By Stephanie Berry | 3rd July 2014

On 27th May, the Indian Minister of Minority Affairs, Najma Heptullah, declared that 'Muslims are not minorities, Parsis are,' the suggestion being that Muslims are too large in number to constitute a minority. Yet out of a population of 1.2 billion people, Indian Muslims, at approximately 138 million, clearly constitute a numerical minority. While India is a secular state, 80 percent of the population is Hindu. Furthermore, the newly-elected ruling party, the Bharatiya Janata Party (BJP), is pro-Hindu and was involved in the campaign to demolish the Babri mosque in the 1980s-90s. Consequently, the suggestion that Indian Muslims are not able to

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benefit from the protections available to minority communities has the potential to impact their ability to preserve their identity.

Although the Indian Constitution provides for freedom of religion, the suggestion that Muslims are not a minority excludes this group from the additional protections it affords to minorities. Notably, Section 30 of the Indian Constitution recognises that '[a]ll minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.' Furthermore, Section 29, entitled, 'Protection of the Interests of Minorities,' focuses on the conservation of minority languages, scripts and cultures. As Islam is recognised to be a 'way of life,' akin to a culture with a distinct language, Section 29 is also relevant to the preservation of the Indian Muslim minority identity.



Article 27 of the International Covenant on Civil and Political Rights (ICCPR) (acceded to by India in 1979) establishes that persons belonging to religious, linguistic and ethnic minorities have the right to preserve their minority identity. The 2006 Sachar Committee Report, commissioned by the Indian government, noted that '[m]arkers of Muslim Identity . . . have very often been a target for ridiculing the community as well as of looking upon them with suspicion.' Furthermore, the demolition of the Babri mosque in the 1990s and subsequent intercommunal violence highlight the significant barriers that Indian Muslims face to the preservation of their identity.

Socio-economic disadvantage related to minority identity also has the potential to negatively impact the preservation of that identity. Thus, Article 2.2 of the UN Declaration on Minorities recognises that measures must also be taken to overcome socio-economic disadvantage. The Sachar Report revealed that Indian Muslims are predominantly poor and suffer from disadvantage in education, health and employment. The poor economic situation of India's Muslims, coupled with social stigma, has the potential to significantly impact the ability of this community to preserve its minority identity. The suggestion that Indian Muslims are not a minority overlooks not only the fact that they constitute a numerical minority but also their disadvantaged position within society.

The significance of the exclusion of Muslims from the protections afforded to minorities is most acute with respect to Muslim Dalits, who suffer from intersectional discrimination. Muslim Dalits are discriminated against on the basis of both their religious identity and their ethnic identity, as members of the Scheduled Castes (the most socially disadvantaged Castes in India). The UN Special Rapporteur on Religion and Belief and the Committee on the Elimination of Racial Discrimination have noted with concern that, upon conversion to Islam, Muslims Dalits are excluded from affirmative action programmes targeting the Scheduled Castes. Additionally, although Dalits convert to Islam in order to escape caste-based discrimination associated with Hinduism, 'the previous caste status and related social bias . . . often remain at the social level.' Thus, the discrimination suffered by this community is magnified.

The exclusion of Indian Muslims from minority group status and the accompanying rights protections has the potential to exacerbate the difficulties faced by this community and, thus, conflict with India's obligations under both the ICCPR and the International Convention for the Elimination of All Forms of Racial Discrimination. While the suggestion that Indian Muslims are not a minority is motivated by the size of the community, the fact that they are large in number does not impact their ability to preserve their identity and should not deprive them of minority status. The election of a pro-Hindu party in a country that has witnessed religiously-motivated violence underscores the need for measures to protect the identity of Indian Muslims.

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## Translating Questions Of Religion Conversions to Issues of Human Rights: The Proposed Ban on Religious Conversions in a Secular Indian State

By Shantanu Dey | 30th January 2015

In recent months, the political focus in India has shifted towards the sensitive issue of 'forced religious conversions,' known as, 'Ghar Wapsi' (Homecoming Ceremony). The conversions of 200 Muslims in Agra and Christians in Gujarat to Hinduism, thought to have been forcefully carried out by radical Hindu groups, have sparked controversy and generated disruption in the Indian Parliament.

To combat such conversions, the Central Government in India has proposed a contentious national anti-conversion law to ban and criminalise religious conversions initiated by force, inducement or fraud, prescribing a monetary penalty, along with imprisonment of up to two years. Despite its secular appearances, serious questions remain as to whether, paradoxically, the proposal serves to bolster the country's powerful Bharatiya Janata Party and its Hindu ideology at the cost of freedom of religion.

The ambiguous words 'force, inducement or fraud,' currently used in anti-conversion legislation of five other Indian States, have meant the statutory definition of forced religious conversions includes inducements in the form of promises, economic benefits and free education/health services. The proposed legislation seeks to draw from the state-level laws, curiously referred to as 'Freedom of Religion Laws,' which require religious converts to provide a month-notice to the district administration of conversions.

It is important to set the proposed law against the social and economic backdrop of religious conversions in India. The root cause of conversion has always been the pursuit of opportunities to protect human dignity and to battle against societal discrimination by the socio-economically defenceless classes of a particular religious group. The proposed law amounts to the criminalization of religion as means of 'capability-building,' encroaching on individual choice and misunderstanding the virtue of religious diversity, which underlies the constitutional text. The enjoyment of religious freedom by minority groups remains an ongoing issue in India, as discussed in the US State Department's 2013 Report.

The political discourse, which blurs the line between voluntary and forced conversions, has demonstrated insensitivity to the international principles enshrined within the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR), to which India is a signatory. Article 18 of the UDHR explicitly grants an individual the freedom to change his religion or belief, and freedom, either alone or in community with others, and in public or private.

Such a right to conversion can also be found within the ICCPR framework under Article 18(1), articulating the freedom to adopt a religion of one's choice, as supplemented by the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, which also endorses such expansive understanding of freedom of religion. That said, it must be recognized that Article 18(2) of the ICCPR explicitly prohibits coerced conversions.

If enacted, the Indian Parliament's anti-conversion proposal is fated to reach the Supreme Court. Article 25 of the Constitution of India guarantees the fundamental right to 'freely profess, practice and propagate religion.' The 'freedom to convert' has often been argued to be a subset of 'freedom of conscience' guaranteed under Article 25, suggesting that the resultant widening of powers granted to the government to dictate citizens' choice in the realm of faith and religion is tantamount to violation of such freedom.

However, the limited ambit of the right has been stated by the Supreme Court of India in *Rev Stanislaus v State of Madhya Pradesh*, where it held that the '*right to propagate does not include right to convert*,' meaning state-level anti-conversion statutes were upheld. In order to democratically manage religious differences in a secular society like India, the 'Lemon Test,' laid down by the US Supreme Court in *Lemon v Kurtzman*, which held that '*a statute must guard against excessive state-religion entanglement*,' ought to be the approach for reviewing the proposed anti-conversion law.

Rev Stanislaus came at a time when judicial activism was still in its emerging phase. Whether the Supreme Court will engage further with the national and international rights mentioned here against the social and economic context of religious conversions in

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contemporary India may yet be seen.

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### Using Faith to Reinforce Human Rights of Bahá'ís in Iran

By Nazila Ghanea | 20th May 2014

An Islamic cleric's gesture to the persecuted Bahá'í community in Iran shows that in countries where universal human rights standards have little local resonance, appeals for tolerance based on religion, cultural traditions and domestic history can help break the deadlock.



Veteran human rights activist Larry Cox suggested that religion offers the human rights movement hope for renewal, greater legitimacy and impact. This begs some important questions, however: which religion, whose religion, which human rights and in what part of the world?

Greater engagement of religions with human rights requires domestication and rootedness, rather than a shallow application of universal standards. Appeals for tolerance and equality are communicated best when based on a people's accepted cultural and intellectual traditions. This is most urgent in cases of longstanding persecution of particular religious communities by government or social groups.

The persecution of the Bahá'ís in Iran is one such case. With over 300,000 followers, the Bahá'ís are Iran's largest non-Muslim religious minority. However, they have no legal protection or recognition as a minority because unlike Jews, Zoroastrians and Christians, the Iranian constitution does not recognize their faith. For decades, they have been arbitrarily detained, executed, refused education and livelihood. Hundreds were killed after the 1979 revolution. More than 130 Bahá'ís are currently in prison on false charges. Seven former religious leaders are serving 20-year jail terms. A 35-year-long history of intolerance has become systematized and institutionalized into a far-reaching pattern of serious, government-instigated and government-perpetuated violations.

At first glance, the case of Iran's Bahá'ís seems to support the notion that religion should be kept, at best, to the fringes of rights discussions. Greater pragmatism, however, suggests otherwise. Since political and religious leaders in Iran have attempted to base 170 years of anti-Bahá'í sentiment on religious foundations, then the appeal to universal standards of human rights alone will not sufficiently realize respectful coexistence. While universal standards have merit, they may have insufficient resonance. In Iran, and elsewhere, the best access may prove to be the human rights appeal through dominant sacred texts and values.

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Recent statements by Shia clerics favoring coexistence with the Bahá'ís offer room for hope. Ayatollah Masoumi-Tehrani is no stranger to calling for religious co-existence in Iran. Recently, however, he included a call to respect Iran's Bahá'ís. In a statement released on 7 April 2014, Masoumi-Tehrani recalled that Iran's history includes periods in which 'different religions and denominations, with manifold beliefs and practices, enjoyed social interaction and tolerant coexistence.' He bemoaned the loss of that tradition, noting the devastating undermining of 'the right to be human,' the right to life, and human dignity. He described Iran's current social reality as one of 'religious apartheid.'

As a gift to the Bahá'ís, Masoumi-Tehrani prepared calligraphic works of art, choosing a symbol of the Bahá'í Faith known as the Greatest Name – a representation of the conceptual relationship between God, His prophets and the world of creation – and a verse from the Bahá'í Holy writings. The fact that he chose the symbol and texts of the recipient and persecuted religious community, the Bahá'ís, goes some way towards underscoring his generosity.

This gesture's intent is best captured by the Ayatollah's own words: 'I present this precious symbol – and expression of sympathy and care from me and on behalf of all my open-minded fellow citizens who respect others for their humanity and not for their religion or way of worship – to all the Bahá'ís of the world, particularly to the Bahá'ís of Iran who have suffered in manifold ways as a result of blind religious prejudice.' Such religiously meaningful gestures serve to complement human rights efforts and offer a hope for greater legitimacy and impact.

Admittedly, the wide-ranging rights violations in Iran – for the Bahá'ís, and for all – call for much more than a few gestures by a handful of maverick religious leaders. However, these appeals play a significant role in undermining Iran's longstanding tendency to legitimize religiously motivated attacks on human rights. They foster a new tradition of inclusion to battle the ruling tradition of impunity. They may also prove a necessary precursor to the improvement of human rights in deeply religious, but also highly polarized, countries such as Iran.

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## Conform or be confined: S.A.S. v France

By Lucy Vickers | 8th July 2014

The European Court of Human Rights ruled on 1st July that France's ban on face coverings, known as the burqa-ban, does not breach the European Convention on Human Rights. The ban criminalises anyone wearing clothing designed to conceal the face in public.

Although not limited to the burqa, the legislative history of the provision makes very clear that this is its main target. It follows the well-known debate on the wearing of headscarves and other religious symbols in public employment and schools. Thus far, this debate has concluded in favour of allowing restrictions to religious dress, for example for teachers (*Dahlab v Switzerland*) and students (*Sahin and Karaduman v Turkey*), although the restrictions have been disallowed when they have been applied disproportionately (*Eweida et al v UK*), or applied in public spaces more generally (*Ahmet Arslan and Others*).

What makes the French burqa-ban different is that it criminalises the manifestation of religion, which is highly symbolic, even if the penalty is small. It also applies to veiling at all times in public. There is no potential for opting out: even if the veil wearer is welcome in some venues, she cannot get there without entering the public space. She is effectively confined unless she conforms. These factors might lead one to expect a decision that the ban was unduly restrictive of religious freedom.

Indeed, the judgment builds a strong case against the ban. First, it considers relevant international law and practice, and concludes that a ban on the burqa in public would breach human rights standards and would be alien to European values. Second, the Court reviews the situation in other European states and finds almost universal consensus against bans in public spaces. Third, the court considered the legitimate aims that have been used previously to justify ban on religious symbols and shows how the ban is unnecessary to achieve most of them. It finds that the aim of public safety does not require a ban on the burqa in all public spaces.

It is not necessary to uphold gender equality; nor is it necessary for human dignity. The Court also notes that small numbers of women wear the veil and that criminalisation in itself is serious and may ingrain negative stereotypes. These arguments are made so fully that it seems an almost inevitable conclusion that the ban will be found to breach Article 9 of the ECHR, protecting freedom of religion.

However, the court identified one final legitimate aim: 'respect for the minimum requirements of life in society' referred to as

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'living together.' This must surely be one of the weakest of legitimate aims identified by the court. The dissenting judges label it 'far-fetched' and 'vague,' and even the majority of the court concede that it is a 'flexible' notion, which therefore needs careful examination to ensure its necessity. Yet despite its own recognition of its weakness, the court accepted it as legitimate and decided that, given the wide margin of appreciation applicable in religious freedom cases, the ban was proportionate. This conclusion is disappointing, particularly the reliance on the nebulous concept of 'living together,' an aim which could equally be met by promoting a 'live and let live' attitude, and which moreover could lead to bans on anything that makes the majority feel uncomfortable.

The final decision thus seems something of a let-down, coming as it does after such a careful and well evidenced demolition of the standard arguments in favour of banning the veil.

Towards the end of the judgment, the Court acknowledges the need to exercise restraint in reviewing policies that have been agreed through democratic processes; and recent political changes in Europe towards Euro-scepticism (addressed to the EU but which may well have a spill-over effect on the Council of Europe) may go some way to explain its timid approach.

It remains a pity that, in the final analysis, the Court did not pay much regard to its own findings. Nonetheless, the decision has some positive aspects. The Court clearly dismisses some of the traditional arguments for burqa-bans based on public safety and gender equality. Moreover, the majority judgement and two thorough dissents provide a rich source of material for those wishing to challenge wholesale bans in future.

*Professor Lucy Vickers is Professor of Law at Oxford Brookes University.*



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### **Professor Frances Raday Comments on SAS v France** By Frances Raday | 19th July 2014

In the Grand Chamber judgment in the case of *S.A.S. v. France*, the European Court of Human Rights held, by a majority, that Law no. 2010-1192 of 11 October 2010, which made it illegal for anyone to conceal their face in public places, did not violate the European Convention of Human Rights.

The Court directed its inquiry to verifying whether the ban was necessary in a democratic society for protecting the rights and freedoms of others. The French Government had listed three values in that connection: respect for gender equality, respect for human dignity and respect for the minimum requirements of life in society (or of 'living together').

While dismissing the arguments relating to the first two of those values, the Court accepted that a veil concealing the face in public

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raised a barrier against others which could undermine the notion of 'living together' and therefore could be regarded as necessary for protecting the rights and freedoms of others in a democratic society. The dissenting opinion pointed out that the very general concept of living together does not fall directly under any of the rights and freedoms guaranteed by the Convention and that, moreover, the blanket ban could be interpreted as selective pluralism and restricted tolerance.

The dissenting opinion has been widely endorsed by civil society organisations. Indeed 'unease' when encountering the 'other' can scarcely be considered a good stand-alone ground for restricting a minority's cultural practices. It is a good ground only where the unease arises from the violation of human rights by the minority practice, and, in the present case, the unease arises from the practice's depersonalisation of women. The community has a valid interest in negating the message to all women that they are required to be self-effacing in order not to be immodest, and in preventing, as I have called it elsewhere, the shadow effect of gendered modesty.

It is my aim to question the ease with which the aim of securing gender equality and women's dignity by banning the burqa was unanimously dismissed by members of the Court and indeed, similarly rejected by constitutional instances in Spain and the Netherlands and by civil society organisations, such as Amnesty International and the Open Society Initiative. All these have emphasized the intersectional discrimination that a ban on full-face veiling creates for Moslem women who wish to wear the full-face veil and the violation of their constitutional freedom of choice. However, the discriminatory impact of giving license to the full-face veil on women's autonomy and freedom of choice has not been satisfactorily considered.

Islam – like the other monotheistic religions – although requiring both men and women to be modest, imposes on women the burden of maintaining modesty codes. Modesty in the monotheisms is gendered and is designed to preserve patriarchal control of women's sexuality, the family and the public space. Full-face covering is regarded as a modesty dictate by some followers of Islam, although it is not expressly required in the Quran. It is at the extreme end of the spectrum of gendered modesty mechanisms and is integrally related to a patriarchal regime, which submits women to men's power. The cost to the wearer is the negation of the opportunity to move freely and interact fully with others in the public space; the health cost of being prevented from receiving full medical care from male doctors; the impossibility of participating in any occupation that requires facial communication; and the restriction of mobility by loss of field of vision. Moslem feminist activists have called this not a form of dress but a canvas prison.

The Court does not doubt that gender equality might rightly justify an interference with the exercise of certain rights and freedoms. In this, the Court echoes the caveat of international human rights instances that freedom of religion and conscience cannot justify discrimination against women. However, the Court takes the view that a State Party cannot invoke gender equality to ban a practice that is defended by women unless it were understood that individuals could be protected on that basis from the exercise of their own fundamental rights. Here the Court has failed to acknowledge that harmful traditional practices such as female genital mutilation and discriminatory religious practices such as polygamy are regarded under international law as violations of women's human rights, which should be prohibited, whether or not there are women who defend them.

Nor is the consent argument empirically persuasive. For every woman in a liberal democracy who chooses the burkah there are other women who are compelled to wear the burkah in the context of family or community patriarchal control. The cases in which girls flee from family homes in immigrant communities in Western liberal democracies in order to avoid being sent abroad for female genital mutilation or forced marriage provides evidence of the ongoing force of religious patriarchy.

Furthermore, globally, many millions of the women who wear burkahs do not choose to wear them but are forced to wear them in regimes where modesty police will impose corporal punishment for their failure to do so. The choice of a handful of women in democratic countries to wear the burkah is perhaps an ethnic and religious identification symbol but it is also a symbol of identification with women's oppression. The justified fear of human rights protagonists that criticism of Moslem religious practices in Europe is an instrumentalist weapon of ethnic hatred should be addressed but cannot justify condoning practices harmful to women.

Full-face covering depersonalizes women in social interaction and is harmful for their freedom of expression and freedom of movement and, often, for their access to healthcare. In a democratic society it is necessary to protect the rights and freedoms of women, including by providing effective regulatory frameworks to protect them against harmful practices. The legitimacy of the French Law should have been considered in this context.

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*Professor Raday writes in her academic capacity, and not in the framework of her work as a mandate holder of the HRC.*

### SAS v France in Context: the Margin of Appreciation Doctrine and Protection of Minorities

By Julie Maher | 18th July 2014

In *SAS v France* the Grand Chamber of the European Court of Human Rights (ECtHR) found that a French law prohibiting the concealment of the face in public places did not violate the European Convention on Human Rights (ECHR). The findings in the case have been detailed elsewhere. This post asks how the judgment in *SAS* fits with the Court's other Article 9 case law and highlights some of the issues raised by the judgment.



It might have been supposed that the ECtHR would view the October 2010 law as violating the Convention, given its previous ruling in *Arslan v Turkey*, in which a violation of Article 9 arose from the conviction of 127 members of a religious group for wearing religious dress in the streets. The Court emphasised the distinction between such restrictions operating in public areas open to all and restrictions in schools or other public establishments, where religious neutrality was key, suggesting that a blanket ban in all public spaces would likely violate Article 9. Moreover, as the ECtHR itself acknowledges in *SAS*, 'a large number of actors, both international and national, in the field of fundamental rights protection have found a blanket ban to be disproportionate' (para 147).

However, it nonetheless finds the ban proportionate and goes to some lengths to distinguish *Arslan*. It stresses that, though both cases involve a ban on wearing religious dress in public places, *SAS* 'differs significantly ... [as] the full-face Islamic veil has the particularity of entirely concealing the face...' (para 136). This appears a relatively thin basis on which to reconcile its findings with the earlier case. It also appears at odds with the Chamber's findings in *Eweida* and others that a far narrower rule, prohibiting the wearing of religious symbols by British Airways employees, was in violation of Article 9.

The Grand Chamber highlights that the law did not expressly target religious dress (para 151). Such emphasis on ostensible neutrality is unconvincing, given the legislative history of the ban and its impact on a highly specific class of persons; the Court notes its concern at Islamophobic comments in debates on the law (paras 148-149). Nonetheless, the Court attributes significant weight to the fact that the law was 'not expressly based on the religious connotation of the clothing in question but solely on the fact that it conceals the face' (para 151). This, in the Grand Chamber's view, is sufficient to distinguish the 2010 law from the restrictions in *Arslan*. However, it is obvious that the law is aimed at targeting religious persons and one religious group in particular.

There are certainly positives to take away from the judgment. In line with the Court's more recent case law, it is careful to acknowledge the harm that restrictions on dress can cause to religious individuals, in contrast with much of its previous case law on restrictions on the headscarf (paras 139, 146, and 152). The Grand Chamber makes an effort to recognise the divergent meanings attributable to religious dress, abandoning the one-dimensional approach in some of its previous case law on Muslim dress (such as *Sahin v Turkey* and *Dahlab v Switzerland*). As Lucy Vickers' post highlights, the Court at times actually makes a strong case against the ban, rejecting justifications of a blanket ban by reference to public safety, gender equality, or human dignity.

It is increasingly difficult to reconcile the varying elements of the Court's Article 9 case law because of the degree to which deference to states' choices of church-state models plays a role. In *SAS* the Court acknowledges the risk of abuse resulting from the flexibility of the aim of 'living together.' However, this statement of intent is contradicted by its subsequent acceptance that a wide margin of appreciation should apply (para 155).

Adopting a hands-off approach because the boundaries of religious freedom vary across Convention states or out of deference to the democratic process contradicts the necessarily counter-majoritarian nature of human rights, particularly where protection of minorities is concerned. As the dissenting judges (Nussberger and Jäderblom) argue, 'it still remains the task of the Court to protect small minorities against disproportionate interferences' (para 20). The question remains how the judgments in Eweida and others, Arslan, and SAS can be reconciled so as to identify the minimum content of Article 9's protection of religious manifestations.

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## Clash of Rights at Centre of Canadian Law School Controversy

By Ravi Amarnath | 28th October 2014

The debate over whether to recognise a proposed law school in Canada has pitted fundamental freedoms against one another.

Trinity Western University (TWU) is a private, Christian university located in the Canadian province of British Columbia. TWU requires its students, faculty and administrators to sign and abide by the terms of a Community Covenant, which includes a provision to abstain from 'sexual intimacy that violates the sacredness of marriage between a man and a woman.' Individuals who breach the Community Covenant are subject to potential sanction.

In December 2013 TWU received government approval from the province of British Columbia to administer a three-year undergraduate law program, starting in 2016. The Community Covenant has made the decision controversial, as same sex marriage is legal in Canada.

A number of provincial law societies across Canada have decided not to accredit – or in other words, recognize – the proposed law school. An individual cannot practice law in a particular province in Canada unless his or her law degree is accredited by that province's law society.

Notably, last April, law society leaders in Canada's largest province, Ontario, voted against the accreditation of TWU's proposed law school. In June, the leaders of Nova Scotia's law society resolved not to accredit the law school unless TWU either 'exempts law students from signing the Community Covenant' or 'amends the Covenant for law students in a way that ceases to discriminate.' TWU has started legal proceedings in each province reviewing these decisions.

Two Canadian provinces, New Brunswick and British Columbia, originally resolved to accredit the TWU's proposed law school but have since reversed their decisions. Leaders from the Law Society of New Brunswick resolved in September not to recognize TWU graduates, while the Law Society of British Columbia is holding a binding referendum with the province's lawyers to decide the issue, the results of which are expected to be released on October 30.

Opponents of the proposed law school assert that the Community Covenant offends the equality guarantee in the *Canadian Charter of Rights and Freedoms*, while proponents note that the Charter also protects the freedom of conscience and religion as well as freedom of association.

The Canadian Charter does not directly apply to TWU's policies, however, as TWU is privately administered, and the Charter only applies to the actions of government institutions.

British Columbia's Human Rights Code, which applies to TWU, prevents employers or individuals who provide services available to the public from discriminating on the basis of either religion or sexual orientation. However, section 41 of the Code also permits organizations like TWU to grant preference to members of an 'identifiable group or class of persons' if the organization 'is not operated for profit' and has 'as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons' characterized by a number of grounds, including religion.

This is not the first case in which TWU's Community Covenant has caused controversy. In the 1990s, the British Columbia College of Teachers (BCCT) refused to approve TWU's application to assume full responsibility for a teaching education program. The College stated 'the proposed program follows discriminatory practices which are contrary to the public interest and public policy.'

The Supreme Court of Canada eventually determined that this decision was incorrect and held TWU could administer a teaching education program. In resolving the competing values in the decision, the majority stated that '[a]bsent concrete evidence that training teachers at TWU fosters discrimination in the public schools of [British Columbia], the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected.'

A factor that could be determinative in the present dispute is the standard of review by which the courts review individual law

society decisions to not accredit TWU's proposed law school. While the Supreme Court of Canada reviewed the BCCT decision on a standard of 'correctness,' in recent years the Court has mandated courts to apply a more deferential standard of 'reasonableness' when reviewing decisions made by administrative bodies, such as a law society.

*Ravi Amarnath was born and raised in Fort Saskatchewan, Alberta (Canada). He is a graduate student in law at the University of Oxford.*

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## Law Society of Canadian Province Nova Scotia is Found to Have Overstepped its Mandate, Violating Religious Freedoms

By Ravi Amarnath | 10th February 2015

The first of a series of decisions that will shape how the balance is to be struck between Canada's constitutionally protected rights of equality and freedom of religion has held that the latter cannot be unduly interfered with by a private institution.

Recently, a judge of the Supreme Court of Nova Scotia held that the Nova Scotia Barristers' Society (NSBS), an organization which regulates the legal profession in the Canadian province of Nova Scotia, overstepped its jurisdiction when it decided not to admit students from Trinity Western University (TWU) to the bar.

TWU is a private, Christian university located in the Canadian province of British Columbia. It requires its students, faculty and administrators to sign and abide by the terms of a Community Covenant (the Covenant), which includes a provision to abstain from 'sexual intimacy that violates the sacredness of marriage between a man and a woman.' Individuals who breach the Covenant are subject to potential sanction.

In December 2013, TWU received approval from the government of British Columbia to administer a three-year undergraduate law program starting in 2016 (a decision that has since been revoked and is under review). The provision of the Covenant that regulates intimacy has made the proposed law school controversial, since same sex marriage is legal in Canada.

The *Canadian Charter of Rights and Freedoms* does not apply to TWU's policies because it is a private university, and the Charter only applies to the actions of government institutions.

Moreover, section 41 of British Columbia's Human Rights Code law permits private, religious institutions to grant preference to members of an 'identifiable group or class of persons' if the organization 'is not operated for profit' and has 'as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons.'

In April 2014, the leaders of the NSBS resolved not to accredit graduates from TWU unless the school 'exempts law students from signing the Community Covenant' or 'amends the Community Covenant for law students in a way that ceases to discriminate.' The decision effectively prohibited future TWU graduates from meeting their requirements for entry into the legal profession in Nova Scotia, barring a change in the school's policies.

The NSBS subsequently amended the definition of 'law degree' in its Regulations, allowing its leaders to deny entry to students who attend institutions which 'unlawfully [discriminate] in its law student admissions or enrollment policies or requirements on grounds prohibited by either or both the Charter of Rights and freedoms or the Nova Scotia Human Rights Act.'

In a lengthy decision, Justice Jamie Campbell held the NSBS overstepped its statutory mandate to 'uphold and protect the public interest in the practice of law' and 'regulate the practice of law' by trying to regulate TWU itself.

Justice Campbell held that NSBS' actions were 'directed toward the institution of the law school and not the quality of the law degree, or the qualification or lack of qualification of the student or potential lawyer in Nova Scotia' (para 172).

The judge further explained that the 'public interest in the practice of law does not extend to how law schools function. Neither the degree of moral outrage directed toward the policy, nor the extent to which it is deemed to be in the public interest to attack it, change that' (para 176).

At the conclusion of the judgment, Justice Campbell addressed the clash of rights at the heart of the matter, stating: 'The discomfiting truth is that religions with views that many Canadians find incomprehensible or offensive abound in a liberal and multicultural society. The law protects them and must carve out a place not only where they can exist but flourish' (para 271).

The NSBS has not determined whether it will appeal the decision. In the meantime, legal proceedings continue in the Canadian provinces of Ontario, and British Columbia, where the respective law societies have outright refused to recognize TWU graduates

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for bar accreditation.

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### **Navigating the Troubled Waters of Religious Accommodation**

**By Stephanie Tsang | 29th January 2014**

Reports concerning a situation in York University, Toronto, have reignited discussion on the complex subject of the right to religious accommodation.



A male student, enrolled on an online course, requested permission from his professor to be excused from participating in group work with female students in person, citing his undisclosed religious belief as his reason for seeking accommodation. His professor rejected his request essentially on the grounds of gender equality. However, following the professor's consultation with the Centre for Human Rights and the program dean at the university, the dean ordered the professor to accommodate the student. The professor has continued to refuse to comply with the order, stating:

*'My main concern was that for religious beliefs, we also can justify not interacting with Jews, blacks, gays, you name it. And if this were allowed to go through, then all these other absurd demands could be made.'*

Many believe that the university had taken political correctness to the extreme.

The fact that this case has not invited much international media attention could be due to the fact that the student did not pursue his case any further. But this is yet another example being added to the troubled waters of religious accommodation across Western democracies.

The European Court of Human Rights has famously captured the right to religion as *'one of the most vital elements that go to*

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*make up the identity of believers and their conception of life.* But the idea that an individual may cite her religious convictions in order to be treated as an exception to the norm has resulted in frustrated responses. Only a month ago, disbelief followed Marks & Spencer's decision to endorse a policy, now withdrawn, which allowed Muslim members of staff to refuse to sell customers alcohol at their counter. Of course, religious claimants who have felt unfairly treated have also resorted to the courts, as in the well-known European Court of Human Rights case of *Eweida & Others v UK*, where pitting the right to religion against the rights of others led to mixed results.

The Professor's comment captures the fear of the religious 'trump card' over the rights of others, which would result in room for continuing misogyny, racism and homophobia. Whilst many may reject the view that religion should be a trump card, is it time to take a step further and establish a hierarchy of rights? The Canadian Supreme Court has explicitly maintained that there is no hierarchy of rights under the Canadian Charter of Rights and Freedoms. There could be a pragmatic argument in favour of a hierarchy the sake of clarity: whilst religious freedom is to be protected, a bright line is drawn so that accommodation simply cannot be given at the expense of, for example, gender equality. If the default is that religion tends to become a trump card, steps should be taken so that it is given an appropriate place.

On the other hand, such a move could reduce the right to religion (particularly the right to manifest one's religion) to close to nothing, as often the most obvious religious manifestations are the very ones that sit uncomfortably against secular ideas of, for example, gender equality. To have such a hierarchy would make religious accommodation meaningless. Another hesitation is that a rigid ranking of rights may leave little room for the nuances found in each case. In particular, one interesting detail in the York University scenario is that the student would have had a certain expectation that his online course meant that he was not going to meet any other students in person. The question is whether this makes a difference at all, and if so, how.

The idea of religious accommodation remains frustratingly complex, as at its core is a demand to clarify the purpose and practice of human rights. If a certain conception of human rights is protection against the tyranny of the majority, then there must be room for those who do not conform to the norm. It is as palatable as many ideas in the abstract – but in practice, we continue to navigate these troubled waters.

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## Religious Anti-Gay Refusal – Valuing Dissent Without Making it Lawful

By Davina Cooper | 22nd July 2014

According to Supreme Court judge, Lady Hale, the law has yet to find the right balance between accommodating people's beliefs and avoiding anti-gay discrimination.



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Her remarks, made during a lecture at the Law Society of Ireland, take a position common amongst judges, politicians, activists and scholars seeking to find a midway point between privileging beliefs and privileging non-discrimination. But in suggesting a compromise that gives some religious folk the right to conscientiously object, another, quite different, settlement is ignored. This is one that rejects a *legal* entitlement to discriminate, while recognising that resistance and dissent within workplaces, including government ones, can be valuable.

Christian claims to be allowed to lawfully discriminate against lesbians and gay men have emerged globally. In the UK, the best known case is that of Islington registrar Lillian Ladele who took her case as far as the European Court of Human Rights arguing for the right to *refuse* to perform, or even register, lesbian and gay civil partnerships. Other British cases have involved guesthouse owners, marriage guidance counsellors, adoption providers and foster parents – arguing that their deeply held Christian beliefs should protect them from the reach of (gay) equality law.

While many secular liberals applaud the court judgments, which have almost unanimously refused to exempt religious objectors from treating lesbians and gay men equally, more radical perspectives have been mixed. For some, the concerns of ‘homonormativity’ – of mainstream middle-class life underlying many gay rights claims – generate indifference. Others see conservative Christians as rightfully entitled to express deeply held views without penalty, even if this means refusing to do what they’re told. Indeed, the demand on state employees and others to comply with their employers’ instructions seems hard to recognise as the rallying cry of a progressive state, even if equality is involved.

But does this mean anti-gay refusal should be accommodated, particularly once we bear in mind that equality law not only protects religious beliefs but ‘philosophical’ ones as well? Lady Hale may wish to see more recognition of religious beliefs and conscience, but exemptions here will also apply to ‘philosophical’-based objections. This means secular conservatives and radicals can also, at least theoretically, try to argue that their deeply held beliefs include a principled rejection to providing services that support gay liberal life.

My argument isn’t for religious beliefs to be given more weight than ‘philosophical’ ones. Rather, since contemporary British anti-discrimination law is minimising the distinction, we need to ask how belief-based refusals, *in general*, to provide gay people with a service should be regarded.

Many argue it’s absurd for British law to legislate gay equality and then provide an exception for those whose objections are grounded in *belief* – what other reasons for demanding an exception are likely to be articulated? But – and this is key – state law’s refusal to accommodate discrimination isn’t the final word. If we adopt a legal pluralist perspective, *multiple* legal and normative orders can be found co-existing within the same social space. This means the religious laws animating conservative Christian refusal occupy and confront secular state law from a shared terrain.

Should state law then ‘recognise’ religious law, in the sense of treating it as a *legitimate* basis for equality exemptions? Conventionally, such recognition is seen as deference to religious authority. But we can also see it as asserting a mono-legal mind-set in which state law takes upon itself the authority (and responsibility) for establishing the terms and provisions for law-animating action. Creating a situation where state law is the only law in town, enormous pressure is placed on the state’s legal infrastructure to *recognise* religious refusal – since if state law doesn’t, who or what can?

There is an alternative. State law can *refuse* to accommodate religious motivations for discriminatory action. At the same time, we – a wider public – can stand back from state law to recognise that other, competing, legal and normative orders also shape what people do. Public bodies, such as local councils, become some of the sites where these conflicts are played out.

Conflict between people over their views and beliefs isn’t always productive. It can make public action impossible, exacerbate exclusionary and hostile organisational cultures, and generally make people dread going to work. At the same time, political, judicial and managerial demands that workers do what they’re told, or face charges of insubordination, treat workers like machines, and – at considerable cost – disregard the vibrant political character of workplace struggles. The challenge is to find institutional ways of supporting conflict, involving other modes of performance. Where can we look for examples of how to do dissent and disagreement in constructive, stimulating, even pleasurable, ways?

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## Conscientious Objection to Military Service in International Human Rights Law

By Ozgur Cinar | 30th January 2014

Conscientious objection to military service is a means of resisting war and military service for reasons of conscience based on profound religious, ethical, moral, philosophical, humanitarian, or similar convictions. It generally concerns the exemption of people from fulfilling legal obligations that would necessitate a violation of their conscience, religion, or belief. The phenomenon of

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conscientious objection appears in diverse forms and covers a wide variety of societal issues from nonpayment of tax for military expenses to the performance of abortions. However, conscientious objection is more commonly associated with refusal to perform military service.

According to Moskos and Chambers, conscientious objection in the military context is a fundamental part of an individual's relationship with the State: it calls into question the obligation to defend the nation, which is considered to be one of the most important duties of the citizen. When conscientious objectors refuse to perform such a duty they, in fact, experience a conflict in their relationship with the State, a conflict between the beliefs of the objector and the duties laid down in positive law. By making a declaration, the objector consciously avoids performing obligations in the name of a superior command originating from conscience.

Conscientious objection also exposes the limits of what a state can demand of its citizens where that demand may oppose individual conscience. This situation leads to the dilemma of whether a state can intentionally violate an individual's conscience and has attracted considerable controversy. It has been examined from historical, sociological, and political perspectives, as well as from an activist viewpoint. This subject has also excited interest in international human rights law.

My recent book on conscientious objection is composed of five chapters. Part I is divided into three chapters, of which the first chapter explores the concept of conscience with a view to understanding the meaning and potential scope of the right to conscientious objection from a legal perspective. The evolution of the concept of conscientious objection is expounded in the second chapter. In the light of the first chapter, this chapter shows that the secularization of conscience has played an important role in the concept of conscientious objection. An attempt is made in the third chapter to define various types of conscientious objectors in the light of the evolution of conscientious objection. A legal analysis of different forms of conscientious objection is conducted; current debates on how these different forms should be interpreted at national and international levels, and whether they are officially recognised is also addressed.

Part II investigates the right to conscientious objection in international human rights law as a legitimate exercise of freedom of thought, conscience, and religion. This part is divided into two chapters dealing with the content and scope of the right to conscientious objection at both the international and regional level. United Nations mechanisms are examined at the international level in chapter 4; at the regional level, the European and Inter-American mechanisms are analysed in chapter 5.

The conclusion summarizes the current international standards on the right to conscientious objection to military service. Conscientious objection is now accepted as a legitimate expression of freedom of thought, conscience and religion. Present international law standards suggest that alternative service should be of a purely civilian nature and should be in the public interest and not be, in any way, of a punitive or deterrent nature.

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### Freedom of Religion and Belief in Turkey

By Ozgur Cinar | 10th January 2014

One of the fundamental values of a democratic society is the freedom of thought, conscience and religion. From this freedom derive the concepts of pluralism, tolerance and open-mindedness, hallmarks of a democratic society. In its religious dimension, it is a vital element of the identity of believers and their conception of life, but it is also a precious asset for those with no religiously held beliefs such as atheists, agnostics and sceptics.

The freedom of thought, conscience and religion is recognised by the key international human rights documents such as Article 18 of both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, Article 9 of the European Convention of Human Rights, Article 10 of the Charter of Fundamental Rights of the European Union. The Republic of Turkey (hereafter 'Turkey') acknowledges this freedom, in principle, through international treaty commitments, but its implementation has been inconsistent.

Turkey is a candidate to accede to the European Union (EU). The Development and Justice Party (*Adalet ve Kalkınma Partisi* – AKP) came to power in 2002, promising to introduce freedoms, and in its eleven years in government has made some important legal changes in conformity with the political criteria of the EU, but various restrictions connected to the freedom of thought, conscience and religion remain unaddressed. For instance, religious minority groups, such as Christians, Jews and Alevis (adherents of a sect of Islam) have important limitations on their religious and community life and though, initially, concessions aimed at incorporating these minorities were made, they now seem to have abated. Moreover, there is still compulsory religious education in schools and no recognition of conscientious objection to military service.

The particular problems of Turkey today can be better understood by a brief look at its history. When the Republic of Turkey was established on the remnants of the Ottoman Empire, a secular state system based on the notion of the nation-state replaced the existing Ottoman system of '*millets*' (confessional communities). While the rights of non-Muslims were safeguarded in the Treaty of Lausanne (1923), signed during the founding of the Republic, in practice we can see that they have encountered difficulties as regards the exercise of these rights.

Obstacles to the freedom of religion and belief in Turkey increased during the 28 February Process (military intervention). Hence, efforts were made to reshape society in the name of 'combating reaction.' While during this process there was a constriction of political and civil rights, we can also see pledges made to take steps in order not to become isolated from the EU.

In its 2012 report, the United States Commission on International Religious Freedom included Turkey amongst countries where the most severe violations of religious freedoms occur, pinpointing the most serious problem as state interferences in the inner dimension of religious freedom (or *forum internum*). We also come across these unfavourable assessments in reports by the United Nations Special Rapporteur on Freedom of Religion or Belief and in EU progress reports.

In a special issue (Religion and Human Rights 8 (2013)), we endeavoured to comprehend developments in the acknowledgement of the right to freedom of religion and belief in Turkey, a country that describes itself in its constitution as a democratic and secular state. Our focus was restricted to the most topical and urgent issues.

In her article, Rossella Bolletti tried to find a way through the legal, political and social obstacles to a satisfactory solution regarding the question of headscarves.

Mine Yıldırım discussed the legal difficulties faced by non-Muslims and Alevis as regards places of worship.

Özgür H. Çınar addressed the question of the compulsory religious education/instruction given in Turkish schools, which has been the subject of criticism on account of its Sunni Islamic bias.

In the last article, Hasan Sayim Vural detailed discussions by constitutional law scholars regarding the right to freedom of religion and belief in Turkey and endeavoured to find answers to the question of how domestic judicial mechanisms interpret this freedom.

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