

FAITH IN THE COURTS: RELIGIOUS DRESS AND HUMAN RIGHTS

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I. INTRODUCTION

WE live in “an age of increasingly multicultural societies”.¹ This multiplicity of cultures brings with it diversity and differences: religious beliefs form one, but arguably an increasingly important, point of distinction within our societies today – both between religious and non-religious people and between people of different faiths.² Recent and current events – local and global – emphasise the importance for society of maintaining adequate means of mediating between different and divergent interests in matters of faith.

Courts – as arbiters of the law – have a vital role in mediating between these interests and thereby promoting social cohesion. As Lord Nicholls has stated, “in a pluralist society a balance has to be held between freedom to practise one’s own beliefs and the interests affected by those practices.”³ Indeed, disputes in the courts regarding matters of faith have recently become increasingly prevalent or, at the very least, increasingly prominent.⁴ Issues relating to the wearing of the Islamic headscarf or other forms of Islamic dress have attracted particular interest in the media and more widely. For courts – and, indeed, the law – to be able to perform a role as mediators effectively, society must have faith in their ability to do so – there must be public confidence in, and respect for, the rule of law.

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¹ *Per* Lord Walker in *R. (Williamson) v. Secretary of State for Education and Employment* [2005] 2 A.C. 246, at para. [54]. The most recent census provides data regarding the ethnicity of the United Kingdom in 2001: <http://www.statistics.gov.uk/ccinugget.asp?id=273>.

² S. Knights, “Religious Symbols in the School: Freedom of Religion, Minorities and Education” (2005) 5 E.H.R.L.R. 499 provides demographic data regarding different religious groups in various European countries. The Office of National Statistics analyses the relationship between ethnicity and religion across all respondents in the 2001 census: <http://www.statistics.gov.uk/ccinugget.asp?id=460>. All but 7.7% of respondents provided details of their religious affiliation: <http://www.statistics.gov.uk/census2001/profiles/commentaries/ethnicity.asp#religion>. This was the first time the question had been asked.

³ *Williamson* [2005] 2 A.C. 246, at para. [17].

⁴ Recent examples include widespread media coverage of *Begum* (and *Şahin*), and also: *R. (X) v. Y School* [2007] EWHC 298 (Admin), [2007] H.R.L.R. 20; *R. (Playfoot) v. Millais School*, [2007] EWHC 1698 (Admin); and Ms. Eweida’s dispute with her employer, British Airways, regarding her right to wear a crucifix, which was ultimately resolved by British Airways changing its uniform policy.

This paper focuses on two recent cases concerning the right to wear Islamic dress: *Leyla Şahin v. Turkey*, before the European Court of Human Rights (the “Court”) (a Grand Chamber judgment of 10 November 2005);⁵ and *R. (Shabina Begum) v. Denbigh High School*, before the House of Lords (a judgment of 22 March 2006).⁶ On the basis of those judgments and related jurisprudence, it assesses the courts’ recent performance in their role as mediators between the divergent interests of individuals and society in matters of religion, and argues that this performance can and must be improved upon.

A. *Mechanisms for Mediation*

The paper considers the legal mechanism for mediating between interests in matters of faith provided at Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “Convention”). Human rights, Article 9 included, strive to protect the rights of the individual to the extent they are consistent with the rights of others and the interests of society as a whole. This requires a balance between these competing interests – a balance reflected generally in the drafting of each article, and specifically (for qualified rights) in assessing whether any interference with an individual’s rights is “necessary in a democratic society”.

Article 9 provides that:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes the freedom to change his religion or belief and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 9 therefore protects both an absolute right to hold a belief and a qualified right to manifest belief. When considering whether there has been a violation of the right to manifest belief, the following questions arise:⁷

1. Does the matter relate to a protected “belief”?
2. If so, does the individual’s act constitute a “manifestation” of that belief?

⁵ (2007) 44 E.H.R.R. 5.

⁶ [2007] 1 A.C. 100.

⁷ *Per* Lord Walker in *Williamson* [2005] 2 A.C. 246, at para. [57].

3. If so, does the act complained of constitute a limitation on, or “interference” with, that individual’s manifestation of his or her belief?
4. If so, is that interference “justified”?
 - a. Is it prescribed by law?
 - b. Is it undertaken in pursuance of the stipulated objectives?
 - c. Is it necessary for, and proportionate in scope and effect to,⁸ those objectives?

Analysis in cases concerning the Islamic headscarf or other forms of Islamic dress focuses on the third and fourth questions: Islam, as one of the world’s great religions, is a protected “belief”; and wearing the *türban* or *hijab* (headscarf), *jilbab* (a long coat-like garment covering, in conjunction with *hijab*, the whole body except hands and face), or *niqab* (full veil, covering the whole face except the eyes) is generally considered an act not merely motivated by the Islamic faith but “intimately linked” to (and, so, a “manifestation” of⁹) its beliefs.

Detailed consideration of the first and second questions therefore lies outside the scope of this paper, which considers how the present case-law might better approach: the notion of “interference”; and the proportionality assessment required under Article 9(2).

B. Cases under Analysis: Şahin and Begum

1. Leyla Şahin v. Turkey

In *Şahin*, the prohibition on students wearing the Islamic headscarf at Istanbul University was found not to violate Ms. Şahin’s Article 9 rights.¹⁰ This was the unanimous decision of the European Court sitting as a Chamber of seven judges in 2004¹¹ – a finding which the Grand Chamber endorsed by a majority of sixteen to one in 2005.¹²

Ms. Şahin was a medical student who enrolled at Istanbul University in 1997, having previously studied for four years at the University of Bursa, during which time she had worn the Islamic headscarf. “She comes from a traditional family of practising Muslims and considers it her religious duty to wear the Islamic headscarf.”¹³ Wearing the headscarf was her free choice, based on religious

⁸ In *Pretty v. UK* (2002) 35 E.H.R.R. 1, at para. [70], the Court held that “the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.”

⁹ Cf. *C v. UK* (App. No. 10358/83) 37 D.R. 142, 147; *Arrowsmith v. UK* (App. No. 7050/75) 19 D.R. 5.

¹⁰ The Chamber considers only Article 9, whereas the Grand Chamber also examines Protocol I, Article 2 (right to education). This paper considers only Article 9.

¹¹ (2005) 41 E.H.R.R. 8.

¹² (2007) 44 E.H.R.R. 5.

¹³ *Ibid.*, at para. [14]–[15].

conviction.¹⁴ In accordance with her conviction, Ms. Şahin refused to remove her headscarf and, therefore, was denied access to, and subsequently suspended from, Istanbul University. Following successive unsuccessful challenges against these disciplinary measures, she left Turkey to continue her studies at Vienna University.¹⁵

The whole of the Chamber and all but one of the Grand Chamber “proceed[ed] on the assumption that the regulations ... constituted an interference with [her] right to manifest her religion.”¹⁶ However, the interference was found justified and proportionate to the aim pursued.¹⁷ Judge Tulkens gave the solitary dissenting judgment, holding that there had been an unjustifiable interference with Ms. Şahin’s Article 9 rights.¹⁸

2. *R. (Begum) v. Denbigh High School*

In *Begum*, the House of Lords held that a refusal by a state-funded secondary school to allow a schoolgirl to wear the *jilbab* did not violate her Article 9 rights. The Lords reinstated the decision of the first instance court,¹⁹ overturning the Court of Appeal.²⁰

The school had refused to allow Miss Begum (aged 14) to attend wearing the *jilbab* because it breached uniform rules. However, the school, 80% of the pupils of which were Muslim, does permit the Islamic headscarf and the *shalwar kameez* (sleeveless dress and loose, tapered trousers),²¹ having formulated these uniform options in consultation with the local Muslim community.

Though all five judges in *Begum* agreed that the school’s refusal did not violate Miss Begum’s freedom of religion, they diverged in their reasoning. The majority – Lords Bingham, Hoffman and Scott – found there had been no “interference” with Miss Begum’s Article 9 rights, but, had there been an interference, it would have been justified. The minority – Lord Nicholls and Baroness Hale – held that there had been an interference, but agreed it was necessary and proportionate.

¹⁴ (2005) 41 E.H.R.R. 8, at para. [85]–[87]; (2007) 44 E.H.R.R. 5, at para. [101]. The decision to wear the headscarf is generally considered to derive from *sūrat* 24:31 and 33:59 of *al-Qur’an* (Human Rights Watch, “Memorandum to the Turkish Government on Human Rights Watch’s Concerns with Regard to Academic Freedom in Higher Education, and Access to Higher Education for Women Who Wear the Headscarf” at <http://www.hrw.org/backgroundunder/eca/turkey/2004>, p. 26).

¹⁵ (2005) 41 E.H.R.R. 8, at para. [13]–[25]; (2007) 44 E.H.R.R. 5, at para. [17]–[28].

¹⁶ (2005) 41 E.H.R.R. 8, at para. [71]; endorsed (2007) 44 E.H.R.R. 5, at para. [78].

¹⁷ (2005) 41 E.H.R.R. 8, at para. [114]; (2007) 44 E.H.R.R. 5, at para. [122].

¹⁸ *Ibid.*, dissenting opinion of Judge Tulkens at para. [13].

¹⁹ [2004] E.L.R. 374.

²⁰ [2005] 1 W.L.R. 3372.

²¹ The *shalwar kameez* is described more fully in *Begum* by Lord Scott [2007] 1 A.C. 100, at para. [76].

C. Overview

This paper contends that the present jurisprudence regarding limitations on the right to wear Islamic dress can and must be improved upon. The majority judgment in *Şahin* falls far short of the standards necessary to maintain public confidence in the courts' ability to mediate between divergent interests in matters of faith. *Begum* better illustrates how a court might approach the issue, though the majority approach in that case too might be refined.

The paper advances each of the following arguments, considering where the existing case-law falls short and how those shortcomings might be overcome.

- (1) The existing threshold for a finding of “interference” is set too high, and is inherently inappropriate to decide issues as sensitive as those arising in cases regarding the right to wear Islamic dress. The majority in *Begum*, while coming close to acknowledging this, fail to find accordingly. This failure constitutes the primary critique of the majority in that case, in section [II].
- (2) The proportionality assessment required by Article 9(2), however, is particularly apt to decide such issues: it requires careful calibration of the balance between an individual's rights and those of society. This need for balance is acknowledged by the Court in *Şahin* in word, but not in deed. This deficiency forms the primary criticism of the majority in *Şahin*, in section [III].
- (3) The subsidiarity principle dictates that the European Court apply a “margin of appreciation” when reviewing national authorities' decisions – acknowledging the national authorities' primary role in protecting human rights. Yet, this margin of appreciation goes hand-in-hand with the Court's responsibility for European-level supervision. The Court's application of the margin of appreciation in *Şahin* amounts to an abdication of that responsibility. This forms the secondary criticism of the judgment, in section [IV].²²
- (4) The Strasbourg Court's reluctance to exercise its supervisory responsibility betrays a failure to understand when and how secular authority – executive, legislative *and* judicial – should intervene in religious matters. This issue is explored in section [V].

The paper contrasts the judgments in each case to illustrate the problems with the approach of the majority in each. It is argued that, while the majority in each case err, for different reasons, in their judgment, the minority view in each has much to commend it.

²² The subsidiarity principle has evolved as a “fourth instance” doctrine. However, the application of the margin of appreciation has domestic repercussions, which are also considered at para. [IV.B].

II. THE BRUTE FORCE OF NO INTERFERENCE

Analysis in cases concerning Islamic dress has focused on the third and fourth steps of Article 9 evaluation: “interference” and “justification”. Regrettably, the majority in *Begum* diverged from *Şahin*, deciding Miss Begum’s case on the issue of “interference”.

Their Lordships thus opted to apply a blunt instrument to a delicate issue. The test for “interference” may appear easier to apply than the more nuanced assessment under Article 9(2). Yet, currently, that test is flawed and inapt to decide the issue in Miss Begum’s case. The majority of the Lords could and should have followed the route chosen in *Şahin* and by the minority in *Begum*, which would have led to a judgment better able to command public confidence in its findings.

A. *The Tools and the Task*

Lord Walker in *Williamson* conceptualises the court’s task in cases alleging violations of the right to manifest belief. In balancing between individual and societal interests, some “filter is certainly needed” to determine whether the situation merits protection under Article 9.²³ Lord Walker identifies two filters: the first under Article 9(1) in determining whether the right is engaged;²⁴ the second under Article 9(2) in determining whether an interference with that right is “justified”.²⁵

The court’s task then is to evaluate which filter is more appropriate in the circumstances of the case before it. Lord Walker counsels against an unduly rigidly approach to Article 9 analysis, since the issues of engagement, interference and justification are sometimes closely inter-linked.²⁶ While true, it is also true that the first and second filters have significant practical differences. Understanding those differences is crucial to the critique of the majority’s approach in *Begum*.

The “interference” filter favours the respondent. First, because the respondent avoids the burden of proving any “justification”.²⁷ Secondly, because having to assess whether an interference is proportionate (in terms of both scope and effect)²⁸ is a more exacting, multi-faceted exercise than the single question of whether there has

²³ [2005] 2 A.C. 246, at para. [58].

²⁴ Lord Walker’s first filter is the concept of “manifestation”. Analysis of “manifestation” is conceptually distinct from “interference”. However, they are considered alternative “first filters” for determining whether Article 9(2) analysis is required in this paper (*cf.* section [V.A]).

²⁵ [2005] 2 A.C. 246, at para. [58].

²⁶ *Ibid.*, at para. [66].

²⁷ *Kokkinakis v. Greece* (1994) 17 E.H.R.R. 297, at para. [49]. The burden of proving interference lies with the applicant: *Begum* [2007] 1 A.C. 100, at para. [52].

²⁸ The proportionality analysis is discussed at section [III].

been “interference”. A proportionality assessment not only contributes to the task facing the respondent, but also requires more detailed analysis by the court. The apparent simplicity of the test of interference might therefore also seem attractive to a court when creating precedent which other courts must later follow.²⁹

However, if the first filter has any appeal, it is superficial: the interference test is a blunt tool not fit for mediating between the divergent interests in Miss Begum’s case. Nothing required the Lords to decide the issue on “interference”, not least when better options were available. The issue was one inherently suited to the nuanced approach offered by the second filter.

B. *Too Blunt an Instrument*

It is axiomatic that the right to manifest one’s religion must have an outer limit. The Strasbourg Court said in *Kalaç*:³⁰

Article 9 does not protect every act motivated or inspired by a religion or a belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account.

Such a limit is necessary “in order to prevent article 9 becoming unmanageably diffuse and unpredictable in its operation”.³¹ In democratic society, the external manifestation of one person’s belief must logically be circumscribed at a certain point by the rights of others to manifest their beliefs or exercise other protected rights.

However, it must also be true that the extent to which another party may act without encroaching on, or “interfering” with, the substance of an individual’s Article 9 rights must have an outer limit too. Without such a limit, the protection afforded by the right to manifest one’s religion would effectively be eviscerated.

Yet, from current Strasbourg jurisprudence relating to “interference” under Article 9, it is difficult to discern any appropriate guidance on where such a limit lies. That jurisprudence suggests two tests, neither fit to define the scope of rights: the first describes a limit so extreme as to deprive the right to manifest belief of any meaning; the second provides a definition so vague as to deprive itself of any meaning.

²⁹ Though no strict precedent doctrine applies in Convention jurisprudence, “cogent reasons” are required to depart from a recent decision (*Wynne v. UK* (1994) 19 E.H.R.R. 333, at para. [36], regarding a decision around four years earlier).

³⁰ 27 E.H.R.R. 552, at para. [27].

³¹ *Per* Lord Walker in *Williamson* [2005] 2 A.C. 246, at para. [62].

1. *Limitation without Limits*

The first approach derives from *Cha'are Shalom*, the Grand Chamber holding:³²

there would be interference ... only if the illegality of performing ritual slaughter made it *impossible* for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable.

Lords Bingham and Hoffman conceded an “impossibility” threshold might be doubted or considered “rather high”.³³ Judicial economy indeed! The threshold would be laughable were its effects not so pernicious for applicants’ rights and irreconcilable with the principle of effectiveness.³⁴ Yet, Lord Scott suggests that a child in Miss Begum’s position might only show an interference with her Article 9 rights if denied access to a school providing an “essential service not obtainable elsewhere”.³⁵ “Essentiality” is consonant with “impossibility” and therefore equally inappropriate as a threshold for interference.

2. *Infinite Choice*

Even assuming the Lords intended to endorse a lower standard – more attainable than “impossibility” – that standard is still unsuitably vague: it reduces to a slippery question of “choice”. Thus, Mr. Kalaç “chose” military service knowing secularism’s importance to Turkey,³⁶ Mr. Konttinen “chose” his religious views knowing they would require him to leave work earlier than permitted.³⁷ Both could “choose” alternative employment, as Ms. Stedman could “choose” to resign rather than work Sundays.³⁸ Perhaps these applicants did have a “choice”. Indeed, their cases may have been rightly decided. Yet, almost any situation can be framed as involving a choice.

However correct the outcome, reasoning based on an amorphous concept of “choice” is objectionable because unpredictable. Predictability is crucial to maintaining respect for the rule of law.³⁹

³² *Cha'are Shalom ve Tsedek v. France* (2000) 9 B.H.R.C. 27, at para. [80] (emphasis added).

³³ [2007] 1 A.C. 100 at para. [24] and [52] respectively.

³⁴ This interpretative principle is “intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective” (*Airey v. Ireland* (1979) 2 E.H.R.R. 305, at para. [24]). It requires that rights are interpreted broadly to receive their full weight and exceptions, consequently, are construed narrowly (*Niemietz v. Germany* (1993) 16 E.H.R.R. 97, at para. [29]–[30]; *Klass v. Germany* (1978) 2 E.H.R.R. 214, at para. [42]).

³⁵ [2007] 1 A.C. 100, at para. [88]

³⁶ *Kalaç v. Turkey* (1999) 27 E.H.R.R. 552 at para. [28].

³⁷ *Konttinen v. Finland* (1996) 87-A D.R. 68.

³⁸ *Stedman v. United Kingdom* (1997) 23 E.H.R.R. CD 168.

³⁹ Cf. Lord Bingham, “The Rule of Law” [2007] C.L.J. 67.

The “choice” threshold suffers from a double vice: not only can Miss Begum not predict the case’s outcome, a court cannot defend that result. “Choice” is a concept inherently unsuited to cases so publicly scrutinised and involving such sensitive issues.

C. Not Necessary or Appropriate for the Task

Despite allusions to these shortcomings, the Lords elected to apply this jurisprudence to deny the school’s actions constituted an interference. Yet, the Lords were not obliged to follow Strasbourg’s approach and, even if they had been, there were good grounds for distinguishing Miss Begum’s case.

1. No Obligation to Apply

The fact that Strasbourg has adopted a narrow approach in defining “interference” did not preclude the House from opting for a broader one. Convention jurisprudence is intended to guarantee only a minimum standard of protection: domestic authorities can adopt a higher standard.⁴⁰ Since Strasbourg is a “fourth instance” court, seeking to establish a common standard across the 47 member states of the Council of Europe its judgments may not be as exacting as those of its national counterparts’. The margin of appreciation exacerbates this tendency.⁴¹

Referring obliquely to the obligation on “our domestic courts [to] take into account” Strasbourg authority is apt to mislead.⁴² Parliament stipulated only that courts “take into account” Strasbourg case-law, not that they be bound by it. Such language allows for, and arguably sought to enable, “our domestic courts” to set higher standards. Since the Lords refer to judicial criticism of that case-law as “overly restrictive” and acknowledge it might “have erred on the side of strictness”,⁴³ the interference test would seem particularly in need of higher, or at least clearer, standards.

2. Good Grounds for Distinction

The Lords also ignore the possibility that, even were they to elect to apply Strasbourg’s case-law, “choice” is susceptible to qualification or

⁴⁰ *J.A.Pye (Oxford) Ltd. v. Graham* (App. No. 8695/79), dissenting judgment of Judges Maruste, Garlicki and Borrego Borrego, at para. [3]. This, and other cases listed below which are not published as law reports, can be accessed via the Court’s case-law database “HUDOC” at <http://cmiskp.echr.coe.int/>. Cf. also Article 53 of the Convention.

⁴¹ See section [IV.B.1].

⁴² [2007] 1 A.C. 100, at para. [23]–[24], citing the requirement to “take into account” Convention jurisprudence when determining a question which has arisen in connection with a Convention right (s.2, Human Rights Act 1998). Cf. also para. [51]–[54] and [86]–[87].

⁴³ *Ibid.*, at para. [23]–[24].

distinction when considering children's education.⁴⁴ Lord Hoffman dismisses the tenuous distinction advanced by the Court of Appeal:⁴⁵ Mummery L.J., seeking to distinguish Miss Begum's situation from that of employees (in *Konttinen*, *Kalaç* and *Stedman*), had emphasised that Miss Begum's education depended not on her contractual choice but the school's statutory duty.⁴⁶ This abstruse distinction between contractual and statutory obligations was duly criticised by commentators.⁴⁷

However, Lord Hoffman ignores Lord Nicholls' more obvious observation that denying the prohibition on wearing *jilbab* constituted an interference over-estimates the ease with which children can move to alternative schools and under-estimates the disruption this may cause to their education.⁴⁸ It also assumes that all schools are equal. However, as Baroness Hale notes in her partial dissent, "This particular school is a good school: that, it appears, is one reason why Shabina Begum wanted to stay there."⁴⁹ The principle of "choice" is doubly inappropriate in a case concerning both the sensitive question of Islamic dress and the vexed question of school choice.

D. Alternative Options Ignored

The current interference test is, then, inadequate to the task. Two solutions arise: formulate a more refined filter for deciding how far another party may go without encroaching on an individual's Article 9 rights; or, preferably, opt to mediate between their competing interests through the more nuanced mechanism of Article 9(2). These alternative tools have been applied to similar tasks in other cases. It is perplexing, then, that the Lords choose not to apply them in *Begum*.

1. Narrowing Choice

If the courts are to analyse Article 9 cases by reference to the test of interference, then some qualification is necessary to distinguish

⁴⁴ In discussing "interference", Lord Bingham (*ibid.*, at para. [23]) did cite one case concerning education: *Kjeldsen, Busk Madsen and Pederson v. Denmark* (1976) 1 E.H.R.R. 711, para. [54] and [57]. However, unlike *Begum*, *Kjeldsen* was not decided on the issue of "interference". Rather, *Kjeldsen* (at para. [54]) made passing observations about the applicant parents' alternatives (on which Lord Bingham relies). The lack of "interference" analysis is unsurprising since *Kjeldsen* focused on the second sentence of Article 2, Protocol I of the Convention (the "right to education"), which requires governments to "respect the rights of parents to ensure ... teaching in conformity with their own religious ... convictions". The applicants' Article 9 claim is only analysed briefly (at para. [57]): the Article 9 distinction between analyses of "interference" and "justification" is missing from *Kjeldsen*. *Kjeldsen* therefore provides an inadequate basis for denying that Miss Begum's case should be decided under Article 9(2).

⁴⁵ [2007] 1 A.C. 100, at para. [56]–[57].

⁴⁶ [2005] 1 W.L.R. 3372, at para. [84].

⁴⁷ E.g. T. Poole, "Of Headscarves and Heresies: the *Denbigh High School* Case and Public Authority Decision Making under the Human Rights Act" [2005] P.L. 685 at p. 689.

⁴⁸ [2007] 1 A.C. 100, at para. [41].

⁴⁹ *Ibid.*, at para. [97].

between the “choices” which are reasonable to require of individuals and those which are not.

In *Williamson*, Lord Nicholls reverses the “choice” analysis, suggesting “the question is whether [*the act complained of*] interfered *materially*, that is, *to an extent which was significant in practice*, with the claimants’ freedom to manifest their beliefs in this way.”⁵⁰ This focuses on the alleged interference instead of the individual’s options. Considering the “materiality” or “significance” of the act introduces a subtle but welcome qualification to the Strasbourg jurisprudence: it honours the principle of effectiveness by concentrating on the act’s impact on the protection provided by the right.

Lord Nicholls also goes further than Lords Bingham and Hoffman in doubting “whether the use of the word ‘impossible’” in *Cha’are Shalom* “was intend[ed] to enunciate a standard which is less protective” than the test as he formulated it. A test of “impossibility”, he correctly notes, “would be inconsistent with the bedrock principle that human rights Conventions are intended to afford practical and effective protection to human rights.”

Yet, *Begum* departs from *Williamson* without providing any convincing basis for doing so. Lord Hoffman cites passages from Lord Nicholls’ judgment in the case, but makes no reference to the qualification to the Strasbourg jurisprudence Lord Nicholls suggests.⁵¹ Admittedly, in *Williamson*, Lord Nicholls does not expressly advert to having introduced any qualification: he simply infers his test from Strasbourg case-law. However, the difference between the *Williamson* and *Begum* interpretations of that case-law merits explanation, not least since the former accords better with the principle of effectiveness.

2. Strasbourg and Headscarves

The Lords also prefer *Karaduman*’s interference analysis to *Dahlab*’s or *Şahin*’s – other Strasbourg cases involving the Islamic headscarf.⁵² *Karaduman* is confused in its reasoning and far from a “strong case”.⁵³ Yet, if nothing else, the strength of the finding of the European Human Rights Commission (the “Commission”) in *Karaduman* – that

⁵⁰ [2005] 2 A.C. 246, at para. [39].

⁵¹ [2007] 1 A.C. 100, at para. [55]. Lord Bingham also cites *Williamson*, at para. [20], [22] and [24], but it is unclear what position Lord Bingham adopts vis-à-vis the *Williamson* interpretation of Strasbourg jurisprudence. He suggests that, to find no interference, there must be “other means open to the person to practise ... religion *without undue hardship or inconvenience*” (at para. [23] (emphasis added)). This could be interpreted as moving towards *Williamson*, but he does not endorse Lord Nicholls’ test. In *Begum*, the two diverge in their interference analysis, but Lord Bingham acknowledges the question is “debatable” (at [25]). If Lord Bingham was hesitant, the effectiveness principle might suggest he should have found there had been an interference.

⁵² *Karaduman v Turkey* (App. No. 16278/90) 74 D.R. 93. *Dahlab v. Switzerland* (App. No. 42393/98), 15 February 2001.

⁵³ [2007] 1 A.C. 100, at para. [23] and [87].

refusing to grant Ms. Karaduman a degree certificate because she was wearing a headscarf in the photograph provided with her application did not interfere with her rights – is surely obsolete following the more recent decisions in *Dahlab* and *Şahin*, in which similar prohibitions did interfere with individuals' rights.⁵⁴

The majority does not satisfactorily explain this erratic reliance on Strasbourg's Islamic headscarf jurisprudence. Lords Bingham and Scott do not deal with the issue. Lord Hoffman also neglects *Dahlab*, but, to explain the assumed interference in *Şahin*, states, "there was no other Turkish university which did not have the same rule".⁵⁵ However, *Şahin* is not clear on this issue: the facts state that her original Faculty of Medicine, at Bursa University, permitted her to wear the headscarf for a number of years;⁵⁶ but they also suggest Ms. Şahin later had no alternative except studying in Vienna.⁵⁷

Yet, even assuming Ms. Şahin could not study elsewhere in Turkey, Turkey's regulations would not necessarily constitute "interference" with Ms. Şahin's rights according to Strasbourg's "choice" test. For example, Lord Hoffman's reasoning does not explain why "choosing" studies outside medicine (or to cease studying) were not valid alternatives for Ms. Şahin, while Messrs Kontinen and Kalaç and Ms. Stedman had to "choose" other jobs.⁵⁸ Moreover, his reasoning diverges from *Cha'are Shalom* in which it was deemed an acceptable "choice" for applicants to seek the same services in another country. It was clearly not "impossible" for Ms. Şahin to do so, for this is what she did. These apparent inconsistencies again merit explanation but receive no acknowledgment let alone elucidation.

E. *The Retreat to Interference?*

The Lords rightly endorsed commentators' criticism of the Court of Appeal in *Begum*, which had advocated a prescriptive, impractical procedural approach to Article 9 analysis.⁵⁹ Lord Bingham therefore cited approvingly the following critique, adding his own remarks:⁶⁰

⁵⁴ *Şahin* assumed there had been an interference. *Dahlab* was also decided by analysing whether a Swiss school's refusal to allow a primary school teacher to wear the Islamic headscarf was justified under Article 9(2).

⁵⁵ [2007] 1 A.C. 100, at para. [59].

⁵⁶ (2007) 44 E.H.R.R. 5, at para. [15].

⁵⁷ (2007) 44 E.H.R.R. 5, dissenting opinion of Judge Tulkens, at para. [17].

⁵⁸ There is arguably a distinction on the basis of her status as a student, which then supports the argument for distinguishing (children's) education in *Begum*.

⁵⁹ The Court of Appeal ([2005] 1 W.L.R. 3372) unanimously decided for Miss Begum not because Denbigh's decision was substantively wrong, but because the school had not followed the court's step-by-step *legal* analysis of Article 9 issues (*cf.* section [I.A]).

⁶⁰ [2007] 1 A.C. 100, at para. [30].

“The retreat to procedure is of course a way of avoiding difficult questions.” But it is in my view clear that the court must confront these questions, however difficult.

The same criticism, for the same reasons, can be levelled at the Lords’ own retreat to the case-law of interference.

Miss Begum’s case undoubtedly poses difficult questions. The sensitivity of the issue of Islamic dress and the popular attention it commands demand greater rigour in the reasoning of cases dealing with the issue than is to be found in the Strasbourg case-law and the majority’s reliance on it. The foregoing analysis exposes the weaknesses in the present test for determining whether there has been an interference with an applicant’s Article 9 rights.

A finding of “no interference” therefore constitutes a poor basis on which to determine Miss Begum’s case. At the start of his opinion, Lord Bingham stressed that *Begum* concerned a “particular pupil in a particular school in a particular place at a particular time”.⁶¹ Nonetheless, the majority judgment approved dubious Convention case-law, creating a precedent which is already being applied.⁶²

Difficult questions demand delicate treatment – treatment a proportionality assessment provides.⁶³ *Şahin* is therefore to be preferred for having decided the issue under the second filter of Article 9 analysis. Arguably, this option should be preferred in most cases where religious issues arise⁶⁴ – especially those concerning sensitive matters like Islamic dress.⁶⁵ The Lords could certainly have opted for a better approach when confronting *Begum*’s difficult question.

III. STRIKING AN IMBALANCE

Since *Şahin* opted to require that Turkey justify its interference, it is disappointing the majority in that case then squander the opportunity

⁶¹ [2007] 1 A.C. 100, at para. [2].

⁶² *Cf. R. (X) v. Y School* [2007] EWHC 298 (Admin), in which the appeal of a Muslim schoolgirl against the refusal to allow her to wear the *niqab* also failed on the basis that there had not been any interference.

⁶³ For example, the comparison (as part of the proportionality assessment, *cf.* section [III.B.2]) between the benefit to society of any interference and its detriment to an individual’s rights is a far better context for assessing the adequacy of “choices” available to individuals.

⁶⁴ The importance attributed to religious sensitivities in the United Kingdom is arguably borne out by the specific protection included in section 13 of the Human Rights Act 1998.

⁶⁵ Naturally, there will be cases where a finding of no interference is appropriate (applying the *Williamson* test). Recently, for example, *R. (Playfoot) v. Millais School* [2007] EWHC 1698 (Admin) found that a devout Christian girl wearing a chastity ring did not engage Article 9 (at para. [20]–[24]). However, (if it had) the schools’ ban on her wearing it would not have interfered materially with her freedom to manifest her belief in chastity before marriage because she could attach “her ring, or a keyring or other visible sign, to her bag” (para. [30(1)]).

this approach presents. Proportionality is “inherent in the whole of the Convention”,⁶⁶ yet conspicuously absent when appraising “necessity” in *Şahin*. The Court’s Article 9(2) analysis falls short in two respects, failing both to require the government to meet its evidential burden, and to observe the requirements of the proportionality principle. This absence erodes confidence in the Court’s decision-making: *Begum*’s “justification” analysis stands in stark and welcome contrast.

A. Irrelevant and Insufficient Reasons

Turkey had to establish that its interference was necessary and proportionate.⁶⁷ “Necessary”, here, is less flexible than “useful” or “desirable”,⁶⁸ a respondent must demonstrate “relevant and sufficient” reasons for its interference.⁶⁹ The evidence required to meet this standard depends on other factors weighed in the balance. However, the Court has emphasised the need for “concrete evidence to substantiate the alleged damage”,⁷⁰ and that the government’s position “must be convincingly established”,⁷¹ which it failed to do where it “did not sufficiently specify in what way” the interference was justified.⁷²

The majority judgment, however, is supported by evidence which is neither relevant nor sufficient. It fails to subject Turkey’s arguments to evidential or logical scrutiny, and accords little or no weight to those of Ms. Şahin.

1. Insufficient Government Evidence

Turkey’s case depends on mere assertion. It contends that the prohibition is necessary to uphold secularism and gender equality.⁷³ In principle, these goals accord with Article 9(2) objectives, where they protect public order and the rights and freedoms of others. What is lacking in practice is any evidential link between Ms. Şahin’s wearing of the headscarf and these concerns.

The Court uncritically endorses Turkey’s interpretation of the Islamic headscarf’s significance as a flag for political Islam⁷⁴ and a symbol of women’s subjugation.⁷⁵ Yet, there is no evidence suggesting

⁶⁶ *Sporrong and Lönnroth v. Sweden* (1983) 5 E.H.R.R. 35, at para. [69].

⁶⁷ *Kokkinakis v. Greece* (1994) 17 E.H.R.R. 297, at para. [49].

⁶⁸ *Handyside v. United Kingdom* (1976) 1 E.H.R.R. 737.

⁶⁹ *Jersild v. Denmark* (1995) 19 E.H.R.R. 1, at para. [31].

⁷⁰ *Smith and Grady v. UK* (2000) 29 E.H.R.R. 493, at para. [99].

⁷¹ *Autronic v. Switzerland* (1990) 12 E.H.R.R. 485, at para. [61].

⁷² *Kokkinakis v. Greece* (1994) 17 E.H.R.R. 297, at para. [49].

⁷³ (2005) 41 E.H.R.R. 8, at para. [90]–[110]; (2007) 44 E.H.R.R. 5, at para. [100]–[116].

⁷⁴ (2005) 41 E.H.R.R. 8, at para. [108]–[109]; (2007) 44 E.H.R.R. 5, at para. [115].

⁷⁵ (2005) 41 E.H.R.R. 8, at para. [98]; (2007) 44 E.H.R.R. 5, at para. [111].

Ms. Şahin's headscarf will either engender the downfall of Turkish democracy, or coerce other students to don the headscarf.

As to the former threat, the government refers to "the scene of violent confrontations between opposing radical groups",⁷⁶ and the Court refers to the headscarf's "political significance", "extremist political movements", and people hoping to establish "a regime based on the *Sharia*".⁷⁷ As to the latter, Turkey refers to "complaints by other students of pressure from students from fundamentalist religious movements".⁷⁸ Similarly, the majority refer to "the impact which wearing such a symbol ... may have on those who choose not to wear it".⁷⁹

Yet, Ms. Şahin's, or *any* female student's, connection with "radical groups" or parties promoting theocracy is unexplained. The Court instead seemingly applies a "precautionary principle", noting the prohibition constituted a "preventive measure".⁸⁰ The Court effectively suggests that, by wearing the headscarf, Ms. Şahin supports an extremist movement intent on imposing theocratic government. Absent supporting evidence, this position borders on absurd: born of fear rather than judgement.

Nor is there any evidence that Ms. Şahin sought to pressure or influence others by wearing the headscarf. Preventing students actively coercing others to conform to their conception of proper dress is one thing. It is quite another to suggest Ms. Şahin's appearance would have the same effect. The majority elides the two without evidencing, or elaborating on, their reasoning. Worse, this uncritical acceptance of the Islamic headscarf's meaning betrays a paternalist – or "maternalist" – assumption regarding why women wear it.⁸¹

2. *Insufficient Attention to the Applicant's Evidence*

Furthermore, no account is taken of, or answer given to, Ms. Şahin's evidence that her wearing the headscarf had neither the object or effect of threatening public order or the rights and freedoms of others.

As to her object, Ms. Şahin stated her decision was one of religious conviction. She had no intention of protesting, pressuring, provoking

⁷⁶ (2005) 41 E.H.R.R. 8, at para. [96].

⁷⁷ *Ibid.*, at para. [31]–[32] and [108]–[109]; (2007) 44 E.H.R.R. 5, at para. [115].

⁷⁸ (2005) 41 E.H.R.R.8, at para. [96].

⁷⁹ *Ibid.*, at para. [108]; (2007) 44 E.H.R.R. 5, at para. [115].

⁸⁰ (2005) 41 E.H.R.R. 8, at para. [96]. This problem is apparently not unique to Strasbourg's Islamic headscarf jurisprudence: Article 8 analysis connected with adoptive parents' sexual orientation provokes similar criticism: T.W. Stone, "Margin of Appreciation Gone Awry: The European Court of Human Rights' Implicit Use of the Precautionary Principle in *Fretté v. France* to Backtrack on Protection from Discrimination on the Basis of Sexual Orientation" [2003] 3 Conn. Pub. Int. L.J. 218.

⁸¹ D. Lyon and D. Spini, "Unveiling the Headscarf Debate" (2004) 12 Feminist Legal Studies 333.

or proselytising by doing so: she supported secularism.⁸² Neither Turkey nor the Court contradict these assertions. They do not evaluate them either. For the Court to assert gender equality's importance and then to disregard an adult woman's professed motivation is perverse.

As to the effect, Ms. Şahin notes that, during four years at her previous university and five months at Istanbul (prior to the prohibition), she had worn the headscarf without causing "any disruption, disturbance or threat to the public order".⁸³ This contradicts the assertion that the ban is necessary to uphold public order, demonstrating other universities have maintained order without one. The Court should have at least addressed these arguments, even if it ultimately found grounds to reject them. It did neither.

B. Proportionality Awry

The principle of proportionality requires a reasonable relationship between the means employed and the end to be achieved,⁸⁴ a fair balance between the benefit to the community and the detriment to the individual,⁸⁵ and (arguably) that no less intrusive means might have achieved the same end.

Yet, the majority judgment is wanting in each respect: the Court acknowledges the need for balance in word, but not in deed. The Lords in *Begum* (both the minority and the majority, who considered justification in the alternative) demonstrate a better attuned approach towards the proportionality assessment – an example for the future.

1. Means and Ends

The dearth of any evidential link in *Şahin* between Turkey's objectives (maintaining public order and protecting other students' rights) and the prohibition (the means of doing so) has been discussed: it is also difficult to detect any compelling logic linking the two.

If the danger is "opposing radical groups" threatening "violent confrontations",⁸⁶ then, rationally, Turkey should enforce offences against aggression or incitement to violence. If the threat derives from "extremist political movements" intending to establish a *Sharia*-based regime,⁸⁷ then Turkey's dissolution of political parties espousing such views is more likely an effective (and sufficient) means of countering it. Likewise, if "fundamentalist religious" students exerting pressure on

⁸² (2005) 41 E.H.R.R.8, at para. [85]–[87]; (2007) 44 E.H.R.R. 5, at para. [101].

⁸³ (2005) 41 E.H.R.R.8, at para. [86].

⁸⁴ *James v. UK* (1986) 8 E.H.R.R. 123, at para. [50].

⁸⁵ *Sporrong and Lönnroth v. Sweden* (1983) 5 E.H.R.R. 35, at para. [69].

⁸⁶ (2005) 41 E.H.R.R. 8, at para. [96].

⁸⁷ (2005) 41 E.H.R.R. 8, at para. [31]–[32] and [108]–[109]; (2007) 44 E.H.R.R. 5, at para. [115].

their fellow-students is the concern,⁸⁸ then universities should act against those specifically complained about or those they legitimately suspect. Arguing these issues demand a blanket ban on all headscarved university students irrespective of their motivation, and absent evidence of improper intent or actual disturbances or coercion, is tenuous to the extreme.

The majority's reasoning is based on a false premise. All "fundamentalist" Muslim women might wear headscarves; not all Muslim women who wear headscarves are necessarily "fundamentalist". It is, as Judge Tulkens notes, "vital to distinguish" between the two.⁸⁹ The majority, in failing to do so, also fail to appreciate there is no rational connection between the prohibition and the problems it purports to address.

2. *Community Benefit and Individual Detriment*

Even assuming headscarved students did pose theoretical risks to the community, it is untenable to suggest the level of risk warrants the level of interference in the lives of women affected by the ban.

The detriment to women like Ms. Şahin far outweighs the benefit gained from a precautionary "preventive measure" against an unsubstantiated risk. Ms. Şahin had to study outside Turkey – a significant financial and emotional cost. Others in primary, secondary and higher education also face disruption, or denial, of studies following the ban.

The Court suggests the university had already balanced cost to individuals against return to society by seeking "to adapt to the evolving situation in a way that would not bar access to the university to students wearing the veil through continued dialogue with those concerned, while at the same time ensuring that order was maintained".⁹⁰

However, the Court's responsibility for reviewing the Turkish authorities' purported assessment of these competing interests remains. Nothing in *Şahin* demonstrates that the authorities engaged headscarved students in dialogue. Even if they had, the solution adopted still *does* bar access to them. If the measure sought to avoid such an outcome, it patently failed.

3. *Less Intrusive Means*

Other solutions could therefore arguably have addressed the university's concerns. Though the availability of less intrusive means

⁸⁸ (2005) 41 E.H.R.R. 8, at para. [96].

⁸⁹ (2007) 44 E.H.R.R. 5, at para. [10].

⁹⁰ (2007) 44 E.H.R.R. 5, at para. [120].

has not always determined whether a measure is proportionate,⁹¹ the Court has sometimes found measures disproportionate on that basis.⁹²

Instead, in *Şahin*, the Court inverts the test, accepting the prohibition's proportionality because it could have been *more* restrictive but was not. Thus, the Court notes "practising Muslim students in Turkish universities are free ... to manifest their religion in accordance with habitual forms of Muslim observance".⁹³ However, that the university did not *also* prohibit Muslim prayer (for example) is incidental to whether it was proportionate to prohibit Muslim dress. Excluding all practising Muslims would achieve the aim of removing extremist Muslims from university property; indeed, so would closing the university. Yet, the fact that more extreme options might achieve the same aim does not answer whether the measure under review was proportionate.

C. Endemic Imbalance?

Unfortunately, *Şahin* is not the only Strasbourg case concerning headscarves to display these deficiencies.⁹⁴ *Dahlab* also suffers from want of evidence and balance in the Court's "justification" analysis.

The Court's decision is speculative and unsupported by evidence. The Court argued "it is very difficult to assess the impact" of Ms. Dahlab's headscarf,⁹⁵ but ignored the fact she had worn it for over four years "without any action being taken ... or any comments being made". Instead, it justifies its decision using the cumbersome negative formulation: "it *cannot be denied outright* that the wearing of a headscarf *might have some kind of* proselytising effect".⁹⁶

It thus relies on bold assertion and bald assumption, ignoring alternative arguments. It betrays significant prejudice in finding the headscarf "is hard to square with the principle of gender equality" and "difficult to reconcile ... with the message of tolerance, respect for others and, above all, equality and non-discrimination".⁹⁷ The irony is stark. The headscarf's symbolism is varied:⁹⁸

⁹¹ *Inze v. Austria* (1988) 10 E.H.R.R. 394, at para. [44].

⁹² *Campbell v. UK* (1993) 15 E.H.R.R. 137, at para. [48].

⁹³ (2005) 41 E.H.R.R. 8, at para. [111]; (2007) 44 E.H.R.R. 5, at para. [118].

⁹⁴ *Karaduman* deploys arguments similar to those in *Şahin*; Strasbourg headscarf case-law since *Şahin* continues the trend. In 2006 and 2007, the Court declared applications in 6 cases inadmissible, relying on *Şahin* in each: *Kurtulmuş v. Turkey* (App. No. 65500/01); *Köse v. Turkey* (App. No. 26625/02); *Çağlayan v. Turkey* (App. No. 1638/04); *Fatma Karaduman v. Turkey* (App. No. 41296/04); *Tandoğan v. Turkey* (App. No. 41298/04); *Yılmaz v. Turkey* (App. No. 37829/05). Other cases concerning Islam in Turkey also suffer scant evidence: the Court decided against Mr. Kalaç despite the Commission's concerns that government documents "did not support the argument that [he] had any links with a sect" (27 E.H.R.R. 552 at para. [26]).

⁹⁵ *Dahlab*, The Law, at para. [1].

⁹⁶ *Ibid.*, The Law, at para. [1] (emphasis added).

⁹⁷ *Ibid.*, The Law, at para. [1].

⁹⁸ (2007) 44 E.H.R.R. 5, dissenting opinion of Judge Tulkens, at para. [11].

... wearing the headscarf has no single meaning; ... there are those who maintain that, in certain cases, it can even be a means of emancipating women. What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to.

The Court in *Dahlab* (and *Şahin*) ignores possible alternatives, cutting across its professed commitment to pluralism.

Furthermore, there is no proportionality between Ms. Dahlab's detriment and Genevan society's benefit. No-one had complained about Ms. Dahlab's appearance, so any "pressing social need" benefiting the wider community is hard to detect. Ms. Dahlab, however, could no longer teach in Geneva once excluded from public education, since "[i]n practice, State schools had a virtual monopoly on infant classes. Private schools ... were governed by religious authorities other than those of the applicant; accordingly, they were not accessible to her".⁹⁹

D. Disparity across Convention Case-law

The Court did not consider Ms. Şahin's arguments under other Convention Articles,¹⁰⁰ arguing they were a "mere reformulation" of her Article 9 complaint.¹⁰¹ This argument would be more tenable were the Court's approach when balancing individual and community interests in Articles 9, 10 (freedom of expression) and 11 (freedom of association) consistent. Instead, Strasbourg jurisprudence regarding Articles 10 and 11 demonstrates markedly better poise than *Şahin*. Given this discrepancy, the Court should either have considered the balance under Article 9 more carefully, or also have analysed the case under Article 10.

Judge Tulkens' juxtaposition of *Gündüz* and *Şahin* provides one example of this disparity. Turkey prosecuted Mr. Gündüz for advocating establishment of a *Sharia* state during a televised debate. Mr. Gündüz did not incite violence. Prosecuting him, therefore, violated Article 10.¹⁰² Judge Tulkens noted that, bizarrely, "manifesting one's religion by peacefully wearing a headscarf may be prohibited whereas, in the same context, remarks which could be construed as incitement to religious hatred are covered by freedom of expression."¹⁰³

⁹⁹ *Dahlab*, The Law, at para. [1].

¹⁰⁰ Except Article 2, Protocol I.

¹⁰¹ (2005) 41 E.H.R.R. 8, at para. [117]; (2007) 44 E.H.R.R. 5, at para. [163]–[166].

¹⁰² *Gündüz v. Turkey* (2005) 41 E.H.R.R. 5, at para. [46]–[51].

¹⁰³ (2007) 44 E.H.R.R. 5, at para. [9].

The comparison between *Vogt* and *Dahlab* is also instructive.¹⁰⁴ Ms. Vogt, a school teacher, was dismissed for her active involvement in the German Communist Party contrary to the duty of political loyalty to the state. The Court found her dismissal violated Articles 10 and 11, for several reasons: Ms. Vogt had not indoctrinated or exerted “improper influence” over pupils; colleagues, pupils and parents had made no complaint; Ms. Vogt had not personally adopted an anti-constitutional stance in or out of school; as a teacher, she did not intrinsically pose any security risk; and it would be “well nigh impossible to find another job as a teacher, since in Germany teaching posts outside the civil service are scarce”.¹⁰⁵

Ms. Dahlab’s position was the same in each respect, yet the Court considered the prohibition in her case was justified. Arguably, Ms. Dahlab’s passive affiliation with Islam provided an even weaker basis for concern than Ms. Vogt’s active political involvement (including standing as candidate in elections). Ms. Şahin’s position, as a student, compares even more favourably.

The Court’s approach in *Vogt* and *Gündüz* accords better with Convention jurisprudence and interpretative principles, and achieves a more balanced result than *Şahin* and *Dahlab*. It therefore provides a better basis for decisions, promoting public confidence in the judicial process as a means of mediating between divergent interests.

E. Better Balance in *Begum*

Article 9(2) analysis in *Begum* is also better balanced than *Şahin*, both in the use of evidence and the approach to the proportionality assessment. Since their analysis under the second filter produces a more robust result, it is perplexing that the majority chose to rely on the first filter at all.

1. Same Principles, Different Application

First, the arguments supporting their decision were based on facts, not “mere worries or fears” as in *Şahin*. In *Begum*, the spectre of coercion is less ephemeral: Lords Bingham, Hoffman and Scott emphasise the role that Miss Begum’s brother played in determining her decisions and creating confrontation.¹⁰⁶ These facts, and schoolgirls’ express concerns about pressure to wear *jilbab*, provide “the evidence to support the justification which Judge Tulkens found lacking” in *Şahin*.¹⁰⁷

¹⁰⁴ *Vogt v. Germany* (1996) 21 E.H.R.R. 205.

¹⁰⁵ *Ibid.*, at para. [60].

¹⁰⁶ [2007] 1 A.C. 100, at para. [10]–[11], [46]–[47], [50] and [79]–[81].

¹⁰⁷ *Ibid.*, at para. [18] and [98].

Secondly, due regard is given to alternative arguments in the debate regarding the headscarf. Baroness Hale, like Judge Tulkens, adverts to the headscarf's complex significance, drawing parallels with "a Sikh man wear[ing] a turban or a Jewish man a ya[r]moulka": all adults, regardless of gender, should be assumed to choose freely what they wear.¹⁰⁸

Thirdly, the Lords consider more carefully the balance between parties' respective interests. In *Şahin*, purported "continued dialogue" resulted in a total prohibition on Islamic dress;¹⁰⁹ in *Begum*, actual consultation with the local Muslim community resulted in school rules that make considerable accommodation for Islamic precepts.¹¹⁰ Moreover, the school rules are narrowly tailored to the aims of social cohesion and public order and respectful of the schoolgirls' religious rights. So too, the detriment to Miss Begum is less devastating than to Ms. Şahin: Miss Begum missed two years' schooling, but not for want of effort by the school and educational authorities to provide support.¹¹¹

2. Same Result, Different Rules

These differences between *Begum* and *Şahin* may prompt questions as to why the Lords still found that any interference had been justified. The answer lies in the fundamental difference in the nature of the prohibitions under analysis: the school uniform rules in *Begum* can convincingly be said to be neutral rules of general application.¹¹² Prohibiting the *jilbab* is not the object of the school uniform rules, but merely the incidental effect of intrinsically non-discriminatory policy aims – order and social cohesion.

That rules of general application weigh more heavily in the balance against religious rights is accepted in Europe and beyond.¹¹³ Society can cohere only if all its participants accept that certain basic norms and standards are binding.¹¹⁴ This imperative dictates that the state need not meet so high a standard as when justifying other rules. US law, for example, replaces the "compelling state interest" test with a less strict alternative.¹¹⁵ In South Africa, this is reflected in the nuanced

¹⁰⁸ *Ibid.*, at para. [94].

¹⁰⁹ (2007) 44 E.H.R.R. 5, at para. [120].

¹¹⁰ [2007] 1 A.C. 100, at para. [3]–[8], [43]–[44] and [73]–[77].

¹¹¹ *Ibid.*, at para. [25].

¹¹² Turkey's spurious contention that the regulations in *Şahin* share such characteristics – "legislation ... which applied generally and without distinction in the public sphere" ((2005) 41 E.H.R.R. 8, at para. [69]) – is not even considered by the Court.

¹¹³ S. Stavros, "Freedom of Religion and Claims for Exemption from Generally Applicable, Neutral Laws: Lessons from Across the Pond" [1997] 6 E.H.R.L.R. 607.

¹¹⁴ *Christian Education South Africa v. Minister of Education* [2001] 1 L.R.C. 441, per Sachs J. at para. [35]; cf. *Employment Division v. Smith* 494 US 872, 878; *Valsamis v. Greece* (1997) 24 E.H.R.R. 294.

¹¹⁵ See *Employment Division*.

and context-sensitive balancing exercise required under section 36 of the Bill of Rights.

Contrasting the prohibition in *Begum* with that in *Şahin* (or, indeed, France¹¹⁶) illustrates this distinction. Ostensibly, the objective of the prohibition on religious dress in each case is similar: preservation of public order and social cohesion. However, the means by which each state seeks to achieve that purported objective diverge significantly.

Turkish (and French) rules promote cohesion *specifically* by preventing religious expression. Even if the purported indirect objective of those rules is to preserve public order, the direct and immediate objective of the rules in question is to prohibit certain aspects of the exercise of religion. In France, it is striking that there are no general rules regarding uniform. The prohibitions are premised on the assumption that religion is divisive, that social cohesion depends on limiting religious expression. The rule *directly* affects religious dress, expressly requiring its prohibition.

The school uniform rules in *Begum* seek to promote cohesion *generally* by preventing divergent forms of dress. They make no presumption as to whether or not religion is divisive. Religious dress is only limited to the extent that it breaches the uniform rules. The rule *indirectly* affects religious dress; it only requires its prohibition incidentally, as it would equally prohibit any other deviation from the uniform rules that may undermine the principle of social cohesion.¹¹⁷

F. Scales of Justice

He who decides a case without hearing the other side ... though he decides justly, cannot be considered just.

– Seneca

¹¹⁶ France legislated against “the wearing of signs or dress by which pupils overtly manifest a religious affiliation” (*Loi* No.2004-228, Article 1). *Cf.* the analysis in S. Knights, “Religious Symbols”, 500.

¹¹⁷ The rules in *Begum* withstand even the standard of scrutiny suggested by Blackmun J. (dissenting) in *Employment Division*, pp. 909–910, and Sachs J. in *Christian Education South Africa v. Minister of Education* [2001] 1 L.R.C. 441, at para. [32]. Following Blackmun and Sachs JJ.’s reasoning, it is not the state’s broad interest in promoting school uniform rules that must be weighed against the individual’s interest in wearing the *jilbab*, but the state’s narrow interest in refusing to make an exception in Miss Begum’s case. Yet, it is inherent in the very purpose of *uniform* rules that they can tolerate exceptions only to a limited degree before any uniformity is fatally diluted. Though the state can be required to consider requests for exceptions and make reasonable efforts to accommodate them, its cannot be expected to accept any and all. In *Begum*, the House (rightly) felt that the school had made sufficient effort to accommodate the religious precepts of a diverse community.

Faith in the courts' ability to mediate between divergent interests in matters of faith depends on the quality of their decision-making. It is, then, crucial to develop decision-making which is balanced and robust. As the majority in *Şahin* explain, "democracy does not simply mean that the view of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position".¹¹⁸ Yet, the majority's judgment lacks evidence and balance – shortcomings with consequences beyond Ms. Şahin's case.

The proportionality assessment is specifically designed to achieve a measured balance between the interests of society and individual. It is exacting – "more precise and more sophisticated than the traditional [English] ground of review"¹¹⁹ – and preferable to the crude test of "interference". Its finely-tuned requirements are particularly apposite when dealing with sensitive issues such as those surrounding the wearing of Islamic dress. Yet, in balancing the interests of individual and community when assessing the necessity of the interference with Ms. Şahin's rights, the majority judgment demonstrates a woefully one-sided appraisal of the arguments in the case and scant regard for the precision required in a proportionality review.

Moreover, the respondent bears the burden of establishing that an interference is justified. This burden cannot be discharged lightly: the strength of a decision depends on a firm grounding in evidenced argument – the antithesis of arbitrary decision-making. Yet, as Judge Tulkens' observes: "only indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears – are capable of ... justifying interference with a right guaranteed by the Convention. ... Such examples do not appear to have been forthcoming in the present case".¹²⁰

The Court therefore accepts the government's arguments on the basis of little or no evidence and produces a perfunctory proportionality assessment. This cavalier approach is not only a concern for Ms. Şahin. The failure to observe these principles undermines the authority of the Court to act as a mediator between individual and societal interests where they conflict. The present social and political environment in Europe calls for care and skill in deciding issues connected with Islamic dress. The European Court's response currently falls far short in both respects.

¹¹⁸ (2007) 44 E.H.R.R. 5, at para. [106]–[108].

¹¹⁹ *Per* Lord Steyn in *R. (Daly) v. Home Secretary* [2001] 2 A.C. 532, at para. [27].

¹²⁰ (2007) 44 E.H.R.R. 5, dissenting opinion of Judge Tulkens, at para. [5].

IV. HAZY AROUND THE MARGINS

The Court justifies its lax review of the balance between Ms. Şahin's rights and those of the Turkish community by its "regard in particular to the margin of appreciation".¹²¹ While the margin of appreciation is crucial to the Court's adjudicatory method, its application in *Şahin* is questionable. Arguably questionable too is the attention shown in *Begum* to the implications of this European principle in domestic courts.

A. *A Margin of Abdication?*

The Court rightly observes that national authorities are sometimes better placed to assess the balance between individual and community interests.¹²² This follows from the subsidiarity principle, which recognises that central authority should be subsidiary to, and performing only tasks which cannot be performed effectively at, more immediate levels.¹²³ Thus, the Court's responsibility is supervisory: it cannot substitute its own factual assessment, but instead ensures the national decision-making process was fair in its entirety.¹²⁴ It may, however, sometimes be appropriate to grant national authorities a measure of discretion (*une marge d'appréciation*), reducing the intensity of the Court's review.

Yet, in *Şahin*, the Court misapplies this principle: the circumstances do not warrant the width of its application; and, even if they did, its application does not obviate the Court's supervisory responsibility.

1. *Questionable Margins*

The width of the margin applied depends on various factors, including "the existence or non-existence of common ground between the laws of the Contracting States":¹²⁵ whether there is clear European consensus on an "issue". The Court in *Şahin* focuses on the "issue" of religious dress in an educational context; arguably, however, its primary concern is the broader "issue" of religion's relationship with the state and, specifically, Turkish secularism. Whichever view is taken, the margin the Court applies is questionable.

Headscarves in Europe

The Court justifies applying a wide margin of appreciation because of "the diversity of the approaches taken by national authorities on the

¹²¹ (2005) 41 E.H.R.R. 8, at para. [114]; (2007) 44 E.H.R.R. 5, at para. [122].

¹²² (2005) 41 E.H.R.R. 8, at para. [100]; (2007) 44 E.H.R.R. 5, at para. [109].

¹²³ *Oxford English Dictionary* (1989, 2nd edn., at <http://dictionary.oed.com>).

¹²⁴ *Edwards v. UK* (App. No. 13071/87), at para. [34].

¹²⁵ *Rasmussen v. Denmark* (1985) 7 E.H.R.R. 352, at para. [40].

issue”, describing the “issue” as “regulating the wearing of religious symbols in educational institutions” and referring to comparative law material in the judgment to support this approach.¹²⁶

However, the Court’s definition of the “issue” seems arbitrary – chosen to allow the Court to conclude European consensus is lacking. While European states may disagree about how to regulate wearing religious symbols in primary and secondary educational institutions, no such divergence arises in tertiary-level education. The comparative law materials in the judgment show that Turkey is in a tiny minority in prohibiting university students wearing the headscarf.¹²⁷

From this perspective, considerable consensus exists across Europe. Outside Turkey, university students, as adults, are uniformly permitted to choose whether to wear the headscarf. As Judge Tulkens observes, this subverts the Court’s argument for a broad margin of appreciation.¹²⁸

Secularism in Europe

While the Court is ostensibly concerned with Ms. Şahin’s attire, it also seems anxious to provide a wide margin of discretion to Turkish decision-makers because “questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely”.¹²⁹

Democratic opinion may indeed differ on *some* questions concerning the relationship between state and religions, but this does not mean it will differ on *all*. The Court’s deference in *Şahin* to Turkish decision-making depends on a dangerously simplistic understanding of secularism.

Secularism encompasses two views regarding “the relationship between State and religions”, connoting either an indifference towards, or the exclusion of, religion.¹³⁰ “Liberal secularism” demonstrates neutrality towards religion on the part of the state. “Fundamentalist secularism” carries a state prejudice against religion,¹³¹ which is just as antithetical to freedom of thought, conscience and religion as religious fundamentalism.¹³²

This distinction impacts on the width of the margin it is appropriate to apply. Democratic opinion in Europe does differ as

¹²⁶ (2007) 44 E.H.R.R. 5, at para. [109] and [55]–[65].

¹²⁷ (2005) 41 E.H.R.R. 8, at para. [53]–[57]; (2007) 44 E.H.R.R. 5, at para. [55]–[65].

¹²⁸ *Ibid.*, dissenting opinion of Judge Tulkens, at para. [3].

¹²⁹ *Ibid.*, at para. [109].

¹³⁰ Merriam Webster Dictionary (at <http://www.m-w.com/dictionary>).

¹³¹ I.T. Plesner, “The European Court of Human Rights Between Fundamentalist and Liberal Secularism” (Strasbourg conference: A Forum on Freedom of Religion and Belief, 2005 at [http://www.strasbourgconference.org/papers/Plesner's%20Strasbourg%20paper%20\(revised\).pdf](http://www.strasbourgconference.org/papers/Plesner's%20Strasbourg%20paper%20(revised).pdf)).

¹³² J. Martínez-Torrón, “Religious Liberty in European Jurisprudence” in M. Hill (ed.), *Religious Liberty and Human Rights* (Cardiff 2002), pp. 126–127. The fundamentalist strain was evident in, e.g., the ‘atheocracies’ of the former U.S.S.R.

to whether religion should have any role in government. Where liberal secularism is in issue, it may therefore be appropriate to recognise a margin of appreciation. Secular fundamentalism, however, questions whether religion should be permitted in society. Here, there is no difference of opinion – “Pluralism, tolerance and broadmindedness are hallmarks of a ‘democratic society’”¹³³ – and no scope for the application of any margin of appreciation.

The Court in *Şahin* does not examine the nature of the secular regime in Turkey, or consider the possibility that secularism may imply a prejudice against religion. Yet, Turkey’s Kemalist secularism could arguably fall closer to the latter category.¹³⁴ At the very least, this risk militates against the glib assumption that the “notion of secularism ... is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights”.¹³⁵ Whether this is true depends on the “notion” being liberal and neutral towards, rather than fundamentalist and opposed to, religion. Absent examination of these issues, it is wholly inappropriate for the Court to apply a wide margin of appreciation.

2. *Unquestionable Responsibility*

Irrespective of the margin applied, it cannot supplant the Court’s supervisory role. Even where state practices diverge, European supervision is not “limited to ascertaining whether the respondent state has exercised its discretion reasonably, carefully and in good faith”: the Court must consider the proportionality of the prohibition, and confirm the Turkish authorities’ reasons are relevant and sufficient to justify their approach.¹³⁶

¹³³ (2007) 44 E.H.R.R. 5, at para. [108].

¹³⁴ For political background on the Turkish situation, see, e.g.: Human Rights Watch, “Memorandum to the Turkish Government on Human Rights Watch’s Concerns with Regard to Academic Freedom in Higher Education, and Access to Higher Education for Women Who Wear the Headscarf” at <http://www.hrw.org/backgrounder/eca/turkey/2004>; I. Traynor, “Secular Turks and Islamists Fight for Supremacy in the Courts and Streets”, *The Guardian*, 12 June 2006.

¹³⁵ (2007) 44 E.H.R.R. 5, at para. [114]. The Court refers consistently to the special constitutional importance to the Turkish state of “secularism, as the guarantor of democratic values” ((2007) 44 E.H.R.R. 5, at para. [113]). However, it would be inappropriate to attribute any weight to Turkey’s own assessment of secularism’s importance when considering the margin of appreciation. The necessity of any interference must be evaluated by reference to Convention principles alone. It would be circular (and self-defeating) for the necessity of national rules to be determined by national values: this would effectively deprive persons living in that country of human rights protection. Article 9(2) prescribes the only objectives justifying interference: national values are only relevant to the extent they align with these objectives. Many national constitutional precepts will align with them, because national constitutions and the European Convention are, in principle, both concerned with fundamental freedoms. However, the application of Turkish secularism in *Şahin* is not consonant with Article 9(2): its constitutional significance in Turkey is therefore irrelevant.

¹³⁶ *Vogt v. Germany* (1996) 21 E.H.R.R. 205, at para. [52(iii)].

The Court acknowledges its responsibility, but fails to act accordingly. It accepts a margin of appreciation “goes hand in hand with” and “does not exclude” European supervision, even referring to its continuing obligation to “determine whether the measures taken ... were justified in principle and proportionate”.¹³⁷ Yet, it plays no such role. As Judge Tulkens remarks, “European supervision seems quite simply to be absent from the judgment”.¹³⁸

Instead, the Court applies an even wider margin of appreciation than could be justified were its conception of the “issue” at stake correct. It merely checks whether regulations prohibiting the headscarf are *not disproportionate*. This effectively shifts the burden from the state (to show the means were proportionate) to Ms. Şahin (to show they were not).¹³⁹

Thus, the Court applies a “margin of abdication”: (ab)using the doctrine to justify its failure to scrutinise the Turkish authorities’ actions properly. The Court’s posture vis-à-vis the national authorities is not deferential; it is positively supine. Such a stance is hardly apt to foster public faith in its ability to mediate between the interests of individuals and society.

B. *Marginal Significance*

The margin of appreciation, being a direct function of the subsidiarity principle,¹⁴⁰ does not apply in national cases. However, the issue still has resonance in the domestic context. A domestic court must understand both the differences and similarities between the European principle and its national counterparts.

1. *Differences in Deference*

Domestic courts must consider, and compensate for, the European margin when applying Strasbourg jurisprudence. UK courts also recognise a discretionary area of judgment.¹⁴¹ However, this domestic “margin of discretion” cannot be assumed to apply in the same situations or to leave the same latitude to decision-makers as the margin of appreciation.

The rationale underlying each margin differs and, so, their results may too. The domestic margin reflects the separation of powers: the horizontal relationship between the judiciary, the executive and the legislature. It recognises both: the limits of the judiciary’s institutional

¹³⁷ (2007) 44 E.H.R.R. 5, at para. [110]; (2005) 41 E.H.R.R. 8, at para. [102].

¹³⁸ (2007) 44 E.H.R.R. 5, dissenting opinion of Judge Tulkens, at para. [3].

¹³⁹ E. Bribosia and I. Rorive, “Le Voile à l’École: Une Europe Divisée” (2004) 15 *Revue Trimestrielle des Droits de l’Homme* 951 (at <http://www.fucam.ac.be/redirect.php?id=41495>).

¹⁴⁰ J. Simor and B. Emerson, *Human Rights Practice* (London 2000), at para. [1.087].

¹⁴¹ Cf. Lord Hope in *R. (Kebilene) v. DPP* [2000] 2 A.C. 326.

capacity (with respect to the information or expertise it has available to it) vis-à-vis the executive and the legislature; and that they are both democratically accountable, unlike the judiciary.¹⁴² The European margin reflects the principle of subsidiarity: the vertical relationship between an international court and domestic authorities.¹⁴³

The reliance in *Begum* on Strasbourg authority makes insufficient allowance for these differences. Such considerations should militate towards more circumspect treatment of both Strasbourg's dubious interference case-law and its findings in *Şahin*, particularly given the margin of appreciation's misapplication in that case. Lord Hoffman observes that "In applying the Convention rights ... reproduced as part of domestic law ... the concept of the margin of appreciation has ... no application", yet fails to acknowledge the same principle pertains in applying Convention case-law too.

2. Similarities in Supervision

The reasons for deference may differ, but the overriding obligation on the European Court to exercise supervisory responsibility is similar to the "primary" responsibility for review on domestic courts under the Human Rights Act 1998 (the "Act").

The Act, while not permitting a merits review, requires judges actively to consider the necessity of any interference. Understanding the European system should therefore assist domestic courts more familiar with traditional "secondary" *Wednesbury* review.¹⁴⁴ *Wednesbury* asks simply whether a decision was manifestly unreasonable. Now, like the European Court, domestic courts must accept a proper supervisory role.¹⁴⁵

Lord Hoffman's comments on this issue in *Begum* are opaque and apt to misrepresent this supervisory obligation. He states, "a domestic court should accept the decision of Parliament to allow individual schools to make their own decisions about uniforms".¹⁴⁶ Yet, the proper question is not *where* such decisions should be taken, but *how* they should be taken. The Lords' task, then, was to consider whether the school's decision was justified by Article 9(2) objectives. Lord Hoffman's choice of words is unfortunate since they could be construed as abdicating responsibility for reviewing the school's decision because of Parliament's prior decision.

¹⁴² Cf. Lord Hoffman in *R. (Prolife Alliance) v. BBC* [2004] 1 A.C. 185, at para. [76].

¹⁴³ *Handyside v. United Kingdom* (1976) 1 E.H.R.R. 737, 753 at para. [48].

¹⁴⁴ Cf. *Associated Provincial Picture House Ltd v. Wednesbury Corp* [1948] 1 K.B. 223, 230, CA; even the heightened scrutiny under *R. (Smith) v. Ministry of Defence* [1996] Q.B. 517, CA, falls short of the intensity of proportionality review.

¹⁴⁵ *Per* Lord Steyn in *R. (Daly) v. Home Secretary* [2001] 2 A.C. 532. Cf. Lord Lester and D. Pannick (eds.), *Human Rights Law and Practice* (London 2004), at para. [3.19].

¹⁴⁶ [2007] 1 A.C. 100 at para. [64].

Lord Bingham's exposition of the court's role is to be preferred. He concluded that, "It would be ... irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors, to overrule their judgment on a matter as sensitive as this".¹⁴⁷ However, he did so having first reflected on the decision-making process adopted by the school in arriving at its judgment, finding "the rules laid down were as far from being mindless as uniform rules could ever be."¹⁴⁸ This combines proper review with respect for the school's institutional expertise.

C. No Margin for Error

The margin of appreciation carries no margin for error, and in *Şahin* the Court commits two. First, in misapplying a wide margin, it deprived Ms. Şahin of effective human rights protection. Secondly, in abdicating its supervisory responsibility, it has damaged public confidence in the Court's ability to mediate between the interests at stake in matters of faith. Individuals have no incentive to place their faith in institutions which fail to fulfil their role. The Court's mistakes in *Şahin* therefore have repercussions beyond Ms. Şahin's circumstances alone. Clarity regarding the reasons for, and application of, the margin of appreciation is urgently required if confidence in the Court is to be restored.

V. BOUNDARIES OF REASON AND RELIGION

Şahin and *Begum* therefore both display judicial reluctance to analyse the issues arising in cases concerning Islamic dress under Article 9(2): the former in abdicating its supervisory responsibility; the latter in retreating to interference analysis to decide the case.¹⁴⁹

This reluctance demonstrates confusion within Convention case-law regarding when and how secular authority should intervene in religious matters. The Court has arguably been both too keen to assert its own authority over certain spiritual issues, and too diffident in restraining the intervention of executive authority over those wearing the Islamic headscarf.

¹⁴⁷ *Ibid.*, at para. [34].

¹⁴⁸ *Ibid.*, at para. [33]–[34]. Arguably, the school uniform rules could have been even more tolerant of religious dress. This would depend on what could be considered the minimum degree of uniformity of dress required to promote and preserve cohesion within the school. The rules regulate the colour, cut and cloth of school uniforms; would uniform colour alone be sufficient? Lord Bingham (rightly) regards the answer to this question as lying within the school's discretion.

¹⁴⁹ The majority in *Begum* does at least analyse the case under Article 9(2) in the alternative. Yet, the precedent of preference for interference analysis remains, which sets a dispiriting standard for future applicants to overcome.

A. Limits of Reason

Judges are ill-equipped to assess the validity of belief. It is thus generally accepted that “to adjudicate on the seriousness, cogency and coherence of theological beliefs is ... to take the court beyond its legitimate role.”¹⁵⁰ For this reason, *Williamson* emphasises that the thresholds for “belief” and “manifestation” constitute minimum requirements to ensure that Article 9 cases are brought (quite literally) in good faith.¹⁵¹ Likewise, the European Court has ruled, “The Convention rules out any appreciation by the state of the legitimacy of religious beliefs or the manner in which these are expressed.”¹⁵²

This light-touch analysis should then also apply to the threshold for “interference”. One can posit a conceptual distinction between the circumstances in which a right to manifest is not engaged and those in which it is engaged but without interference. However, having accepted that “manifestation” is “not always susceptible to ... rational justification”,¹⁵³ it is difficult if not impossible to disassociate them. The point at which A’s act limits the manifestation of B’s belief depends on the scope of B’s belief, which the Court accepts it is ill-equipped to determine. How then can it readily deny that A’s act interferes with B’s belief? Yet, as explained at section [II.B], the Court is generally reluctant to find an “interference” which would then require Article 9(2) analysis. The Lords in *Begum* unwisely followed this approach.

Moreover, even where in *Şahin* it does assume an interference, the Court’s subsequent statements betray too great a readiness to opine on the scope of applicants’ beliefs. For example, in stating that, even after the headscarf ban, practising Muslims are able to conform to “habitual forms of Muslim observance”,¹⁵⁴ by necessary implication the Court excludes wearing headscarves from “habitual” observance. Since the Court had already accepted wearing the headscarf constitutes religious manifestation, this statement contradicts the Court’s previous position.

It also puts the Court in the inappropriate position of interpreting *al-Qur’an*. By determining which acts of devout Muslims are habitual forms of observance, the Court substitutes its own interpretation for that of those holding a particular set of beliefs. This is a path fraught

¹⁵⁰ Lord Walker in *Williamson* [2005] 2 A.C. 246, at para. [57], citing in support: the High Court of Australia in *Church of the New Faith v. Comr of Pay-Roll Tax (Victoria)* (1983) 154 C.L.R. 120, 129–130; the Supreme Court of Canada in *Syndicat Northcrest v. Amselem* 241 D.L.R. 4th 1 at para. [43]; and the U.S. Supreme Court in *Employment Division v. Smith* (1990) 494 U.S. 872, at 886–887.

¹⁵¹ [2005] 2 A.C. 246 at para. [22]–[23] *per* Lord Nicholls and [54]–[64] *per* Lord Walker.

¹⁵² *Metropolitan Church of Bessarabia v. Moldova* (2001) 35 E.H.R.R. 306, at para. [117].

¹⁵³ [2005] 2 A.C. 246, at para. [23].

¹⁵⁴ (2005) 41 E.H.R.R. 8, at para. [111]; (2007) 44 E.H.R.R. 5, at para. [118].

with danger. First, it arguably requires believers to “prove” their beliefs, which seems contrary to the very essence of belief. Secondly, even if proof could theoretically be established by, for example, expert testimony, this seems impractical when considering religious observance.¹⁵⁵ Frequently, different sects dispute the correct interpretation of scripture. Disregarding one religious expert’s interpretation in favour of another would not only court controversy, it also potentially subordinates the interests of one individual to that of the group.¹⁵⁶

In *Karaduman*, the Commission again demonstrates an ill-advised willingness to interpret religious dogma. It blithely asserts, “*La photo apposée sur un diplôme a pour fonction d’assurer l’identification de l’intéressé et ne peut être utilisée par celui-ci afin de manifester ses convictions religieuses.*”¹⁵⁷ Such a statement also illustrates the dangers in doing so: the Commission completely misconstrues the Islamic precept, which requires modesty of appearance in public regardless of whether that appearance is in a photograph or in the flesh.

These considerations are, perhaps, why the US Supreme Court stated, “Courts are not arbiters of scriptural interpretation”.¹⁵⁸ They also commend the Court’s original approach: proceeding on the assumption that Ms. Şahin’s “decision to wear the headscarf may be regarded as motivated or inspired by a religion or belief”.¹⁵⁹ By subsequently approaching the issue differently, the Court creates both logical and theological difficulties for itself.

Opting for “justification” analysis under Article 9(2) avoids such difficulties. The proportionality approach is therefore preferable not only for the reasons argued previously – because of the sensitivities surrounding the wearing of Islamic dress and the flaws in the current interference test – but also because secular authorities are poorly placed to determine dogma.

B. Boundaries of Authority

The Court’s abdication of its responsibility for European supervision causes concern not only for Ms. Şahin, but also more generally for individuals across Europe, and begs the question why the Court would adopt such a weak stance in defending religious rights.

¹⁵⁵ The Court of Appeal’s well-intentioned if over-zealous approach in *Begum* illustrates the problems inherent in examining such evidence. Brooke L.J., *e.g.*, devoted 18 paragraphs to reviewing evidence on Islamic teaching regarding the wearing of *jilbab*, but still conceded such analysis was “bound to appear superficial” ([2005] 1 W.L.R. 3372 at para. [31]).

¹⁵⁶ S. Stavros, “Freedom of Religion”, at p. 613.

¹⁵⁷ (App. No. 16278/90) 74 D.R. 93. Translated: “Photos affixed to a diploma are intended to guarantee the identity of the person in question and cannot be used by that person to manifest her religious convictions.”

¹⁵⁸ *Thomas v. Review Board of Indiana Employment Security Division* 67 L.Ed.2d 624, 632.

¹⁵⁹ *Şahin* (2005) 41 E.H.R.R.8, at para. [71]; (2007) 44 E.H.R.R. 5, at para. [78].

The problem arises because the Court fails to distinguish between two differing views as to “the significance of religion in society” in modern Europe.¹⁶⁰ The first seeks to “neutralize public authorities in matters of religion”, the second “to neutralize religions in matters of public life”.¹⁶¹ Understanding where the boundary lies between public authorities and the general public is fundamental to delimiting when the Court can and should intervene in such cases.

1. *Neutrality of Secular Authority*

These differing viewpoints emerge from divergent interpretations of what caused the abuse of religious minorities by dominant religious communities during centuries of European conflict and persecution. One interpretation diagnoses the cause as abuse of *power*, and seeks to prevent abuse by imposing checks on dominant (religious) powers. The other diagnoses *religion* as the cause, perceiving it to be abusive in itself.

Prescriptions to remedy the first diagnosis have evolved gradually. The use of “minority treaties” to protect religious minorities from abuse reached its zenith in the inter-war period and its nadir with the horrors of the Holocaust.¹⁶² Following the failure of such treaties to protect Jewish and other minorities during the Second World War, a revised approach was adopted – replacing an emphasis on minority rights with that on the human rights of the individual.¹⁶³ Under either approach, the religious affiliation (if any) of governmental authority is not significant, provided the government is neutral towards those of other (or no) religious persuasions. This explains why “the Court has frequently emphasised the State’s role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society”.¹⁶⁴

The second diagnosis is the basis for secularism. Secularism appears in liberal and fundamentalist forms; in common is an assumption that religion itself is suspect. Liberal secularism only requires religion be removed from any position of power (a narrow assessment of the risk posed by religion), secular fundamentalism its removal from society altogether (a broader assessment). This

¹⁶⁰ (2007) 44 E.H.R.R. 5, at para. [109].

¹⁶¹ C. Caldwell, “In Europe, ‘Secular’ Doesn’t Quite Translate”, *The New York Times*, 21 December 2003.

¹⁶² The “Allied Powers” concluded a treaty with the new Polish state which included provisions for the protection of its Jewish religious minority. Similar treaties were concluded with other states in the same period: Czech-Slovak; Serb-Croat-Slovene; Romanian; and Greek. The Second World War horrifically exposed the inadequacies of the enforcement mechanism of such protections for religious freedom.

¹⁶³ M. D. Evans, *Religious Liberty and International Law in Europe* (Cambridge 1997).

¹⁶⁴ (2007) 44 E.H.R.R. 5, at para. [107].

distinction is crucial. Requiring that *government* be devoid of religious affiliation does not necessarily require that *society* be secular as well. Secular government can be neutral as to whether the population holds any particular (or no) religious belief(s), whereas secularised society is a population purged of religion. The former is consistent with the state's role as a "neutral and impartial organiser"; the latter patently is not.

Thus, there are two issues regarding "the significance of religion in society". The first concerns whether religion should have any role in government. Here, "opinion in a democratic society may reasonably differ widely" and it is appropriate to recognise a margin of appreciation, as noted above.¹⁶⁵ The second concerns whether religion (or atheism) should be permitted in society. To call this into question is anathema to Convention principles: Article 9 (and the Convention as a whole) is premised on protecting pluralism against the establishment of either uniformly religious or uniformly secular societies: "the pluralism indissociable from a democratic society ... depends on it".¹⁶⁶

2. *Boundaries of Secular Authority*

Understanding this fundamental distinction is vital given the inherent ambiguity in terms used when discussing these issues: "secularism" carries alternative meanings; so too, the term "state" may indicate either "government" – public authority – (*viz.* "state-run economy") or "society" – the general public – (*viz.* "nation-state").

Patently, the Court should only tolerate religion's removal from the state *qua* government, since only on *this* issue do European jurisdictions diverge. Religion must be permitted in the state *qua* society if it is to be pluralist. As the Court notes in *Şahin*, but seemingly fails to appreciate, "the role of the authorities ... is not to remove the cause of tension by eliminating pluralism, but to ensure that competing groups tolerate each other".¹⁶⁷

This distinction should, therefore, define the boundary of "public space" within which (liberal) secularist countries are permitted to require there to be no manifestation of religious identity. There must be a rational relationship to the actual objective: protecting the neutrality of public authority, *i.e.* governmental power.

Thus, one cannot accept the Turkish government's assertion in *Şahin* that "in the sphere of State education, which was regarded as a public service, the principle of secularism, of which the principle of neutrality formed an integral part, applied".¹⁶⁸ Applied to students,

¹⁶⁵ (2005) 41 E.H.R.R. 8, at para. [101].

¹⁶⁶ *Ibid.*, at para. [104].

¹⁶⁷ *Ibid.*, at para. [107], citing *Serif v. Greece* (2001) 31 E.H.R.R. 20, at para. [53].

¹⁶⁸ (2005) 41 E.H.R.R. 8, at para. [93].

this widens the concept of “state” neutrality beyond the governmental sphere of public authority to an amorphous, general “public” sphere. Students, unlike civil servants, patently are not part of the governmental function. Turkey’s reference to “public service” is therefore misleading. If the “public” sphere is not delimited by reference to involvement in government, it becomes difficult to discern what basis there is for determining its boundary.¹⁶⁹ What is purportedly necessary to protect governmental neutrality may, instead, facilitate purging religion from society.

Even as a teacher, Ms. Dahlab’s connection with governmental authority also remains distant. Perhaps the Court in her case considered banning headscarves a quid pro quo for an earlier Swiss judgment requiring the removal of crucifixes from classrooms.¹⁷⁰ Yet, it cannot convincingly be said that classrooms and teachers merit equivalent treatment under the principle of secularism. A classroom is inanimate, lacking “individuality” to which rights attach. Teachers have public responsibilities, but individual rights also.

To argue that civil servants waive all their individual rights because of their “relationship of subordination to the public authorities”¹⁷¹ would narrow the universal jurisdiction of human rights unjustifiably.¹⁷² While this relationship may entail circumstances where their individual rights are trumped by public responsibilities, this should not automatically be so. The proper mechanism for deciding the issue is by a carefully calibrated proportionality assessment, not by denying teachers’ rights are engaged at all.¹⁷³

3. Importance of Boundaries

Understanding this distinction becomes increasingly important as societies become increasingly diverse. The requirement of neutrality applies equally to all states, whether secular or otherwise. Pluralism demands that the governmental function of all countries *acts* neutrally as towards, and between, religion(s); (liberal) secularism just expects

¹⁶⁹ As Ms. Karaduman argued: “la laïcité fait partie des principes politiques d’un modèle gouvernementale” (*Karaduman v. Turkey* (App. No. 16278/90) 74 D.R. 93 (emphasis added)).

¹⁷⁰ *Dahlab*, The Law, at para. [1], cites an article regarding this issue: “Kreuz und Kruzifix in öffentlichen Räumen im säkularen Staat” (1997) 1 *Revue du Droit Suisse* 63.

¹⁷¹ *Dahlab*, The Law, at para. [1].

¹⁷² Under the Convention, Article 1, rights are to be secured to everyone. In *Kurtulmuş v Turkey* (App. No. 65500/01), the Court concedes as much, stating “membres de la fonction publique” are “individus qui, à ce titre, bénéficient de la protection de l’article 9 Il revient donc à la Cour ... de rechercher si un juste équilibre a été respecté entre le droit fondamental de l’individu ... et l’intérêt légitime”.

¹⁷³ However, whether teachers can manifest religious affiliation is definitely an issue of divergence among European states (*cf.* C. Langenfeld and S. Mohsen, “Germany: the Teacher Head Scarf Case” (2005) 3 *I.J.C.L.* 86; O. Gerstenberg, “Germany: Freedom of Conscience in Public Schools” (2005) 3 *I.J.C.L.* 94; S. Knights, “Religious Symbols”. Though this does not invalidate the foregoing critique of the reasoning in *Dahlab*, it does provide the Court with stronger arguments for applying a wider margin of appreciation in that case.

those associated with the governmental function to *dress* neutrally as well.¹⁷⁴ It is, therefore, vitally important the Court is clear about both its role and the distinctions to be made.

This distinction is particularly important vis-à-vis Turkey. Turkey is rightly concerned that religious fundamentalists should not threaten the rights of those who choose not to share their religious views. However, it is of equal concern that secular fundamentalists should not threaten the rights of devout Muslims who do not share their secular views. The “notion of secularism” is only “consistent with the values underpinning the Convention”¹⁷⁵ insofar as it protects the freedom of belief of devout Muslims to the same extent as that of their fellow Turks.

4. *Blurring the Boundary*

The Court’s reluctance to intervene against authorities in its headscarf jurisprudence must also be understood in the context of its repeated references to the threat of the headscarf’s potentially “proselytising effect”.¹⁷⁶ Such references are misleading and unhelpful. Completely contradicting the landmark decision in *Kokkinakis*, they suggest proselytism itself is wrong. This contradiction betrays further confusion: a failure to recognise that secularism and proselytism give rise to distinct concerns.

The Test of “Impropriety”

Kokkinakis established that proselytism was not only permitted under, but protected by, Article 9. In *Kokkinakis*, a 77-year old Jehovah’s Witness was sentenced to imprisonment for “proselytism”, having engaged a woman in discussion about his faith. The Court found Mr. Kokkinakis’s conviction violated Article 9, which includes the right to try to convince others of one’s beliefs. The Court recognised this right could be circumscribed, under Article 9(2), where necessary to protect others’ rights. However, in balancing between these competing interests, Mr. Kokkinakis’s right actively to evangelise his faith receives considerably more weight than Ms. Şahin’s right passively to wear her headscarf subsequently does.

¹⁷⁴ This comparison arguably calls into question the nature of ‘secularism’ even in its liberal manifestation. If not essentially a sop to anti-clerical secular fundamentalism, then what purpose does it serve to require neutral dress of those performing governmental functions? The appearance of civil servants should be incidental; it is their behaviour that should determine whether they adhere to state neutrality. Arguably, it is better that civil servants’ potential (religious) bias is visible, since this alerts persons dealing with those civil servants to it, whereas neutral dress disguises it.

¹⁷⁵ (2007) 44 E.H.R.R. 5, at para. [114].

¹⁷⁶ *Dahlab*, The Law, at para. [1]; *Şahin* (2005) 41 E.H.R.R. 8, at para. [98]; *Şahin* (2007) 44 E.H.R.R. 5, at para. [111]; *Karaduman* (App. No. 16278/90) 74 D.R. 93.

Kokkinakis found that protecting the rights and freedoms of others only required restrictions on “improper proselytism”.¹⁷⁷ Examples of “impropriety” include, “offering material or social advantages ... exerting improper pressure on people in distress or in need ... use of violence or brainwashing”,¹⁷⁸ none of which were demonstrated in *Kokkinakis*. These examples mark the boundary between the minister’s wife’s right to freedom *from* Mr. Kokkinakis’s views, and Mr. Kokkinakis’s freedom *to* express them. This balance is calibrated, consistent with the principle of effectiveness, to provide for broad rights for Mr. Kokkinakis and narrow exceptions to them.

Two Further Distinct Issues

Proselytism may, therefore, give rise to concern under Article 9, but concern quite separate from that arising in connection with secularism. Both concerns may seek to protect against abuse of power. Yet, secularism is concerned with preventing abuse of governmental power, whereas proselytism may concern abuse of any position of power. Conceivably, the two concerns may arise from the same facts, but this does not make them the same concern. Thus, an air-force officer may, in seeking to convert a subordinate to his faith, both abuse his position of authority as an officer (by proselytising “improperly”), and breach his obligation of neutrality as a civil servant (contrary to secularism).¹⁷⁹ However, the question of his proselytism remains incidental to that of preserving secular government.

It is crucial to be clear about which of the two concerns arises in any given case, since this determines the test to be applied in calibrating the appropriate balance between competing interests. Secularism permits that individuals in governmental roles can be obliged not to display (even passively) outward signs of their religion. The case-law on proselytism, however, only permits restrictions on individuals’ active propagation of their religion, where they do so “improperly”. The test of impropriety is open to interpretation,¹⁸⁰ and probably requires consideration of the position and power of both proselytiser and proselytised.¹⁸¹ However, it is not the same test as that regarding secularism. Secularism depends on what function an individual performs. Impropriety depends on how she or he performs it.

¹⁷⁷ *Kokkinakis v. Greece* (1994) 17 E.H.R.R. 297, at para. [48] (emphasis added).

¹⁷⁸ Judge Valticos (dissenting) even described proselytism as “rape of the beliefs of others”.

¹⁷⁹ This example combines the facts and findings of *Larissis v. Greece* (1999) 27 E.H.R.R. 329, at para. [54], and, among others, *Kalaç v. Turkey* (1999) 27 E.H.R.R. 552, at para. [30].

¹⁸⁰ Judge Pettiti suggests “impropriety”, “coercion” and “duress” could have been defined more clearly (*Kokkinakis v. Greece* (1994) 17 E.H.R.R. 297 (concurring opinion)).

¹⁸¹ Thus, for example, the position of authority held by a government official could be a factor in determining the propriety of her or his proselytism. Yet, it would not be the sole or conclusive factor.

Blurring the Distinction

The headscarf case-law blurs these two concerns. The consequent confusion regarding the proper test to apply renders it even less likely the Court will balance community and individual interests fairly. In *Dahlab*, in particular, the Court was persuaded by the potential “proselytising effect” a teacher’s headscarf may have on young students. If the Court’s concern truly related to proselytism, it should have analysed the “impropriety” of Ms. Dahlab’s, Karaduman’s and Şahin’s actions.

The mere wearing of religious attire is scarcely “improper”. The *passive* act of wearing the headscarf (even if worn with the intent of proselytising, which Ms. Şahin insists she did not¹⁸²) is a far cry from the *active* coercion inherent in the examples of impropriety listed in *Kokkinakis*. Even where worn in school classrooms, as by Ms. Dahlab, this alone cannot constitute “impropriety” on her part, which would require more active attempts by her to coerce or corrupt.¹⁸³ Yet, in *Dahlab* any such active proselytism was lacking: the Swiss Federal Court even expressly accepted that Ms. Dahlab was “not accused of proselytising or even of talking to her pupils about her beliefs”.¹⁸⁴

Therefore, unqualified references to the headscarf’s “proselytising effect” are unwarranted and unhelpful. By conflating the two issues of proselytism and secularism, the Court creates confusion for itself in determining the proper balance between competing interests, and for the interpretation of existing case-law relating to proselytism as well. If the Court felt proselytism to be a relevant concern, it should have applied the test expounded in previous decisions. If not, it should have avoided referring to the headscarf’s “proselytising effect” altogether.

C. Call for Clarity

The foregoing discussion illustrates the difficulties facing secular authorities in considering religious matters. It also emphasises the need for greater clarity within the Strasbourg headscarf jurisprudence. At present, the case-law is confusing and confused, and therefore risks

¹⁸² (2005) 41 E.H.R.R.8, at para. [85]; (2007) 44 E.H.R.R. 5, at para. [101].

¹⁸³ *Cf. Larissis v. Greece* (1999) 27 E.H.R.R. 329, at para. [8]–[9], where improperly proselytising air-force officers “engaged [their subordinate] in religious discussions, reading aloud extracts from the Bible and encouraging him to accept the beliefs of the Pentecostal Church.” The Court (applying the margin of appreciation) did also accept that, even where a superior merely responded to unsolicited questions from a subordinate regarding biblical interpretation and did not pressure the subordinate to convert, this could also be “improper” because of the subordinate-superior relationship (at para. [10] and [53]). However, even if the teacher-pupil relationship were deemed equivalent, there was no evidence that Ms. Dahlab even responded to unsolicited questions from the children. Absent evidence of active proselytism (whether solicited or unsolicited), there is no basis for suggesting any impropriety on her part.

¹⁸⁴ *Dahlab*, The Law, at para. [1].

further damaging public confidence in the ability of the courts to mediate properly between divergent interests in matters of faith.

VI. CONCLUSIONS

The issue of Islamic dress raises difficult questions for courts in Europe and domestically. It reflects one aspect of the diversity inherent in modern multicultural society, requiring courts to strike a balance between divergent interests which achieves social cohesion while respecting cultural difference. Furthermore, it calls for an awareness of the limits of the judiciary's ability both to decide matters of faith, and to review the decisions of democratically accountable authorities.

Difficult questions demand answers: current Convention case-law fails to provide an adequate response. Difficult questions are arguably those which call most urgently for judicial intervention – situations in which a mechanism for mediation is needed to reduce tensions arising from radically divergent interests. The Court's abdication of this role in *Şahin* both leaves those tensions unresolved and undermines public confidence in the Court's ability to resolve them in future.

A. Dangers of the Current Approach

A weak Court is a dangerous Court. The blurring of distinct issues, and the failure to reconcile individual and community interests creates confusion regarding the proper balance to be struck between the two – a failing that has repercussions not only for Ms. Şahin, or women in Turkey more generally, but all those under the Court's jurisdiction. The prohibition on wearing the headscarf in Turkey purportedly seeks both to prevent socially divisive militant political Islam and to promote gender equality. Ironically, the approach endorsed by the Court may produce the contrary result in each case.

1. Compounding Inequalities

Denying women wearing the headscarf access to education is not consonant with promoting gender equality. Turkish women already face significant socio-economic disadvantages.¹⁸⁵ The prohibition applicable to public educational establishments denies many women the opportunity to ameliorate their situation. In practice, this could deny women access to any education, there being no, or no equivalent, alternatives.

¹⁸⁵ According to the UNDP's 2005 gender-related development index, which includes female (il)lteracy, Turkey ranks 70 out of 177 countries (http://hdr.undp.org/statistics/data/pdf/hdr05_table_25.pdf).

Therefore, the majority's judgment could retard progress towards gender equality in Turkey. As Tulkens puts it, "the majority have accepted ... exclusion from precisely the type of liberated environment in which the true meaning of [secularism and equality] can take shape and develop".¹⁸⁶ It seems perverse to counter the (assumed) obligation to wear the headscarf with (another) obligation not to do so.¹⁸⁷

2. Politically Divisive

The approach of the majority in *Şahin* does not merely maintain a status quo; it threatens to exacerbate division. In failing to recognise or acknowledge alternative arguments, the Court conflates the extreme with the moderate. This oversimplification risks alienating and marginalising moderate (and majority) opinion.¹⁸⁸ By denying religious Muslims a political voice, it invites the very militancy it seeks to protect against.

The problem of alienation becomes increasingly acute as states today have increasingly diverse populations. There are various means by which states have sought to reconcile difference, ranging from assimilationism to accommodation.¹⁸⁹ Each requires communication between society's constituents. Alienation severs those very communicative bonds that hold society together. Thus, an approach to dealing with the challenges of diversity that fails to acknowledge and to engage with alternative outlooks is logically bankrupt.

The stance adopted by the Court therefore carries a real risk that Muslims might lose faith in the Court's ability to render impartial justice. The judgment in *Şahin* resulted in the applicants in *Fazilet Partisi v. Turkey* withdrawing their case, arguing that the Court, "in adopting a different approach in dealing with complaints brought by European Muslims confronted by injustice because of their beliefs, has created a double standard".¹⁹⁰ Irrespective of whether the Court's approach actually constitutes "Islamophobic" discrimination as alleged, this perception may herald a wider problem for maintaining respect for the rule of law.

B. Prescription for the Future

A strong Court is needed now more than ever. With the trend in European society moving towards increasingly diverse societies, the need for effective and fair principles by which to navigate the

¹⁸⁶ (2007) 44 E.H.R.R. 5, dissenting opinion of Judge Tulkens, at para. [19].

¹⁸⁷ Lyon and Spini, "Unveiling the Headscarf Debate", p. 341.

¹⁸⁸ "Turkey: Majority Want Headscarf Ban Lifted, Poll Suggests," *The Guardian*, 15 June 2006.

¹⁸⁹ S. Knights, "Religious Symbols", 500; S. M. Poulter, "Muslim Headscarves in School: Contrasting Legal Approaches in England and France" (1997) 17 O.J.L.S. 43.

¹⁹⁰ App. No. 1444/02, at para. [9].

appropriate course between individual and community interests is becoming correspondingly more pertinent. Individual rights should smooth the rough majoritarian edges (or excesses) of democracy.

Instead, in *Şahin*, the Court has set the legal tests of proportionality and necessity so high, and has reduced the intensity of its supervisory review of national action so low, that it is questionable whether the Court, or indeed the Convention, is adequate to the task of securing respect for minority traditions in a multicultural Europe.

Lord Woolf has described the task facing courts today as follows, recognising the need for change and for courts to take a more central role in society in future:¹⁹¹

Over recent years, recognition of the importance of the rule of law and the significance of the independence of the judiciary has increased dramatically. One of the most important of the judiciary's responsibilities is to uphold the rule of law, since it is the rule of law which prevents the Government of the day from abusing its powers. ... Unless the public accepts that the judiciary are independent, they will have no confidence in the honesty and fairness of the decisions of the courts.

The minority judgment in *Begum*, and Judge Tulkens' lone dissenting judgment in *Şahin*, provide a prescription for a better balanced approach to this task for the future. The majority judgment in *Begum*, while prone to criticism for its undue reliance on dubious Convention case-law, also has much to commend it. These decisions demonstrate the value of firm grounding in evidenced argument, the more nuanced balance achievable through proportionality analysis, and the importance of the court's supervisory role in protecting human rights.

The Convention is supposedly a "living instrument":¹⁹² the European Court can and must show itself capable of changing for the better. Examples of the Court's dynamic interpretation of Convention principles and evolving jurisprudence include both the increased tolerance for homosexual behaviour¹⁹³ and increasing recognition for transsexual status.¹⁹⁴

The time for change, then, is now, not years hence. Gradual evolution is a luxury society can ill afford at present. Two decades passed before the Commission conceded it was "opportune to

¹⁹¹ "The Rule of Law and a Change in the Constitution" [2004] C.L.J. 317.

¹⁹² *Tyrer v. UK* (1970) 2 E.H.R.R. 1, at para. [31].

¹⁹³ *Cf. Dudgeon v. UK* (1982) 4 E.H.R.R. 149; and the development from *X v. UK* (1981) 3 E.H.R.R. 63 to *Sutherland v. UK* (1997) 24 E.H.R.R. 22.

¹⁹⁴ *Cf.* the diminishing majority in the successive cases of *Rees v. United Kingdom* (1987) 9 E.H.R.R. 56; *Cossey v. UK* (1991) 13 E.H.R.R. 622; and *Sheffield and Horsham v. UK* (1999) 27 E.H.R.R. 163.

reconsider” the question of the age of homosexual consent in *Sutherland*.¹⁹⁵ If the Convention is indeed a living instrument, now is the time for it to evolve in order to provide an adequate means of resolving the differences arising in today’s multicultural society.

¹⁹⁵ (1997) 24 E.H.R.R. 22, at para. [58]-[60].