COVERING ISLAM – BURQA AND HIJAB: LIMITS TO THE HUMAN RIGHT TO RELIGION

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1 Introduction: Human Rights after 9/11

Since September 11, 2001 opposition to militant forms of Islam and overt modes of public Islamic identification in avowedly 'secular' nation-states has intensified. Since then, following new legislation and court rulings, the covering of Muslim women has become a human rights concern in a number of countries including France, Germany, Holland, Turkey and the United States. Freedom of religion, in this case, the freedom of Muslim women to dress according to their interpretations of the dictates of Islam, has been challenged and 'limited' in the light of the rights of others. A version of this issue surfaced in New Zealand earlier this year. The purpose of this paper is to examine the New Zealand case in the context of a number of overseas developments. Although each context has unique features, the broader references will hopefully extend our understanding of the human right to religion and the limits thereof.

2 The 'Burqa' Case in New Zealand 2004

In the Auckland District Court on 17 January 2005, a New Zealand judge, Lindsay Moore, ruled that two Muslim women, originally from Afghanistan, would have to remove their burqas, full-face and body veils, and show their faces as witnesses in a case of insurance fraud. As a concession to their religious beliefs, and out of respect for their customs, and so that their 'modesty' might be maintained, however, they will be permitted when giving evidence to wear headscarves and be behind a screen shielded from the general public and the defendant. The judge argued that, "authorising the giving of evidence from beneath what is effectively a hood or a mask would be such a major departure from accepted process that the values of a free and

democratic society as to seriously risk bringing the court into disrepute". It is reported that the compromise is acceptable to the two women concerned.[1]

In late October 2004, after listening to expert witnesses and a report from counsel, Judge Moore permitted the two Afghani women refugees to wear their burqas on the stand in the Auckland District Court. He allowed this only for them to explain why wearing their burqas was important to them, and why they had resisted the demand to remove them when called to the stand as witnesses in a case before the court.[2]

This case of insurance fraud had been adjourned until October 26 2004 after the two Afghani women, there as witnesses for the police, refused to remove their burqas when called to the witness box.[3] Faraiba Razamjoo and Fouzya Salim also refused the compromise position offered by the police of a closed court restricted to the interpreter, the judge, the police, the lawyer for the accused and the accused. The defence lawyer, Colin Amery,[4] contested the right of the witnesses to give evidence wearing their burqas as being contrary to the "whole jurisprudence of New Zealand". His argument was that as he would be unable to assess the demeanour and "body language" of these "masked" witnesses, this would prejudice his client, Abdul Razanjoo's right to a "fair trial". He acknowledged the human right to religion as enshrined in New Zealand law but considered that it is limited in this case as secondary to the universal right to justice. He also contended that while it might be acceptable and normal to wear the burqa in Afghanistan, these women had come to New Zealand and should abide by the norms and customs here. The judge considered that whether the women should unveil was a matter of

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1 Elizabeth Binning (18 January 2005) *New Zealand Herald* Auckland. http://www.nzherald.co.nz/index.cfm?ObjectID=10006992 (last accessed 25 January 2005).

2 On Afghani women, see Rosemarie Skaine *The Women of Afghanistan Under the Taliban* (McFarland, London, 2001), and on Islam in Afghanistan, see, Louis Dupres *Afghanistan* (Princeton University Press, Princeton, 1973); Oliver Roy *Islam and Resistance in Afghanistan* (Cambridge University Press, Cambridge, 1986); Oliver Roy *From Holy War to Civil War* (Darwin Press, Princeton, 1995); Asta Olesen *Islam and Politics in Afghanistan* (Curzon, London, 1995).

3 *Police v Abdul Razamjoo*, Auckland District Court, 2004.

4 Elizabeth Binning (27 October 2004) *New Zealand Herald* Auckland, http://www.nzherald.co.nz/index.cfm?ObjectID=3604539 (last accessed 25 January 2005).

"considerable importance", and he was not prepared to give a decision without hearing formal submissions and overseas case law on the issue.

This case raises a number of importance issues concerning the human right to religion and I want to begin by exploring these a little further. The New Zealand Bill of Rights, grants people the right to practice their religion in private and public. Section 15, Religion and Belief:

> *Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.*

And, under Section 20, Rights of Minorities:

> *A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.*

Siraj Salarzi, a spokesman for the New Zealand Afghani Association, reported that "veils were an important part of a Muslim woman's religion".[5] Fouzya added later, insisting on speaking to a woman reporter, that the burqa is her own choice and that "our beauty is saved for our husband".[6] The two women have indicated that whatever the judge's final decision, they will not de-veil even if subpoenaed. The story was picked up in the international press.[7]

While religious rights under New Zealand law are reasonably clear, how are they to be applied in our courts? It is important that the issue is decided as a matter of human rights and not as an interpretation of Islam. It is not the place of New Zealand judges to make judgements about whether Muslims in New Zealand have got their Islam right or not. While there has been considerable debate among members of the country's Muslim communities, they offer differing interpretations of Islamic law on this matter. The president of the Federation of Islamic Associations of New Zealand formally requested information on this from his committee of imams. They were

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5 Editorial (29 July 2004) *New Zealand Herald* Auckland, http://nzherald.co.nz/index.cfm?ObjectID=3581129 (last accessed 25 January 2005).

6 Tony Wall and Sarah Stuart (1 August 2004) *Sunday Star-Times* Auckland, A3.

7 For example (30 July 2004) *Bahrain Tribune* Bahrain.

divided, although a majority argued that the law could be satisfied with a head covering less than the full head and face veil. It is not at all clear of the status of this 'opinion' inside or outside of the constituent communities that make up the Federation. New Zealand's only Muslim Member of Parliament supported this view, claiming that a distinction can be made between Islamic laws per se and customary tradition. What is clear, however, is that elements within the Muslim community understand the law and authoritative religious practices in different ways, and that the different parties justify their view on the basis of the same authoritative texts. As a matter of fact, the wearing of the burqa is justified by 'scriptural' reference cited by Muslim authorities.

3 Veiling in Islamic Traditions

Let's look briefly at some of the religious background to the issue. The principal authority governing Muslim life and faith is the revelations by Allah to Muhammad over a twenty-year period, known as the Qur'an (Arabic, recitation) and the records of his life as an exemplary believer, known as Hadith (Arabic, report or tradition). The 114 chapters (each chapter is a sura) of the Qur'an are arranged in descending order of length. Only the text in Arabic is referred to as the Qur'an.

Historically, all Muslim communities have traced the authority for, and legitimated their customary practices by, reference to the Qur'an and the Hadith. These authoritative customary practices include modest dress for all Muslims, and in particular the 'veiling' (Arabic, hijab) of women. There are a variety of different forms of the hijab (Arabic, covered) or veil, ranging from the headscarf (hijab), via the two-piece veil, the al-amira, the long rectangular scarf or shayla worn widely in the Gulf states, the waist-length cape or khimar, the Iranian chador, the full-face veil or niqab, up to the most concealing of Muslim veils, the burqa, covering the entire face and body.

For the authority for the veil, reference is most usually made to the Qur'an, Sura 33:59. The corresponding English meaning is given as:[8]

> *O Prophet, tell your wives and your daughters, and the women of the believers to bring down over themselves part of their outer garments.*[9] *That is*

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8 Based on the English rendering of the Arabic text by Muhammad Asad *The Message of the Quran* (Dar Al-Andalus, Gibraltar, 1980).

9 The word hijab, here jalabib, the plural form of jilbab is used meaning partition, separator, cover, woman's dress or clothing.

> *the more suitable that they will be known and not be abused. And ever is Allah Forgiving and Merciful.*

Qur'an, Sura 24:31 is also frequently cited in this regard:

> *And tell the believing women to reduce their vision and guard their private parts, and not expose their adornment*[10] *except that which is apparent; and let them wrap their covers over their chests*[11] *and not expose their beauty except to their husbands and fathers, or the fathers of their husbands, or their sons, or the sons of their husbands, or their brothers, or their brothers' sons, or their sisters' sons, or their women, or what their right hands possess, or their male attendants who are incapable, or to children who are not yet aware of women's nakedness; and that they not stamp their feet to make known what they conceal of their adornment. And turn to Allah in repentance, all of you believers, that you may succeed.*

These passages have been interpreted and understood alongside the following Hadith, Bukhari, Volume 1, Book 8, Number 395, Verse 2:[12]

> *And as regards the (verse of) the veiling of the women, I said, 'O Allah's Apostle, I wish you ordered your wives to cover themselves from the men because good and bad ones talk to them.' So the verse of the veiling of the women was revealed.*

The word hijab, partition or cover, is also used in Qur'an, Sura 42:50, where the hijab separates man from God. The Ka'ba in Mecca is veiled and the veil is a sign of something being marked off or sacred.

The original injunction while given to Muhammad and referring only to the women of his household has been understood to refer to the women of 'all believers', that is, all Muslim women. In different Muslim cultures the veiling/covering practices have differed, each authoritatively legitimated by reference to the Qur'an and Hadith, most usually by the same verses. This cultural variation has historically been thus equally mandated by identical authoritative texts. In recent years a number of Muslim reformers have begun to distinguish the teachings of the canonical texts from the cultural

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10 Arabic, zina, ornaments or jewels.

11 Arabic, juyubihinna.

12 *Sahih Al Bukhari* (translated by Muhammad Asad) (Dar Al-Andalus, Gibraltar, 1938).

practices that these have traditionally justified. This new way of interpreting tradition allows traditional scriptural authority to be maintained while granting a degree of flexibility in the development or change in the form of selected cultural practices. These modernist attempts to revise and reform practices are fiercely contested by more traditionalist interpreters. These debates between modernisers and conservatives are complex and take different forms in different cultural contexts. Caution needs to be exercised when entering into these intra-Muslim debates and discussions without a knowledge of how widespread a particular non-traditional point of view is held and when and where and by who. Many reform views are marginal and Algerian or Malaysian, or Indonesian or French or Turkish minority viewpoints may be quite inappropriate when considering, for example, Afghani Muslim traditions. Such external and alien impositions are often used to de-legitimate specific cultural practices.

Veiling or not – whether of the hijab, the al-amira, the shayla, the khimar, the niqab, or the burqa – is a complex matter much debated across the Muslim world. Veiling is the subject of court cases in Europe, Turkey, the United States and elsewhere, and legislation in a number of countries. The practice has proved to be remarkably resilient to modernisation and development, and has in recent years in a number of locations increased as a sign of positive Muslim identity and pride. In Afghanistan the practice of wearing the burqa is near universal and understood to be authorised by the traditions and texts above. Veiling allows for a public declaration of the acknowledgement of the authority of tradition and surrender to Allah.[13] In practice, it is a widespread cultural practice taken on by individual or communal choice and the loss of the veil threatens the usual degree of privacy in public, identity, protection and mandated modesty. The removal of the 'veil' can be profoundly disorienting and lead to vulnerability.[14]

It is interesting to note that veiling also has a widespread Western cultural history, the remnants of which are still evident in the nun's wimple and the

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13 On veiling, see Fadwa El Guindi *Veil: Modesty, Privacy and Resistance* (Berg, New York, 1999).

14 See Marion Moltena, *A Language in Common* (The Women's Press, London, 1987) 90: "A burqa you know is something a person outside sees. You are inside it. You don't see, or think it strange. It is there to stop others from seeing you from watching them. You see everything. Inside you feel free …You don't have impertinent eyes coming in when you want to be alone."

bridal veil, and in some European cultures widows still wear the veil. The cultural variation of Christian practices is a useful parallel to Muslim cultural diversity.

Cultural practices within the law are part of the self-determination of cultural groups and communities, and decisions as to their nature and authority are best left to these communities. Muslim legal codes and practices have a long and complex history and are easily misread as a sort of Protestant Christianity, that is, reading back to the Qur'an, in translation, as a form of proof-texting to support or condemn specific cultural practices. The dynamics and processes of law, customary practice and tradition do not work quite this way in the many forms of Islam.

We can be confident that scripture and tradition authoritatively mandate the covering of women in a modest fashion, and further that for many in the Afghani Muslim community this has been understood to entail the wearing of the burqa. Should such Muslim women be allowed to wear their normal attire whenever possible? In the Auckland case, as their identity was never in question should they just have been given the opportunity to give evidence in their burqas? Here, it might be argued that their human right to religion outweighs the benefits of the removal of their veils. There may well be other scenarios where the human right to practice their religion is outweighed by other considerations.

4 Driving in Florida 2004

The second case that I discuss is that of Sultaana Freedman,[15] which has a number of interesting parallels to the Auckland case. Sultaana Freeman took the stand and gave evidence wearing her niqab, or face veil, similar to a burqa in that only the eyes are visible, and this was unchallenged and does not appear to have been an issue at all in the Florida District Court system. Sultaana Freedman was born Sandra Keller and brought up as a Pentecostal Christian and she served for a number of years as an evangelist preacher. She changed her name when she converted to Islam in 1997 and she is married to Abdul-Malik Freedman, also an American convert to Islam.[16] After moving

15 Sultaana Lakiana *Myke Freeman v. State of Florida*, Department of Highway Safety and Motor Vehicles Case No. 2002-CA-2828 (9th Cir).

16 Details taken from interview with Geraldo Rivera at http://sociology.ucsd.edu/~soc169/topic3/groupc/Script.htm (last accessed 14 January 2005). The

to Florida early in 2001, she applied for a driving licence. For religious reasons, in particular the demand for modesty, which includes not showing her face to men outside of her family, Mrs Freedman wears a full-face niqab. She wore this for the photograph for her Florida driving licence issued in February 2001.

In November and December of 2001, following the terrorist attacks of September 11, the Florida Department of Highway Safety and Motor Vehicles (FDHSMV) wrote to 36 year-old Sultaana Freedman requesting that she have her driving licence photograph retaken with her full face exposed, that is, without her niqab even though her licence had a 2007 expiry date. When she refused her licence was revoked.

The case came to trial in Orlando in May 2003. The American Council of Civil Liberties took up her case and ACLU lawyer, Howard Marks, represented her. Their case was twofold: (1) that her religious freedom under Article 1 of the Constitution, here the Florida constitution, parallels the US Constitution granting religious freedom, freedom of speech, due process, equal protection and right to privacy; and (2) that in demanding that she remove her niqab the State of Florida was in breach of its own Religious Freedom Restoration Act of Florida 1988 (RFRA).[17]

Marks cited the Nebraska case of Francis Quaring, a Pentecostal Christian, who believed that the second of the Ten Commandments[18] of her Christian faith forbade her from being photographed.[19] She was permitted to drive on a licence without a photograph. Other situations and cases in 14 states, including in Indiana and Colorado, were also referred to and the claim made

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significance of their conversions is only in that she argued that as an "American" her religious rights must be allowed.

17 This is Chapter 761 of the Florida Statutes, sections 761.01-05, Florida Freedom Restoration Act of 1998.

18 The second commandment (Exodus 20:4) reads: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is on the earth below, or that is in the water under the earth". *The Holy Bible* (Collins, London, 1929) 71; *Jensen v Quaring* 472 U.S. 478 (1985).

19 (11 August 2002) *New York Times* New York, 4. It is interesting to note that as a result of two earlier arrests Sultaana Freedman's photographs were already on file in her former home state of Illinois. Also, see http://www.geocities.com/freemanvsdmv/ (last accessed 14 January 2005). See also, http://www.cnn.com/2003/LAW/06/06/florida.license.veil/index.html (last accessed 25 January 2005).

that over 4,000 drivers have valid licences without photographs in Florida alone. The majority of these are temporary licences.

The Florida 1988 RFRA has its history in the 1990 US Supreme Court case, Employment Division, *Department of Human Services v Smith*.[20] The Supreme Court ruled that the State of Oregon could refuse employment to Native Americans who used peyote for religious reasons. The perceived threat posed by this decision to established religious freedoms led to Congress passing the Religious Freedom Restoration Act (RFRA) to restore the previous standards for religious freedom.[21] This Act required the government to have a 'compelling reason' for not granting exemption to people with heartfelt attachments to religious customs, costumes, symbols and rituals. In 1997, the Supreme Court ruled that Congress had exceeded its authority when demanding that states comply with the RFRA. A number of states such as Florida passed own version of the RFRA in 1998.

In 761.02, 'exercise of religion' is defined as:

> *[A]n act or refusal to act that is substantially motivated by religious belief, whether or not the religious belief is compulsory or central to a larger system of belief.*

Section 761.03 of the Florida Statutes, Free Exercise of Religion Protected:

> *(1) The government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:*
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> *(a) Is in furtherance of a compelling governmental interest; and*
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> *(b) Is the least restrictive means of furthering that compelling governmental interest.*
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> *(2) A person whose religious exercise has been burdened in violation of this section may assert violation as a claim or defence in a judicial proceeding and obtain appropriate relief.*

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20 Employment Division, *Department of Human Resources v Smith* (1990) 494 U.S. 872.

21 This is the "compelling state interest" test taken from *Sherbert v Verner* (1963) 374 U.S. 398 and *Wisconsin v Yoder* (1972) 406 U.S. 205, 215.

Ninth Judicial Circuit Court Judge, Janet Thorpe,[22] decided in favour of the State of Florida, ruling that while Sultaana Freedman herself posed no threat to national security the possibility that others might use the niqab to endanger public safety permitted a limiting of her religious rights. The State did indeed have a "compelling governmental interest", namely in "public safety and security", and that this necessitated the photographic identification of all drivers. If the plaintiff wanted to drive she would have to remove her face veil for the licence photograph. In order to minimise the restrictions to her religious freedom and achieve the "same end in a less restrictive way", Sultaana offered to give a DNA sample for the purposes of identification. The State of Florida offered a woman photographer in a private room where no man could see her face. The judge ruled that if this interfered with the plaintiff's religious freedom, it was the very minimum that would allow compliance with the laws pertaining to driving licences.

Acknowledging the sincerity of her beliefs, the decision did not allow that the lifting of her veil for an identification photograph in front of women only would be a "substantial burden" to "her rights to free exercise of religion". In relation to the exercise of religion the judge fully recognised that Sultaana Freedman's reasons for wearing the niqab were the result her religious belief and refused to enter into a debate about the different interpretations of Islam by different Muslim experts and communities. The judgement includes:

> *The Court, however, finds it immaterial whether Plaintiff is in the majority or minority of any given sect of practicing Muslims. The Court will not choose between competing experts on Islam to determine whether Plaintiff's religious belief is justifiable or reasonable.*

Sultaana Freedman appealed and it was heard in the Fifth District Court of Appeal, Daytona Beach on June 9, 2004. At the time of writing this essay, the decision is still forthcoming.[23]

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22 For a discussion of the original decision, see Patrick Currier "*Freeman v State of Florida*: Compelling State Interests and the Free Exercise of Religion in Post-September 11th Courts" *Catholic University Law Review* 53 (913-940) Spring 2004.

23 It is interesting to note that in February 2004 the Alabama Department of Public Safety reviewed its policy banning all head coverings for driving licence photographs and decided that although a full-face photograph is required, this can be achieved alongside the wearing of a headscarf. Women unveil for licence photographs in Kuwait, Qatar, Bahrain and Jordan.

5 European Court of Human Rights 2004

In June 2004[24] the European Court of Human Rights in Strasbourg rejected the claims of discrimination made by a 31 year-old female medical student, Leyla Şahin, who had been barred from attending Istanbul University because she insisted on wearing her hijab, or Islamic headscarf.[25] Leyla Şahin, a Turkish citizen from a traditionally observant Muslim family, wore a hijab as part of her religious obligations. In February 1998, when she was in the fifth year of her studies at Istanbul University, the institution issued guidelines banning students 'wearing' beards or headscarves from attending classes. Leyla was refused permission to take an oncology examination paper in the March of that year and she was excluded from her classes. She was give a written warning for contravention of the university's dress code and then suspended for participating in a protest meeting against the code.

Leyla Şahin's case was that prohibition of wearing the hijab at the university was a breach of international legislation, namely the Universal Declaration of Human Rights (UDHR) Article 18:[26]

> *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance;*

and, Article 9 of the European Convention on Human Rights:

> *1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either*

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24 29 June 2004, *Leyla Sahin v Turkey*, European Court of Human Rights, Strasbourg, Fourth Section, Application no 44774/98. The case was heard along with *Zeynep Tekin v Turkey*, a similar case in some respects. This case, however, was dismissed. The judgement is available at: http://www.associazionedeicostituzionalisti.it/cronache/giurisprudenza_comunitaria/cedu_velo/Sentenza_cedu_velo.pdf (last accessed 14 January 2005).

25 This is part of a much larger set of significant issues about the relationship between Islam and European legal and cultural norms that is currently beyond the scope of this paper. More generally on the European Convention, see Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press, New York, 2001).

26 http://www.hrweb.org/legal/udhr.html (last accessed 14 January 2005).

alone or in community with others and in public or 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 the protection of the rights and freedoms of others.

She also complained of interference with her right to education under Article 2 of Protocol No. 1 to the Convention:

> *No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own.*

Finally, she complained of a violation of Article 14 and that being forced to choose between her rights to education and religion was discrimination of believers over non-believers. She also referred to Articles 8 and 10:

14 The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

8 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

10 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of

> *frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*[27]
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

The seven judges of the European Court of Human Rights in June 2004 unanimously held that there had been no violation of Article 9 of the European Convention on Human Rights and having established that no separate issue arose under Articles 8, 10 and Article 14.

The judgement recognised the constitutional rights of the Turkish State to enact laws and regulations and acknowledged the case-law supporting restrictions on religious dress, inappropriate for a secular republic. As these were well known before the 1988 University of Istanbul rules on dress, they upheld the right of the university to formalise such rules and held this "separation of church and state" to be "necessary in a democratic society". While recognising that there had been "interference" with Leyla's religious freedoms based on her belief and obligation to fulfil her religious duties, this was the result of legitimate measures to "protect the rights and freedoms of others" and of maintaining "public order".

The Court contended that this interference was due to the adherence to two fundamental principles. First, secularism which is understood to be the basis of Turkey's democratic system and values since the founding of the modern Turkish state by Mustafa Kemal Ataturk (1881-1938) in 1923, and the recognition of the country's cultural and religious pluralism. This was considered to be important in the context of the university, an avowedly secular institution and agent of modernisation. Secondly, equality, that all citizens are equal before the law and also that Turkey is committed to the protection of the rights of women. The "rights and freedoms of others" was taken into consideration when examining the impact of wearing the hijab as a

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27 http://www.hri.org/docs/ECHR50.html (last accessed 14 January 2005).

symbol of Islamic commitment on other students. The University of Istanbul had universally banned all religious garb regardless of religion but still made provision for Muslim students to pray at the prescribed times. The wearing of religious dress was also linked to the need to maintain "public order" at a time of Islamic militancy and of Muslim groups seeking to revise the secular nature of the republic.

Three points might be made about the decision. First, the Court appeared to distinguish between the restriction of a right and the violation of that right. So that, while Seyla's right to wear her hijab was restricted this was not a violation of the European Convention or the Universal Declaration of Human Rights. Secondly, the Religious Consultative Council of Turkey's fatwa in May 2002, insisting that hijab is an inalienable religious right to women, was perhaps a factor here. Finally, the European Court distinguished between personal and private religion and the public and political expression of religion, namely Islam. The decision to allow the banning of the hijab in educational institutions and universities, formally binding on 45 states and over three-quarters of a billion people, surprised many Muslim and other human rights commentators. Currently, Ms Sahin is completing her medical degree in the Faculty of Medicine at Vienna University.

6 The New French Law 2004

The final example is the new law passed by the French legislature by a large majority[28] early in 2004, signed into law by the President of the Republic, Jacques Chirac, on March 15 under emergency procedures that came into force on September 2, 2004, the start of the school year. The law bans students wearing "conspicuous signs of religion" in state funded schools and has its origins in l'affaire du foulard (the headscarf affair) that began in 1989 when two girls were expelled from their school outside Paris for wearing the hijab. Since then, amid a reported increase in the number of students wearing the hijab, there have been calls for clarification from teachers, principals, Muslim organisations, human rights groups and government officials. In 2003 a Commission was established by the President, who considered the issue one of political order rather than individual conscience, to examine the hijab in the context of guidelines for application of the principle of secularity

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28 In the French Senate the vote was 494 for and 36 against with 31 abstentions, although this included the proviso that there be a review after one year. In the National Assembly, 577 members voted for the new law and 36 against it.

(laicité) in the country's publicly funded schools. The Commission numbered 20 and was chaired by Bernard Stasi, the French Ombudsman. Their report at the end of 2003 stressed the importance of schools for the training and education of the Republic's future citizenry and the necessity for shared values, such as gender equity and secularism. They held the wearing of the hijab to be a potential source of conflict in terms of coercion and divisiveness.[29]

In an address in January 2004, Chirac claimed that the "principle of secularism" was at stake and that the new law was necessary to stop schools being divided along ethnic lines. He stressed the significance of the public schools as primary vehicles for the "the transmission of republican principles" and that banning "conspicuous signs" of religion in schools "respects our history, our customs and our values". The law is designed to support teachers and principals and ensure equal opportunity and strict equality between women and men and "resolutely strive for (the) integration" of the diverse elements that make up French society.

The law prohibits "the wearing of signs or clothes which conspicuously display a pupil's religious affiliation" in public schools. This excludes the wearing of the hijab or Islamic headscarf, the Jewish kippa or yarmulka (skullcap), the Sikh turban, and large crosses or other religious symbols. Commentators indicate that in France at least the focus has largely been on the hijab (foulard) and veil (voile). The size of the Muslim communities compared with other non-Christian religious groups supports this emphasis.[30]

Technically the new legislation is an amendment to an existing law, the law on secularity (la loi sur la laicité).[31] Laïcite refers specifically to the post-1789 revolutionary position on the separation of church and state. The

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29 The Stasi Commission also recommended that there be an enhanced pluralism in French schools, with recognition that many students are non-Christian and support for the idea of education about Jewish and Islamic festivals and holidays.

30 Estimates, as the French census has no religion question, range from 4.5 to as high as 7 million (approximately 11% of the population) for the number of Muslims, the country's largest religious minority, in France.

31 The amendment, "Law framing, pursuant to the principle of secularity, the wearing of signs or behaviours expressing a religious membership in the schools, public colleges and colleges" ("Loi encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics").

government is neutral in matters of religion. Religion does not have a public role in the life of the State although freedom of personal religion is guaranteed. The new amendment prohibits conspicuous religious symbols or clothes being worn by students in France's state funded schools:

> *In public elementary schools, junior high schools and high schools, students are prohibited from wearing signs or attire through which they exhibit conspicuously a religious affiliation. The internal regulations of the schools remind that disciplinary procedures are to be preceded by a dialogue with the student.*

The broad brushstrokes of the law are to be supplemented by practical guidelines in regular circulars from the Ministry of Education. It will be left to school principals to make judgements in particular cases. There are to be discussions with the students concerned and there is provision to include the families concerned. The final framework of application will not be decided until decisions on the refereed cases are made by the Conseil d'État at litigation (Supreme Administrative Court).[32]

The new law adds to the existing 'secularity' of the civil service and the law prohibiting state funding for religion. So, for example, publicly funded schools cannot promote religion and must be open to all students, whether religious or secular. In practice this means that schools do not hold religious assemblies, celebrate religious holidays, nor do they have classes on the bible or religions. In the last two decades, but increasingly over the last few years, Muslim girls, often second and third generation, have been wearing the hijab to class. Many Muslims are from lower socio-economic sectors of the population and for some the hijab is about the development of a positive identity amid deprivation in a hostile environment. As part of a larger debate about the assimilation and integration of Muslim immigrants largely from North Africa, who came to France in the 1960s and 1970s, the hijab raises the issue of the secularity of French society. The new law has been condemned by Muslim groups as discriminatory, led to protest rallies in a number of cities, and led to two French journalists being abducted by the Islamic Army of Iraq demanding that the law be overturned, in spite of the fact that France opposed the war. Paradoxically, this act muted Muslim protest in France.

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32 See, Elisa T. Beller, "The Headscarf Affair: The Conseil d'État on the Role of Religion and Culture in French Society", *Texas International Law Journal* (2004) 39/4, 581-623.

Others have hailed the law as progress on sex equality and supporting Muslim girls who are under pressure to conform to Islamic norms. Some Muslims have argued that the hijab is a cultural rather than religious tradition and as such is consistent with the institution of laïcité.

The majority of French people welcome the 2004 amendment to the law on laïcité,[33] if for no other reason than the fact the French government has finally acted, taken the decision out of the hands of individual school principals, and created a law at the national level. The law has led to an increase in the number of private Muslim schools in France. At the time of writing the number of Muslim girls suspended or expelled from school under the new legislation is more than a dozen and looks set to rise. There are already plans to challenge the law in the French courts and if this fails to take the matter to the European Court of Human Rights.

From the human rights perspective, activists have challenged the new law on the grounds that it contravenes the European Convention on Human Rights, specifically, Article 9 and Article 2 of the first protocol.[34] The Commission rejected this argument on the grounds that the European Court of Human Rights protects a state's right to secularism (laïcité) as a basic value of a democratic state.

Although the traditions of secularity in the modern Republic of France draw on their specific history of opposition to the Catholic Church and religions more generally[35] and their political history of prioritising individual citizens over groups of any kind, whether ethnic or religion, there are evident parallels with the situation in other polities. Another significant factor is that France's center-right government is under pressure – from the National Front and other right wing groups who have focussed on immigration and assimilation – to take the lead and act decisively on these matters.

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33 Agence France-Presse (January 2004) reported 78% of teachers in favour; *Le Parisien* reported 69% of the population supporting the ban and 29% against (February 2004). The same survey indicated that Muslims in France were 42% for and 53% against. Among surveyed Muslim women, 49% approved the proposed law, and 43% opposed it.

34 For the text of the articles, see above.

35 Napoleon Bonaparte established the Concordat with the Church, which officially recognised the Church but limited its powers. This arrangement lasted until 1905 when the Third Republic formally enshrined the firm separation of church and state.

7 Conclusion: Veiled Meanings and the Limits to the Human Right to Religion

The wearing of the hijab or burqa has a variety of meanings to those Muslin women that choose or feel obligated to wear them and to those who interact with them in the course of their daily lives. The issue, however, has become a global touchstone for the nature and future of the secular state. While the signatories to the international conventions on human rights is near universal and every country insists on its own model of the freedom of religion, the willingness of judges and legislators to limit those rights has become more evident since September 11, 2001. What is the link between the terrorist attacks in New York and the limiting of the human right to religion? And, what is the connection between this and the secularity of the majority of modern nation states? An unprecedented level of religious and cultural diversity within almost all nation states, largely through migration, entails that the often mono-cultural institutions and laws that so effectively created the uniformity and shared culture of the modern state serve to marginalise other religions and cultures. This radical pluralism challenges some models of state secularity posing new questions and concerns for legislators. The French model of secularity removing religion from public life and effectively privatising it is very different from the British and Swedish models, which might be called Nehruvian,[36] where while one religious tradition is no longer allowed special privileges there is much more scope for the public face of a variety of different religious traditions.

The second component is Islam.[37] Muslim migrants have brought their religious traditions to formerly Christian countries of Europe and the new world. In the last 20 years or so their marginality and geo-political changes including the defeat of the Soviets in Afghanistan, the Iranian revolution and the Middle East conflicts have changed the assimilatory models of Muslims

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36 Nehru's model of secularism for the new Indian state was to exclude any one faith from politics but to allow religious groups to operate in the public sphere.

37 It is important to note that the debate about secularism and religion in the public sphere is not limited to Islam. In the United States, for example, there has been a recent discussion and cases about the stature of the Ten Commandments, carol singing in schools, the teaching of evolution, and publicly funded Christmas parades and displays. Both sides invoke the Constitution as the basis for their human rights to include or exclude religion from the public realm. See *The Christian Science Monitor* 18-24 December 2004, 19.

around the world and created a more forceful Muslim identity. In many countries this is manifest as a demand for the human right to practice their Islam and a distinction being made between political and cultural assimilation. The extreme face of this identity militancy is to be found in those engaged in a war against the (Christian) West – primarily America – and the fear generated by terrorist attacks leading to unwarranted generalisations characterising all Muslims. Since 9/11 human rights in general have been compromised in the name of security and what might be referred to as 'paranoia' about 'Muslim terrorists'. Alongside the militants are millions of Muslims who are committed to the principles and teachings of Islam, which often are presented, by supporters and militants, as being opposed to the dominant secular values of the West democracies. As this discussion has only recently begun it is too early as yet to determine whether this is in fact so.

The wearing of the hijab or the burqa is currently an issue in Singapore,[38] Germany,[39] Egypt,[40] Russia,[41] Italy,[42] Holland and Turkey[43], and an ongoing

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38 The Singapore Government banned the hijab on the ground of the state's "racial harmony" policy. When a dispute arose with the families of Muslim girls forbidden to attend school wearing the hijab, neighbouring Malaysia caused diplomatic tensions by offering schooling to the girls in that country.

39 The Germany Supreme Court ruled April 1, 2004 that Baden-Wuerttemberg's ban on the hijab in that state's schools was not justified, as there was no supporting legislation. The Court, by a 5 to 3 vote, supported Fereshta Ludin, a qualified teacher, and German citizen, formerly from Afghanistan, who had been denied employment since 1998. The Court recommended that such legislation be enacted by the different state legislatures on the grounds of the German state's 'constitutional religious neutrality'. This is now happening in seven of the German states. See, Edward J. Eberle "Free Exercise of Religion in Germany and the United States" 78/4 *Tulane Law Review* 1023-1088 (March 2004).

40 Last year a number of women were banned from wearing the hijab on state television.

41 In 2003 Russian Muslim women successfully petitioned to overturn the 1997 law that forbade the wearing of the hijab for the photograph on the required identity card. See also "War of the Headscarves" *Economist*, 5 February 2004.

42 In 2002 in Drezzo near Como, Italy, a burqa wearing local, Sabira Verroni, who took the burqa after completing the haj or pilgrimage to Mecca, was fined twice under Article 85 of a 1931 law of Benito Mussolini, forbidding masking in public, a law revived in 1975 for the Red Brigades. The issue has been raised in the Italian parliament.

issue in France and the United States as we have seen. What is the threat to democracy of women wearing the hijab or the burqa? Why all this huge expenditure of energy on this issue? Is secularity likely to collapse because a small minority of women veil themselves? Let me try and answer these questions by returning to the New Zealand context. At Victoria University of Wellington, where I teach, we see daily women wearing the hijab and we have had a number of Religious Studies students who have worn more extensive veils. A Turkish friend of mine here commented that it is strange that in Turkey, where the vast majority of the population is Muslim, the veil cannot be worn at a university while in New Zealand it can. The Sultaana Freedman case indicates that women can wear burqas in court and give evidence without a loss of the values of the judicial process. The French response highlights some of the difficulties of a highly individuated model of rights and of formal commitments to the strenuous separation of church and state. Returning to the Auckland case, it seems to me that there was a degree of racial and religious prejudice in the characterisations of Islam and the linking of Muslims to terrorism. The degree to which Muslims, whose orthodoxy included the wearing of burqas, could assimilate and become 'normal Kiwis' was questioned and was the supposed coercive nature of traditional Islam. As New Zealand's cultural and religious diversity increases many such issues will face us. Our experience with biculturalism has created valuable precedents and processes for the consideration of collective and group rights. There are now approximately 50,000 Muslims in New Zealand hailing from many countries with a range of religious customs and practices. It will be important that we afford our new Muslim citizens their full human rights, in particular the human right to religion. This will entail a collective understanding of Islam and this will be just as vital in appreciating the cultures and religions of our predominantly Muslim Asian neighbours. It might well be that elements of Islam come up against liberal norms and these will need to be debated. It is not, however, at all certain that Islam is as great a threat to democracy in New Zealand as the Destiny Church with its invocation of God's law as surpassing the secular law of the land. The human right to religion is, of course, not absolute and it is easy to imagine a case where in the interests of identification or security limiting the right, to say

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43 Last year tensions between the largely secular armed forces and the Islamist ruling AKP party led to the majority of the AKP MPs boycotting the official 80th anniversary celebrations of the Turkish state following a ban by the country's president on the wearing of headscarves at the event.

wear the hijab or burqa, would clearly be secondary to the rights of others. But these limitations indeed need to be compelling and clearly separated from political and ideological pressures that insist that the choice is between democracy, on the one hand, and the hijab and burqa on the other.[44]

44 It is lamentable, but understandable, that New Zealand did not set a valuable and liberal precedent by allowing the two Afghani women to give evidence wearing their burqas, making it clear that while this was setting a precedent for New Zealand courts it was not an absolute right that was being given.