

GUIDING PRINCIPLES REGARDING STUDENT RIGHTS TO WEAR OR DISPLAY RELIGIOUS SYMBOLS

Board of Experts of the International Religious Liberty Association
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INTRODUCTION

Several highly controversial state actions and court decisions have challenged the right of students to wear religious clothing and symbols at state schools.

Meeting in response, the Board of Experts of the International Religious Liberty Association (IRLA) gathered in Klingenthal, France, from 17 to 22 June 2004, and in Sigüenza, Spain, 12 to 16 November 2005, to analyze the complex issues involved. While an even broader range of issues was discussed, this Statement of Guiding Principles will focus on the human rights considerations for issues regarding the wearing or displaying religious symbols by students in state educational institutions, with a special emphasis on the issue of the Islamic headscarf.

To the extent that States consider policies with regard to the wearing of such attire, there are two critical points that should be made.

First, students presumptively have the right to wear religious attire and symbols as a manifestation of religious belief, and as a fundamental right guaranteed by international human rights norms;

Second, a State may limit this right under certain narrow conditions that are specified under international law, *but only after making a factual showing that objectively supports the rationale for limiting this guaranteed right under the applicable international standards*. Mere assertions of opinion or references to state policies (however important) do not suffice.

BACKGROUND

1. An issue that has become increasingly prominent in the first years of the twenty-first century is the question whether students attending state schools have the right to wear religious clothing and religious symbols. This issue is part of a much broader set of questions regarding the place of religious symbols in public life.

2. Religious symbols are an important part of human life and they appear in a wide variety of settings. They are most obviously present in religious buildings and in religious services, and in such settings they should generate few, if any, difficulties from a human rights perspective. Governments should broadly tolerate such expressions. Religious symbols may sometimes appear in governmental or state settings. In many countries religious imagery is closely associated with prominent national symbols (such as crosses or crescents on national flags) as well as religious declarations in constitutions and laws. In some states religious imagery may appear in or on governmental buildings or property (such as crosses or Ten Commandments). While the question of the appropriateness of state adoption of religious messages raises concerns about the fairness of such messages to citizens who do not adhere to the messages, international law has not arrived at any consensus on how such issues should be resolved.

3. Legal problems should not arise when people wear religious symbols and garb inside their homes and at religious services. States should protect such forms of religious expression. The issue becomes somewhat more complex, from a legal perspective, when religious symbols emerge in more public contexts. Though such expression in religious attire should be respected, there are circumstances that may arise when such religious expression might interfere with genuine issues of public order, health and safety. Important issues, that go beyond the scope of this document, might include the permissibility of wearing religious attire in identification photographs (such as drivers' licenses and passports), when the religious attire might interfere with the ability properly to identify the wearer, but reasonable accommodations should be encouraged. There are also issues where the wearing of religious symbols might interfere with legitimate safety concerns, such as the wearing of a Sikh turban that might interfere with the ability to wear a safety helmet. Where such safety concerns affect only the individual desiring to wear the religious symbol, the individual's balancing of safety and religious concerns should be respected.

4. Because of the breadth and complexity of the general issues regarding religious symbols in public life, and because of the prominence in recent public debate of issues involving the wearing or displaying of public symbols, the IRLA Board of Experts has decided to focus in this Statement on the latter issues. Moreover, although the issue pertains to a variety of clothing and symbols, including the Sikh kirpan and turban, the Jewish yarmulke, and the Christian cross, the most salient issue has become the Muslim headscarf.

5. Perhaps most famously, the Grand Chamber of the European Court of Human Rights issued a decision regarding university students in Turkey¹ and the French parliament enacted a law in 2004² banning primary and secondary students from wearing “conspicuous” (“*ostensible*”) religious attire at state schools. This law was widely understood as prohibiting Muslim school girls from wearing headscarves (frequently called the hijab). On the other hand, the UN Human Rights Committee in the *Submission of Hudoyberganova* (Communication 931/2000) has held that a ban on wearing the Islamic headscarf in a university in Uzbekistan violated the claimant’s religious freedom rights.³

6. Because of the salience of the European Court of Human Rights’ controversial *Şahin* decision, which upholds the Turkish ban on wearing Islamic headscarves in public universities, it is important to note that in light of the unique context of the Court’s decision, the holding does not necessarily apply outside Turkey. Turkish officials have long argued that because Turkey is a predominantly Muslim country and because it is particularly susceptible to the political influences over the general population of certain Islamist trends, it has needed to take additional precautions to protect its universities from the influences of such forms of Islam on university students. The *Şahin* decision did not identify any other European country with such unique circumstances and there are no other European countries with such a background. Although the analysis below will suggest some serious reservations about the legal reasoning of the European Court’s decision, its holding should not be generalized to countries in Europe whose populations are not predominantly Muslim and that have not experienced the same social conflicts that have occurred in Turkey.

7. It should also be noted that the majority of the population of Turkey, as expressed through public opinion polls, in democratic elections, and in measures passed by its parliament (though subsequently struck down by the Turkish Constitutional Court), has expressed support for policies more sensitive to those who desire to wear the headscarf at universities and in other educational

¹ *Şahin v. Turkey*, (ECtHR, application no. 44774/98, 10 November 2005).

² Law No. 2004-228 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190; JCP G 2004, No. 13, Actu. 168, available at <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MENX0400001L> (last visited May 9, 2005) and <http://www.religlaw.org>.

³ Ms. Raihon Hudoyberganova, U.N. Human Rights Committee, Communication No. 931/2000 of 18/01/2005 regarding Uzbekistan (CCPR/C/82/D/932/2000 (Jurisprudence)). For additional analysis of the various cases and legislative acts, see sources collected at www.strasbourgconference.org.

settings and that this democratic objection to the ban is also supported by many progressive and human rights entities within Turkey.

8. In light of the division of authority among bodies construing major international human rights instruments, and in light of the fact that the situation in Turkey is distinguishable from that which obtains in most other countries, it is important to consider carefully the principles that should be applied in resolving the rights of students to wear or display religious symbols.

9. With respect to the background of the legislation in France, the following should be kept in mind. Between 1989 and 2004, the French *Conseil d'Etat* determined, in approximately fifty decisions and judgments, that Muslim school girls had a right to wear headscarves in state schools provided that they did not display the headscarves in a proselytizing manner and that they did not disrupt schools. The *Conseil d'Etat* made these judgments based upon its interpretation of the French Constitution, international human rights law, and the French concept of *laïcité*. In 2004, several leading French politicians made statements saying that a law should be enacted to ban headscarves in public schools. Later in the same year, both the French president and the French parliament appointed commissions to make recommendations regarding headscarves. Although the two commissions made several supposedly “factual” assertions, they failed to provide rigorous evidence to support them. For example, one of their principal claims was that Muslim schoolgirls who wear headscarves are pressured to do so by their families and communities. Despite this broad allegation, neither commission provided any rigorous evidence to support this claim. Although they were able to identify some anecdotal examples of such pressure, the commissions conducted no social scientific research to determine whether this extremely important assertion could in fact be supported by solid evidence. Moreover, neither commission considered or analyzed the rights of conscience that would be implicated by a headscarf ban. Following the issuance of the commission reports, the French parliament, without providing any further evidence to support the commission claims, enacted a law that prohibited students from wearing “conspicuous” (“*ostensible*”) religious attire at state schools.

10. The basic facts in the *Hudoyberganova* decision is that the claimant was a woman who was excluded from a public university in Uzbekistan because she wore a headscarf. The Uzbek government in the case failed to demonstrate any precise justification for the law banning the headscarf, but instead merely relied on the fact that the claimant had violated the law. Because the

government failed to demonstrate factually that the ban was necessary under the criteria provided by the limitation clause of article 18(3) of the ICCPR, the UN Human Rights Committee was compelled to conclude that a violation of the claimant's religious freedom rights had occurred.

11. At a more general level, issues involving religious attire are linked in the minds of some to deeper threats posed by extreme religious groups to fundamental structures of democracy and human rights. In this regard, it is important to remember that the framers of the key international instruments were acutely aware of such risks, which can be adequately addressed by applying the provisions of the relevant limitation clauses.

12. In light of the foregoing background considerations, these Guiding Principles and Concerns accordingly examine situations involving the wearing or displaying of religious symbols with reference to international and other norms governing freedom of religion or belief in order to identify basic principles that can be used as guidelines for governments, religious leaders, educational authorities, and public policy makers. Relevant norms include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Fundamental Rights and Freedoms.

GENERAL PRINCIPLES

1. Religious freedom is a universal right based on human dignity. Freedom of religion includes the right "individually and in community with others and in public or private, to manifest... religion or belief in worship, observance, practice and teaching."⁴

2. Freedom of religion or belief is best fostered in a pluralistic society. Moreover, it is most effectively protected in governmental systems that include a clear distinction between the religious and the political authority, and that assure that each is legally autonomous within its own sphere.

⁴International Covenant on Civil and Political Rights ("ICCPR"), art. 18(1). Parallel provisions are to be found in the Universal Declaration of Human Rights ("UDHR"), art. 18(1); the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), art. 9(1); American Convention on Human Rights ("ACHR"), art. 12(1).

3. Only religious communities and individuals have the right to interpret the meaning and significance of their religious symbols.

4. When states employ concepts such as *laïcité* and secularism, they should be applied in ways consistent with accepted international human rights standards and should not be applied in ways that undermine them.

5. The right to manifest belief is a vital part of religious freedom as defined by the international documents, and this includes the right to manifest belief by wearing or displaying religious symbols and clothing.

6. The limiting of religious freedom rights as practiced and manifested is subject only to the carefully constrained limitations set forth in the international instruments. That is, such limitations must be “prescribed by law and [be] necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”⁵ The burden of proof in establishing that such limitations are justified must be carried by the government seeking to impose such limitations, not by the party whose rights are being limited. Prohibiting the wearing or display of religious symbols without meeting the government’s burden of proving these limitations constitutes a violation of religious freedom.

7. In applying the foregoing limitation provisions, it is vital to bear in mind that they were carefully drafted to avoid undue restrictions on freedom of religion or belief. In this regard several considerations should be noted:

- With respect to the public order limitation it is significant to note that the texts of the applicable limitation clauses in all major international instruments make it clear that they only refer to the prevention of public disturbances. Significantly, they do not justify restricting religious freedom on the basis of alleged interference with general public policies (*ordre public*).⁶

⁵ International Covenant on Civil and Political Rights, art. 18(3).

⁶ Unlike ICCPR provisions relating to freedom of expression (art. 19(3)(b), assembly (art. 21), or association (art. 22(2)), the ICCPR provision dealing with freedom of religion (art. 18(3)) does not contain the parenthetical term *ordre public* as an explanation of public order. Moreover the French language version of the provisions speaks of “protection de l’ordre” rather than “ordre public.” In short the expression “public order” may only be used to “avoid disturbances in the narrow sense.” M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary. Kehl: N. P. Engel Verlag, 1993. Under the ECHR, the limitation provisions for expression, assembly and association are articulated expressly with respect to “disorder” rather than “ordre public,” arts. 10(2) and 11(2), and the notion of order in the limitation clause for freedom of religion, which refers to “public order, health or morals” is not any more expansive. See art. 9(2).

- With the respect to the rights of third parties, freedom of religion or belief should be limited only by “the *fundamental* rights and freedoms of others”⁷—that is, by a right that is fundamental and outweighs in significance the right being limited. The mere fact that some other rights are affected is not sufficient if they do not rise to this level.
- Any State limitation on the manifestation of religious belief must be based on demonstrable facts and not on speculation or presumption.⁸
- Limitations must be “directly related and proportionate to the specific need on which they are predicated.”⁹ That is, even when a limitation based on “public order” or the “rights of third parties” is raised by the wearing of religious symbols, such limits can be justified only if they represent pressing or compelling social needs that cannot be resolved in a less burdensome manner. If there is another alternative that satisfies legitimate state interests and that allows a less restriction of the manifestation of the religious right, the limitation cannot be said to be “necessary,” and the alternative must be permitted.¹⁰
- Restrictions may not be imposed for discriminatory purposes or be applied in a discriminatory manner.¹¹

8. As a general matter, manifestations of religion by individuals or religious communities that merely offends the sensibilities of individuals, as opposed to causing concrete harms, do not constitute a ground for limiting such manifestations.

9. The IRLA Board of Experts is fully conscious of the range of circumstances in which wearing the headscarf may be the reflection of coercion emanating from family or the individual’s social context. However it is also clear that some sincerely desire to wear the headscarf as a part of their religious identity. In the light of the State’s particular obligations to protect human rights, coercion by the state in banning headscarves is arguably even more serious than coercion by private parties. All such manifestations of coercion are to be deplored. However, it is important to note that banning the wearing of headscarves will not necessarily prevent familial or social pressure; indeed it may increase such pressure even leading to forced withdrawal from public schools. Moreo-

⁷ ICCPR, art. 18(3).

⁸ Metropolitan Church of Bessarabia v. Moldova, (ECtHR, App. No. 45701/99, December 13, 2001), para. 125.

⁹ UN Human Rights Committee General Comment No. 22 (48), para. 8.

¹⁰ See, e.g., Metropolitan Church of Bessarabia v. Moldova, (ECtHR, App. No. 45701/99, December 13, 2001), paras. 119, 129.

¹¹ UN Human Rights Committee General Comment No. 22 (48), para. 8.

ver, even legitimate efforts to eliminate coercion of those who do not wish to wear the headscarf do not justify the state in coercing others not to do so.

10. As the European Court of Human Rights has repeatedly stressed, the State has a duty to remain neutral and impartial to ensure the preservation of pluralism and the proper functioning of democracy. When an issue such as the headscarf becomes a source of tension, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups at least tolerate each other and respect each others rights.

RECOMMENDATIONS

1. By their very nature schools have a specific mission in society: to provide a setting where academic objectives are achieved and students have an opportunity to develop their sense of personal identity in a setting that teaches and exemplifies the value of mutual respect. This implies that children from different religious and family backgrounds learn to understand and respect each others' differences while sharing and develop common values. Those involved in dealing practically with controversies involving headscarves or other religious symbols should seek solutions on a case-by-case basis in such a way as to integrate rather than polarize by encouraging all concerned to act according to principles of tolerance and mutual respect.

2. In the educational setting, international instruments recognize the importance of protecting both the rights of parents to guide the upbringing of their children and the rights of children (consistent with their developing capacities) to freedom of religion and belief, and recognize that an appropriate balance must be struck in those situations where parental and children's rights conflict.

3. The rights of parents to educate their child according to their convictions should be respected, and state officials should not simply assume, without clear evidence, that parental teaching and influence are unduly coercive.

4. The right of a young person to make personal decisions concerning the wearing or display of religious symbols should be affirmed consistent with "the evolving capacities of the [individual.]"¹²

¹² Convention on the Rights of the Child, article 14.

5. Legislation establishing a total ban on the wearing of religious symbols in public educational settings should be avoided because it tends to be unnecessarily insensitive to those acting on sincere religious beliefs and often does more to inflame than reduce social tensions.

6. Further study should be encouraged of the specific contexts in which controversies involving religious symbols in school settings arise with an eye to identifying best practices for resolving tensions and approaches that minimize interference with freedom of religion or belief.

7. Policy makers in this area should consider consulting with officials, bodies and non-governmental organizations with expertise concerning these issues, such as the Office of the High Commissioner for Human Rights, the UN Special Rapporteur for Freedom of Religion or Belief, the OSCE/ODIRH Advisory Council on Freedom of Religion or Belief, and the International Religious Liberty Association's Board of Experts.