

Manifesting Religion

Student Materials

- Muslim headscarf cases:
 - *Teacher Headscarf*: decided by the German Constitutional Court in September 2003
 - *Şahin v. Turkey*: decided by the European Court of Human Rights in November 2005
- Sikh turban cases:
 - *Mann Singh v. France I*: decided by the European Court of Human Rights in November 2008
 - *Mann Singh v. France II*: decided by the Human Rights Committee in July 2013
- Key topics: human rights (civil and political rights)

Learning Objectives

- Understand and apply:
 - competing religious rights
 - the margin of appreciation doctrine
- Analyze and evaluate:
 - how human rights bodies balance competing rights in different contexts
 - how these bodies differ in their deference to states

Background Information

International human rights law gives individuals both the right to have their own religious beliefs, and the right to manifest—or demonstrate—those beliefs through “worship, observance, practice and teaching.”¹ However, international law also allows states to limit religious manifestation if “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”² In some religious traditions, individuals have an obligation to wear religious clothing, like headscarves, turbans,

¹ ICCPR (1966), Article 18(1).

² ICCPR (1966), Article 18(3).

and veils. One ongoing controversy in Europe involves whether religious minorities have the right to wear such clothing in public.

For example, many communities in France have banned the “burkhini”, which allows Muslim women to swim while their bodies are fully covered. These laws rose to worldwide public attention in 2016 when French police began issuing fines for “burkhis” in resort communities like Cannes and Nice. In one incident, police threatened to use pepper spray on a Muslim woman unless she removed her clothing while on a public beach.³

The four cases below address similar restrictions on Muslim headscarfs and Sikh turbans, but they were assessed by different legal bodies using different laws. The first two cases involve Muslim headscarves in public schools:

- In the *Teacher Headscarf* case, a Muslim woman sued Germany at the German Constitutional Court after government officials refused to hire her as a public school teacher because she insisted upon wearing a headscarf.
- In *Şahin v. Turkey*, a Muslim woman sued Turkey at the European Court of Human Rights to challenge a public university’s ban on students wearing headscarfs (and beards).

These cases yielded different outcomes, despite involving similar facts and laws.

The second two cases involve Sikh turbans and photographs for government-issued IDs:

- In *Mann Singh v. France I*, a Sikh man challenged French rules that require individuals to be bare-headed in driver’s license photographs. Singh sued France at the European Court of Human Rights, arguing that France violated the European Convention on Human Rights.
- Singh then filed a complaint—*Mann Singh v. France II*—at the Human Right Committee, which is the treaty-based body that oversees the International Covenant on Civil and Political Rights (ICCPR). Singh argued that similar French rules for passport photos violated the ICCPR.

³ See “Woman forced to remove burkini on Nice beach by armed officers” *Telegraph (UK)*, 24 August 2016.

Once again, the two cases, which had nearly identical facts and law, yielded very different outcomes.

As you read these cases, think about the following questions:

- What are the competing rights and policy concerns in each case?
- What is the cultural, economic, and political context of each case?
- How do the facts and context of each case affect its final outcome?

Then think about how these different institutions would assess laws like the French ban on “burkhinis” and other restrictions on religious manifestation that are relevant in your home-state.

Relevant Legal Texts

European Convention on Human Rights (1950)⁴

Article 9

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 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 for the protection of the rights and freedoms of others.

International Covenant on Civil and Political Rights (1966)⁵

Article 2

⁴ Relevant for *Şahin v. Turkey* and *Mann Singh v. France I*.

⁵ Relevant for *Mann Singh v. France II*.

1. Each State Party ... undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status ...

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching ...

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others ...

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Teacher Headscarf Majority Judgment

The German Constitutional Court began by describing the facts in the case. Note that the policy being challenged was a blanket ban on the wearing of headscarves by public teachers in both primary and secondary schools:

The Stuttgart Higher School Authority refused the complainant's application to be appointed to the teaching profession at [a] primary school and [a] secondary school ... on the grounds of lack of personal aptitude. By way of a reason, it was stated that the complainant was not prepared to give up wearing a headscarf during lessons. The headscarf, it was stated, was an expression of cultural

separation and thus not only a religious symbol, but also a political symbol. The objective effect of cultural disintegration associated with the headscarf, it was said, was not compatible with the requirement of state neutrality.

In her objection, the complainant submitted that the wearing of the headscarf was not only a mark of her personality, but also the expression of her religious conviction. Under the precepts of Islam, wearing a headscarf was part of her Islamic identity. The decision refusing her petition, she submitted, violated the fundamental right of freedom of religion under [German law] ... Although the state had an obligation to preserve neutrality in questions of religion, when it fulfilled its duty to provide education ... it was not obliged to refrain completely from religious and ideological references, but had to enable a careful balance between the conflicting interests ...

The complainant in the case argued that by not allowing public school teachers to wear headscarves, the German government was denying Muslim women equal access to public office, which is guaranteed by the German constitution:

In the context to be assessed here, wearing a headscarf makes it clear that the complainant belongs to the Islamic religion and identifies herself as a muslima. Defining such conduct as a lack of aptitude for the office of a teacher at [a] primary school and [a] secondary school encroaches upon the complainant's right to equal access to every public office under [German law] in conjunction with the fundamental right of freedom of faith ... without the necessary, sufficiently definite statutory basis for this being satisfied at present. In this way, the complainant has in a constitutionally unacceptable manner been denied access to a public office.

[German law] grants every German, in accordance with his or her aptitude, qualifications and professional achievement, equal access to every public office. [This right] guarantees the degree of free choice of one's occupation or profession ... [This law] grants no right to be appointed to a public office ... [Yet access to public office may] not be restricted by subjective requirements for admission ... [The law] provides that appointments are to be made on the basis of aptitude, qualifications and professional achievement, without taking into account gender, descent, race, belief, religious or political convictions, origin or connections ...

The evaluation by the employer of an applicant's aptitude for the public office applied for relates to the applicant's future occupation in office and at the same time contains a prediction, which

requires a concrete assessment of the applicant's whole personality based on the individual case ... This also includes a statement with regard to the future as to whether the person in question will fulfill the duties under civil-service law that he or she is subject to in the office applied for. In this assessment with regard to the future, the employer has a wide scope of discretion ... The employer's prediction as to an applicant's aptitude for a particular office must be based on the civil servant's duties ... Official duties that the applicant is expected to carry out must be sufficiently specified in law and must respect the limits imposed by the applicant's fundamental rights.

If a duty is imposed on the civil servant that, at school and in lessons, teachers may not outwardly show their affiliation to a religious group by observing dress rules with a religious basis, this duty encroaches upon the individual freedom of faith ... It confronts those affected with the choice either to exercise the public office they are applying for or obeying the religious requirements as to dress, which they regard as binding.

The German Constitutional Court then discussed religious rights under German domestic law:

[German law] guarantees freedom of faith, conscience and religious and ideological belief; [and] the right of undisturbed practice of religion. [This is] a uniform fundamental right which is to be understood comprehensively ... It extends not only to the inner freedom to believe or not to believe, but also to the outer freedom to express and disseminate the belief ... This includes the individual's right to orientate his or her whole conduct to the teachings of his or her faith and to act in accordance with his or her inner religious convictions. This relates not only to imperative religious doctrines, but also to religious convictions according to which a way of behaviour is the correct one to deal with a situation in life ...

[German law also] provides that admission to public offices is independent of religious belief ... No one may suffer a disadvantage by reason of belonging or not belonging to a faith or to an ideology ... Consequently, a connection between admission to public offices and religious belief is out of the question ... This does not exclude creating official duties that encroach upon the freedom of faith of office-holders and applicants for official offices, and that thus make it harder or impossible for religious applicants to enter the civil service, but it does subject these to the strict requirements of justification that apply to restrictions of freedom of faith, which is

guaranteed unconditionally; in addition, the requirements of strictly equal treatment of the various religions must be observed, both in creating and in the practice of enforcing such official duties.

The German Constitutional Court then noted (based on the findings of lower courts) that wearing a headscarf was, for the complainant, a protected act of religious expression:

The wearing of a headscarf by the complainant at school as well as outside school is protected by the freedom of faith ... According to the findings of fact made by [lower] courts and not disputed [here], the complainant regards the wearing of a headscarf as bindingly imposed on her by the rules of her religion; observing this dress rule is, for her, the expression of her religious belief. The answer to the controversial question as to whether and how far covering the head is prescribed for women by rules of the Islamic faith is not relevant. It is true that not every form of conduct of a person can be regarded as an expression of freedom of faith, which enjoys special protection, purely according to its subjective intention; instead, when conduct by an individual that has been claimed to be an expression of the individual's freedom of faith is assessed, that his or her particular religious group's concept of itself may not be overlooked ... A duty of women to wear a headscarf in public may, by its content and appearance, as a rule of faith founded in the Islamic religion, be attributed with sufficient plausibility to the area protected by [German law] ...

The German Constitutional Court then considered whether allowing a public school teacher to wear a headscarf might conflict with the rights of others, such as the rights of non-Muslim schoolchildren and their parents:

Interests that are protected by the constitution that conflict with freedom of faith here may be the state's duty to provide education ..., which is to be carried out having regard to the duty of ideological and religious neutrality, the parents' right of education ... and the negative freedom of faith of schoolchildren ...

The Court began by discussing the duty of the German government (under domestic law) to religious and ideological neutrality:

[The law] lays down for the state as the home of all citizens the duty of religious and ideological neutrality. It bars the introduction of legal structures in the nature of a state church and forbids giving privileged treatment to particular faiths and excluding those of a different belief ... The

state must be careful to treat the various religious and ideological communities with regard to the principle of equality.

However, the religious and ideological neutrality required of the state is not to be understood as a distancing attitude in the sense of a strict separation of state and church, but as an open and comprehensive one, encouraging freedom of faith equally for all beliefs. [German law] also [contains] a positive requirement to safeguard the space for active exercise of religious conviction and the realisation of autonomous personality in the area of ideology and religion ... The state is prohibited only from exercising deliberate influence in the service of a particular political or ideological tendency or expressly or impliedly identifying itself by way of measures originated by it or attributable to it with a particular belief or a particular ideology and in this way itself endangering religious peace in a society ...

Under [existing law], this applies above all to the area of the compulsory school, for which the state has taken responsibility, and for which, by its nature, religious and ideological ideas have always been relevant ... In this view, Christian references are not absolutely forbidden in the organisation of state schools; however, school must also be open to other ideological and religious content and values ... For the tensions that are unavoidable when children of different ideological and religious beliefs are taught together, it is necessary, giving consideration to the requirement of tolerance as the expression of human dignity ... to seek a balance ...

The Court then addressed the rights of parents:

[German law] guarantees to parents the care and education of their children as a natural right, and ... it also includes the right to educate children in religious and ideological respects; it is therefore above all the responsibility of the parents to convey to their children the convictions in religious and ideological matters that they regard as right ... Corresponding to this is the right to keep the children away from religious convictions that appear to the parents to be wrong or harmful ... However, [German law] does not contain an exclusive right of education for the parents. Separately and in its sphere given equal rights beside the parents, the state ... exercises its own duty to provide education ... How this duty is to be carried out in detail, and in particular to what extent religious references are to have their place at school, is subject within the limits laid down by [German law] ...

Finally, the Court acknowledged the rights of schoolchildren:

Finally, the freedom to exercise religious conviction relied on by the complainant conflicts with the negative freedom of faith of the pupils in her wearing of a headscarf at school and in lessons. [German law], which protects equally the negative and the positive manifestations of freedom of faith, also guarantees the freedom to stay away from cultic acts of a religion that is not shared; this also applies to cults and symbols in which a belief or a religion represents itself. [German law] leaves it to the individual to decide what religious symbols he or she recognises and reveres and which he or she rejects. Admittedly, in a society that affords space to differing religious convictions, he or she has no right to be spared cultic acts, religious symbols and professions of other faiths. But this must be distinguished from a situation created by the state in which the individual is exposed without an alternative to the influence of a particular faith ...

The Court then synthesized these various strands. The Court acknowledged that the religious dress of schoolteachers might (in the “abstract”) violate competing rights. But the Court then suggested that the specific context of the case affects how religious dress is interpreted:

If teachers introduce religious or ideological references at school, this may adversely affect the state’s duty to provide education, which is to be carried out in neutrality, the parents’ right of education and the negative freedom of faith of the pupils. It at least opens up the possibility of influence on the pupils and of conflicts with parents that may lead to a disturbance of the peace of the school and may endanger the carrying out of the school’s duty to provide education. The dress of teachers that is religiously motivated and that is to be interpreted as the profession of a religious conviction may also have these effects. But these are only abstract dangers ...

The Court noted that headscarfs do not exclusively indicate religious values. It argued that women may wear headscarves for non-religious reasons, and many Muslim women in Germany do not view the headscarf as a symbol of oppression:

In considering the question of whether a specific form of dress or other outward sign has a religious or ideological significance in the nature of a symbol, attention must be paid to the effect of the means of expression used and to all possibilities of interpretation that are possible. Unlike the Christian cross ..., the headscarf is not in itself a religious symbol. Only in connection with the

person who wears it and with the conduct of that person in other respects can it have such an effect ...

As well as showing the desire to observe dress rules that are felt to be binding and have a religious basis, it can also be interpreted as a symbol for upholding traditions of the society of the wearer's origin. In the most recent times, it is seen increasingly as a political symbol of Islamic fundamentalism that expresses the separation from values of western society, such as individual self-determination and in particular the emancipation of women. However, ... this is not the message that the complainant wishes to convey by wearing the headscarf.

[An] expert witness ... carried out a survey of about 25 Muslim students at colleges of education, twelve of whom wore a headscarf, and on the basis of this survey she showed that the headscarf is also worn by young women in order to preserve their own identity and at the same time to show consideration for the traditions of their parents in a diaspora situation; in addition, another reason for wearing the headscarf that had been named was the desire to obtain more independent protection by signaling that they were not sexually available and integrating themselves into society in a self-determined way. Admittedly, the wearing of the headscarf was intended to document in public the value one placed on religious orientation in one's own life, but it was understood as the expression of an individual decision and did not conflict with a modern lifestyle. As understood by the women questioned, preserving their difference is a precondition for their integration. It is not possible to make any statements that are representative of all Muslim women living in Germany on the basis of the interviews conducted and evaluated by the expert witness, but the results of the research show that in view of the variety of motives, the interpretation of the headscarf may not be reduced to a symbol of the social repression of women. Rather, the headscarf can for young Muslim women also be a freely chosen means to conduct a self-determined life without breaking with their culture of origin. Against this background, there is no evidence that the complainant, merely because she wears a headscarf, might for example make it more difficult for Muslim girls who are her pupils to develop an image of woman that corresponds to the values of [German law] ...

The Court also suggested that there is a distinction between rules requiring religious clothing, and an individual's decision to wear religious clothing:

With regard to the effect of religious means of expression, it is necessary to distinguish whether the symbol in question is used at the instigation of the school authority or on the basis of one single teacher's personal decision ... If the state tolerates teachers wearing dress at school that they wear by reason of a personal decision and that can be interpreted as religious, this cannot be treated in the same way as a state order to attach religious symbols at school ... The state that accepts the religious statement of an individual teacher associated with wearing a headscarf does not in so doing make this statement its own and is not obliged to have this statement attributed to it as intended by it ...

The German Constitutional Court then dismissed the argument that children might be adversely affected psychologically by having a teacher who wore a headscarf:

There is no confirmed empirical foundation for the assumption that the complainant would commit an infringement of her official duty because of the feared controlling influence of her headscarf on the religious orientation of the schoolchildren. [An] expert witness ... stated that from the point of view of developmental psychology there is at present no confirmed knowledge that proves that children are influenced solely because every day they meet a teacher who wears a headscarf at school and in lessons. Only if there were also conflicts between parents and teacher that might arise in connection with the teacher's headscarf were onerous effects to be expected, in particular on younger pupils ...

Based on this logic, the German Constitutional Court ultimately concluded that a blanket ban on public school teachers wearing headscarves violated the complainant's right to religious freedom.

Postscript: Recall that this case challenged a blanket ban on the wearing of headscarves by public teachers in both primary and secondary schools. In response to this ruling, different German states adopted different policies. Some allowed teachers at all levels to wear headscarves, while others only allowed teachers to wear them in secondary schools (but not in primary schools).⁶ Domestic debates continue within Germany over religious manifestation and public education.

⁶ See "Berlin court bars Muslim teacher from wearing headscarf" *BBC News (UK)*, 9 May 2018.

Şahin v. Turkey Majority Judgment

The European Court of Human Rights began by describing the facts in the case. Note that the policy being challenged was a ban on the wearing of headscarves by all students at Istanbul University:

The applicant ... comes from a traditional family of practising Muslims and considers it her religious duty to wear the Islamic headscarf ... [In] 1997 the applicant ... enrolled at ... Istanbul University. She says she wore the Islamic headscarf during the [previous] four years she spent studying medicine ... and continued to do so until February 1998.

[In] February 1998 the Vice-Chancellor of Istanbul University issued a circular, the relevant part of which provides:

... Students whose 'heads are covered' (who wear the Islamic headscarf) and students (including overseas students) with beards must not be admitted to lectures, courses or tutorials. Consequently, the name and number of any student with a beard or wearing the Islamic headscarf must not be added to the lists of registered students ...

[In] 1998, in accordance with the aforementioned circular, the applicant was denied access ... to a written examination on oncology because she was wearing the Islamic headscarf ... [T]he secretariat of the chair of orthopaedic traumatology refused to allow her to enroll because she was wearing a headscarf. [Then] she was refused admission to a neurology lecture and ... to a written examination on public health, again for the same reason ... [T]he dean of the faculty declared that her attitude and failure to comply with the rules on dress were not befitting of a student ... [A]fter hearing her representations, he suspended her from the university for a semester ... [T]he applicant abandoned her studies in Turkey and enrolled at Vienna University, where she pursued her university education ...

The European Court of Human Rights then provided a brief overview on the historical relationship between religion and the state in Turkey. It also discussed the historical role of women within Turkish society:

The Turkish Republic was founded on the principle that the state should be secular ... Before and after the proclamation of the Republic [in] 1923, the public and religious spheres were separated

through a series of revolutionary reforms: the abolition of the caliphate ...; the repeal of the constitutional provision declaring Islam the religion of the state ...; and, lastly, ... a constitutional amendment according constitutional status to the principle of secularism ...

The principle of secularism was inspired by developments in Ottoman society in the period between the nineteenth century and the proclamation of the Republic. The idea of creating a modern public society in which equality was guaranteed to all citizens without distinction on grounds of religion, denomination or sex had already been rooted in the Ottoman debates of the nineteenth century. Significant advances in women's rights were made during this period ...

The defining feature of the Republican ideal was the presence of women in public life and their active participation in society. Consequently, the ideas that women should be freed from religious constraints and that society should be modernised had a common origin. Thus, [in] 1926 the Civil Code was adopted, which provided for equality of the sexes in the enjoyment of civic rights, in particular with regard to divorce and succession. Subsequently, through a constitutional amendment ..., women obtained equal political rights to men.

The first legislation to regulate dress was the Headgear Act [of] 1925 ..., which treated dress as a modernity issue. Similarly, a ban was imposed on wearing religious attire other than in places of worship or at religious ceremonies, irrespective of the religion or belief concerned ...

The European Court of Human Rights then described the contemporary debate within Turkish society over the wearing of Muslim headscarves. The Court argues that religious headscarves have political connotations in Turkey:

In Turkey, wearing the Islamic headscarf to school and university is a recent phenomenon which only really began to emerge in the 1980s. There has been extensive discussion on the issue and it continues to be the subject of lively debate in Turkish society. Those in favour of the headscarf see wearing it as a duty and/or a form of expression linked to religious identity. However, the supporters of secularism ... see the Islamic headscarf as a symbol of a political Islam. [In the last decade], the debate has taken on strong political overtones. The ambivalence displayed by [politicians] over their attachment to democratic values, and their advocacy of a plurality of legal systems functioning according to different religious rules for each religious community was perceived in Turkish society as a genuine threat to republican values and civil peace ...

For more than twenty years the place of the Islamic headscarf in state education has been the subject of debate across Europe. In most European countries, the debate has focused mainly on primary and secondary schools. However, in Turkey, Azerbaijan and Albania it has concerned not just the question of individual liberty, but also the political meaning of the Islamic headscarf. These are the only member states to have introduced regulations on wearing the Islamic headscarf in universities ...

The Court then discussed the religious rights of the applicant under the European Convention on Human Rights:

The applicant submitted that the ban on wearing the Islamic headscarf in institutions of higher education constituted an unjustified interference with her right to freedom of religion, in particular, her right to manifest her religion ...

The Court reiterates that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion ...

While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one’s religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists the various forms which manifestation of one’s religion or belief may take, namely worship, teaching, practice and observance ... Article 9 does not protect every act motivated or inspired by a religion or belief ...

The Court noted that the Convention also gives states authority to restrict religious manifestation:

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

This follows both from paragraph 2 of Article 9 and the state's positive obligation under Article 1 of the Convention to secure to everyone within its jurisdiction the rights and freedoms defined therein.

The Court has frequently emphasized the state's role as the neutral and impartial organizer 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. It also considers that the state's duty of neutrality and impartiality is incompatible with any power on the state's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed ..., and that it requires the state to ensure mutual tolerance between opposing groups ... Accordingly, 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 tolerate each other ...

Since the Convention text explicitly references "democratic society", the Court discussed how this principle affects religious freedom:

Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views 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 ... Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society ... Where these "rights and freedoms" are themselves among those guaranteed by the Convention ..., it must be accepted that the need to protect them may lead states to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a "democratic society" ...

The Court then argued that different social contexts can lead to different standards on how states balance competing values. The Court argued that governments have a margin of appreciation on how to strike such a balance. The Court argued that this margin of appreciation is consistent with the principle of judicial review:

Where questions concerning the relationship between state and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance ... This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions, especially ... in view of the diversity of the approaches taken by national authorities on the issue. It is not possible to discern throughout Europe a uniform conception of the significance of religion in society ..., and the meaning or impact of the public expression of a religious belief will differ according to time and context ... Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order ... Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the state concerned, as it will depend on the specific domestic context ...

This margin of appreciation goes hand in hand with a European supervision embracing both the law and the decisions applying it. The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate ... In delimiting the extent of the margin of appreciation in the present case, the Court must have regard to what is at stake, namely the need to protect the rights and freedoms of others, to preserve public order and to secure civil peace and true religious pluralism, which is vital to the survival of a democratic society ...

The Court then applied this general description of principles to the specific facts of the case. It argued that Turkey believed that Şahin's right to manifest her religion must be balanced against "the two principles of secularism and equality":

The interference in issue caused by the circular [in] February 1998 imposing restrictions as to place and manner on the rights of students such as Ms Şahin to wear the Islamic headscarf on university premises was, according to the Turkish courts ..., based in particular on the two principles of secularism and equality.

In [a previous judgment], the [Turkish] Constitutional Court stated that secularism, as the guarantor of democratic values, was the meeting point of liberty and equality. The principle prevented the state from manifesting a preference for a particular religion or belief; it thereby guided the state in its role of impartial arbiter, and necessarily entailed freedom of religion and conscience. It also served to protect the individual not only against arbitrary interference by the

state but from external pressure from extremist movements. The [Turkish] Constitutional Court added that freedom to manifest one's religion could be restricted in order to defend those values and principles ...

Even though the principle of secularism does not appear in the European Convention on Human Rights, the Court argues that this principle is consistent with the Convention and that upholding this principle "may be considered necessary to protect the democratic system in Turkey":

The Court considers this notion of secularism to be consistent with the values underpinning the Convention. It finds that upholding that principle, which 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, may be considered necessary to protect the democratic system in Turkey. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention ...

It is the principle of secularism ... which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn...

The Court accordingly concluded that the Istanbul University ban did not violate the European Convention on Human Rights.

There has been no breach of Article 9 of the Convention.

Postscript: After *Şahin v. Turkey* was decided, there were numerous domestic political and legal battles over lifting the ban on headscarves in universities and other public institutions. The headscarf remains a contested issue in Turkish society.

Mann Singh v. France I Majority Judgment

The European Court of Human Rights began by describing the facts in the case. Note that the case challenged a regulation that required photographs on French driving licenses to show an individual bare-headed:

The applicant is a practising Sikh. The Sikh religion requires its male followers to wear a turban at all times. In 2004 the prefecture refused twice to issue the applicant with a duplicate of his driving licence, which had been stolen, because the identity photos he supplied showed him wearing a turban. The applicant took various steps before the domestic courts with a view, in particular, to have the refusals set aside and seeking an order requiring the prefecture to issue the duplicate licence ...

Meanwhile, in December 2005 the [French government] sent prefects a circular concerning identity photographs for use on driving licences, stipulating that applications for driving licences or duplicate licences had to be accompanied by a photograph showing the person “bareheaded and facing forward”.

The Court then described the applicant’s attempt to challenge the driving license regulation at the domestic-level:

In December 2006 the Conseil d’Etat rejected an appeal for abuse of authority lodged by the applicant ... against the December 2005 circular ... [The applicant argued] that the impugned provisions, which were designed to minimise the risk of fraud or falsification of driving licences by enabling the holder to be identified with the maximum degree of certainty, were neither unsuited nor disproportionate to that aim ... [The Conseil d’Etat] ruled that the specific instance of interference complained of with the tenets and rites of the Sikh religion had not been disproportionate to the aim pursued, bearing in mind, in particular, that the requirement for persons to remove head coverings for the purpose of having their photograph taken “bareheaded” was a sporadic one and did not imply that persons of the Sikh faith should be accorded special treatment ...

The Court then included a brief explanation for why it considered the applicant's complaint inadmissible. It acknowledged that the French regulation was an "interference" with religious freedom. But it argued that the French regulation was allowed because it was intended to promote public safety:

The impugned regulations, which required subjects to be shown "bareheaded" in identity photographs for use on driving licences, amounted to interference with exercise of the right to freedom of religion and conscience. The interference in question was prescribed by law and pursued at least one of the legitimate aims listed in the second paragraph of Article 9 of the Convention, namely ensuring public safety. While religious freedom was primarily a matter of individual conscience, it also implied freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shared. However, Article 9 did not protect every act motivated or inspired by a religion or belief. Furthermore, it did not always guarantee the right to behave in a manner governed by a religious belief and did not confer on people who did so the right to disregard rules that had proved to be justified.

In the present case the Court noted that identity photographs on driving licences which showed the subject bareheaded were needed by the authorities in charge of public safety and law and order, particularly in the context of checks carried out under the road traffic regulations, to enable them to identify the driver and verify that he or she was authorised to drive the vehicle concerned. It stressed that checks of that kind were necessary to ensure public safety within the meaning of Article 9, [paragraph] 2.

In conclusion, the Court invoked the margin of appreciation doctrine:

The Court considered that the detailed arrangements for implementing such checks fell within the respondent state's margin of appreciation, especially since the requirement for persons to remove their turbans for that purpose or for the initial issuance of the licence was a sporadic one. It therefore held that the impugned interference had been justified in principle and proportionate to the aim pursued ...

Postscript: A few weeks after the European Court of Human Rights released this decision, Mann Singh filed a complaint at the Human Rights Committee, alleging violations of the ICCPR.

Mann Singh v. France II Majority Judgment

In its official communication, the Human Rights Committee began by describing Mann Singh's attempt to secure a French passport. As with driving licences, French regulations required that passports contain photographs that show an individual bare-headed. The Committee then stated its overall conclusion about Mann Singh's complaint. Note that the Committee differentiates between discriminatory treatment and discriminatory effect:

While the decree appears to be neutral, the requirement to show oneself bareheaded is humiliating for the minority of French citizens who are observant Sikhs. The application of this provision [to the applicant] is thus indirect discrimination based on his ethnic origin and religious beliefs. Identical treatment of persons in very different situations can constitute a form of discrimination. What is important is for people to have the opportunity to equally enjoy the same rights. This discriminatory effect violates Articles 2 and 26 of the Covenant ... France must treat Sikhs differently from how it treats the majority when this is necessary to avoid a discriminatory effect.

The Committee then described the applicant's arguments about why the French violations violated his religious rights. They note that French regulations do not imply a one-time violation of rights (when the photograph is taken), but rather repeated violations of rights (anytime an individual must be identified using the photograph). They also argue that restrictions on religious rights are only allowed when they are necessary, not merely when they are useful:

The [applicant] maintains that he has been a victim of a violation of his right to manifest his religion or belief. The French authorities argue that the requirement for "proportionality" has been met, as the infringement of the [applicant's] freedom of religion is "temporary". However, a bareheaded photograph of the [applicant] is very likely to repeatedly lead to orders to remove the turban so as to make it possible to better compare his appearance with his likeness on the photograph. Such repeated humiliation is not proportionate to the objective of identifying the person. The Covenant does not authorize states to restrict the right to manifest one's religion when such restrictions would have the sole purpose of being useful, desirable or expedient or when they

have an impact only on one religious or ethnic minority. Any restriction must be necessary; with no other solution available that would be proportionate to the objective in question.

The Court additionally noted that French immigration rules allowed foreigners to use passports without bare-headed photographs, suggesting that these photographs were not necessary for public safety:

Immigration officials and computer systems are capable of identifying a passport holder even if the person's hair is covered—even more reliably in the case of Sikhs, who never appear in public without their hair covered and face clearly visible ... The state party currently authorizes citizens of other countries to enter its territory using passports where they are not bareheaded. It is therefore difficult to fathom why restrictions imposed only on the freedom of religion of French citizens are necessary to make France safer ...

The Committee then discussed France's arguments about why its regulation did not violate the ICCPR:

The state party recalls that the freedom to manifest one's religion is subject to the restrictions in Article 18, paragraph 3, of the Covenant ... The state party considers that the conditions established in Article 18, paragraph 3, of the Covenant have been met ...

[France argues that the] measure has a legitimate objective. It addresses the need to limit the risk of passport fraud or falsification by making it possible to use the document in question to identify as veraciously as possible the document holder. This concern is all the more understandable for passports, as such documents, which allow their holders to pass borders, are subject to stringent security requirements, in particular in order to ensure public safety. By applying a simple rule setting out this obligation, the regulations allow the administrative authorities to avoid having to engage in troublesome assessments of whether one or another type of head covering, offering more or less facial coverage, allows for reliable identification of the person in question. It thus ensures public safety and order, and also the equality of all citizens before the law.

[Also, France argues that] the measure at issue is proportionate to the objective. While the obligation to produce bareheaded identity photographs may represent a constraint or even be an embarrassment for some, the constraint is a limited one. People who consider themselves duty-bound to wear turbans are not obliged definitively or even repeatedly to refrain from doing so, but

to do so just once, for the short time required to take a photograph. The nuisance for the applicant must be balanced against the general interest of combating passport falsification ...

The Committee then critiqued France's arguments. In particular, the Committee noted the practices of other states (including "most European countries and others such as Australia, Canada, New Zealand and the United States of America"):

The [applicant] does not contest the fact that reducing fraud and falsification is a valid objective for the state to pursue. However, the state party does not prove that the measure at issue is required for it to attain that objective.

The state party provides no answers to the following arguments: (a) the obligation to use bareheaded photographs on passports is arbitrary, as it can apply to a large number of situations in which head covering is not an obstacle to identification; (b) turbans do not cover facial features. In the long term, turbans pose even fewer identification problems than other changes, such as those that take place when people radically grow out or cut their hair or beards, or when they dye their hair, wear wigs or hairpieces, or lose their hair or wear heavy make-up. In the [applicant's] case, as he always wears his turban in public, a photograph with a turban would facilitate identification rather than hamper it. In all his identity documents issued since 1970 he appears wearing a turban, and this never posed a problem; (c) the state party authorizes foreign citizens whose passport photographs do not show them bareheaded to enter its territory; (d) the state party authorizes the use for visa applications of photographs in which religious symbols that the person normally wears appear; (e) most European countries and others such as Australia, Canada, New Zealand and the United States of America, which have the same concerns as France regarding security and fraud, allow religious symbols to be worn on the head in identity photographs. France is the only country of the European Union that requires passport photographs to be bareheaded ...

According to the [applicant], it is not credible to suggest that the administrative authorities encounter problems in determining whether a head covering hides the face and to suggest that the measure thus ensures the principle of equality before the law. Many states have established rules in this respect. In the United States, for instance, head coverings may be worn in visa or passport photographs for religious reasons, but they must not cast a shadow on the face, and the forehead must not be covered. Furthermore, the state party does not respond to the [applicant's] suggestion

regarding the use of alternative steps to prevent fraud, such as biometric measures or digital recognition.

As for the proportionality of the measure, the state party maintains that it is temporary, but a bareheaded photograph of the [applicant] would continuously be used as a means of official identification. The constraint would thus not be a mere inconvenience but an affront to the Sikh religion, to his ethnic identity and to his place in French society. A bareheaded photograph would result in multiple situations in which he would be requested to remove his turban to make it possible to check his likeness against the photograph.

Finally, the Committee set out its own conclusions. It first stated that French regulations interfere with religious rights:

The freedom to manifest a religion encompasses the wearing of distinctive clothing or head coverings. The fact that the Sikh religion requires its members to wear a turban when in public is not contested. The wearing of a turban is not only regarded as a religious duty, but is also tied in with a person's identity. The Committee therefore considers that the [applicant's] use of a turban is a religiously motivated act and that [the French rules], which require bareheaded passport photographs, interfere with the exercise of the right to freedom of religion.

It then argued that this interference was not authorized under Article 18, paragraph 3 of the ICCPR:

The Committee must therefore determine whether the restriction of the [applicant's] freedom to manifest his religion or belief ... is authorized by Article 18, paragraph 3, of the Covenant.

There is no dispute as to the fact that the law requires people to appear bareheaded in their identity photographs and that the purpose of this requirement is to protect public safety and public order. The task before the Committee therefore is to decide whether that limitation is necessary and proportionate to the end that is sought. The Committee recognizes the state party's need to ensure and verify, for the purposes of public safety and public order, that the person appearing in the photograph on a passport is in fact the rightful holder of that document. The Committee observes, however, that the state party has not explained why the wearing of a Sikh turban covering the top of the head and a portion of the forehead, but leaving the rest of the face clearly visible, would make it more difficult to identify the [applicant], who wears his turban at all times, than if he were

to appear bareheaded. Nor has the state party explained in specific terms how bareheaded identity photographs of people who always appear in public with their heads covered help to facilitate their identification in everyday life and to avert the risk of fraud or falsification of passports.

Consequently, the Committee is of the view that the state party has not demonstrated that the limitation placed on the [applicant] is necessary within the meaning of Article 18, paragraph 3, of the Covenant. It also observes that, even if the obligation to remove the turban for the identity photograph might be described as a one-time requirement, it would potentially interfere with the [applicant's] freedom of religion on a continuing basis because he would always appear without his religious head covering in the identity photograph and could thus be compelled to remove his turban during identity checks. The Committee therefore concludes that the regulation requiring persons to appear bareheaded in their passport photographs is a disproportionate limitation that infringes the [applicant's] freedom of religion and constitutes a violation of Article 18 of the Covenant.