APPLICATION OF ARTICLE 9 ECHR IN FRENCH AND ENGLISH LAW:

HOW DEEP IS THE CHANNEL?

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European influences on public law: 5 years of the Human Rights Act 1998 in the UK and recent developments in France.

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The aim of this report is to explore the way courts in both countries have reacted to actions in which the application of Art. 9 ECHR was at issue. A few caveats might be in order: the time-span is not the same: the ECHR has been in force in France since 1974, while the HRA applies in the UK since 2000. This paper will concentrate on public law, excluding, e.g. family or labour law. It does not purport, for obvious reasons of space and time, to contain an exhaustive analysis of all decisions using Art 9 but rather to explore in which areas applicants invoke or do not invoke its infringement, and, when they do, how courts look at its scope and approach its application, i. e. the reasoning of their decisions.

Another reminder is almost superfluous: France is a secular State. The UK is not.

PART I

THE FRENCH SCENE: A LIMITED USE OF ART 9?

I shall study judicial review proceedings (I) and a recent decision of the Conseil constitutionnel (II).

I / Judicial review proceedings

The infringement of Art. 9 ECHR does not seem to be frequently invoked by applicants in judicial review actions. To this day no annulment of an administrative decision has been decided on this ground. The main areas in which such an infringement has been invoked relate so far to public law aspects of adoption, education law (the Muslim headscarf) and medical law (the administration of medical treatment in public hospitals without the patient's consent). After studying these areas I shall examine other ones, as well as cases in which the infringement of Art. 9 ECHR has *not* been invoked .

1/ Main areas in which the infringement of Art. 9 ECHR has been invoked

1-1 Adoption

Under French law adoption is decided by civil courts. However, for certain categories of children, such as alien ones or wards of the State, the applicant must first be accepted ("agréé") by the local authorities, that is the president of the département's assembly ("conseil général"). There is an an inquiry. Refusals must state the reasons. Any document inserted into the file must, upon request of the applicant, be communicated to him[1]. Before giving his assent the president of the "conseil général" must make sure that the conditions offered by the applicant, from a familial, educational and psychological point of view, correspond to the needs and the interest of the child[2]. Administrative courts review the legality of refusals. The main issue is, in these cases, the existence of such guarantees[3].

A number of Jehovah's Witnesses, whose applications had been rejected, brought actions. The refusals have been upheld. In the first case decided by the Conseil d'Etat Art. 9 was not invoked[4]. The reason of the refusal was that they did not present sufficient guarantees, due to their refusal of blood transfusions and the risks of such an attitude for the children's health. The Conseil d'Etat upheld the legality of the refusal and of its reason. In another Jehovah's Witness case, decided in 2001[5], the breach of Art. 9 was invoked and the refusal was again upheld. It rested, the decision held, not on the belonging of the applicant to the Jehovah's Witnesses, but on the lack of sufficient guarantees. The decision mentions the "risks of isolation and of marginalisation" to which the child would be exposed, in view of the

[1] Art. 63 of the Code de la famille et de l'aide sociale and decree of September 1, 1998.

[2] Decree of September 1, 1998, Art. 4.

[3] See, for an annulment, Epoux H, November 4, 1991, p. 361, concl. Hubert. For decisions upholding refusals see same date, Président du conseil général des Yvelines c Mlle L., p.372, and Epoux C., p. 374, concl. Hubert.

[4] Département du Doubs c. Epoux F., April 24, 1992, p. 195 ; Revue de droit sanitaire et social, 1992.712, concl. Hubert ; *Les Petites Affiches*, 1993, n°1, p.11, note Jorin and Florand ; Revue administrative, 1992.328, note Ruiz-Fabri ; Revue trimestrielle de droit civil, 1992.551, note Hauser- Huet-Weiller.

[5] Douai Court of administrative appeal, May 3, 2001, M. et Mme S., p. 1003; see also Paturel, July 3, 1996, p. 256.

following, by the applicant, of the Witnesses's precepts in their daily life. In view of the European Court of Human Rights's case law concerning cases in which the decision of the domestic courts on child's custody or residence had been taken exclusively on the ground of the belonging of one parent to the Jehovah's Witnesses[6], one may wonder what will its attitude be when it decides on applications directed against the decisions mentioned supra and whether, in addition, Art 8 will be invoked.

1-2 Prohibition of the Muslim headscarf in State schools, before and after the 2004 statute

The breach of Art. 9 has been very rarely invoked, and is therefore not mentioned in most judgments, whether they quah exclusions or uphold them. Three judgments, however, mention it:

- A judgment of the Lyons administrative court held that the exclusion, based on the agitation and demonstrations provoked in the school by the wearing of the headscarf was lawful, since it rested on the necessity of maintaining order and the rights and freedoms of others[7].

- Another judgment of the Strasbourg administrative court quashed an exclusion[8], basing itself not on the infringement of Art. 9 but on the fact that the wearing of thre headscarf had not provoked any disorder in the school. The "Commissaire du gouvernement" examined, in its conclusions, the compatibility with Art. 9 of the school's by-rules banning the wearing of "ostentatious signs which constitute by themselves" elements of proselytism of of propaganda.

- After the adoption of the 2004 statute banning, in State schools, the wearing of signs and dresses "by which students manifest ostensibly a religious belonging"[9], the Minister of Education circulated an instruction relating to its implementation. An association asked the Conseil d'Etat to quash the instruction, invoking, inter alia, the infringement of Art.9 ECHR. The application was rejected. In rejecting the argument based on the breach of Art. 9, the decision held that the banning contained in the statute and commented in the instruction did not restrict excessively freedom of religion, in view of the goal relating to the general interest ("motif d'intérêt general") , which aimed at the respect of the principle of "laïcité" in State schools.

  Such reasoning is problematic: respect for "laïcité" is not among the grounds mentioned in Art. 9-2 and on which freedom to manifest one's religion or beliefs may be limited. In his conclusions the "commissaire du gouvernement" mentioned the European Court of Human Rights's case law[10] and rightly said that none of its judgments could be directly transposed to the case. In his view

[6] Hoffmann v Austria, June 23, 1993; Revue universelle des droits de l'homme, 1993.336 ; Human Rights Law Journal,1993. 106 ; Dalloz.1994.329, note Hauser ; Palau-Martinez v France, December 16, 2003. On the application of Art. 8 to adoption see Pini and Bertani and Manera and Atripaldi v Romania, June 12, 2004.

[7] M. et Mme Aoukili, May 10, 1994 ; Les Petites Affiches, November 30, 1994, n° 143, p.6 , concl. Bézard. The appeal was rejected by the Conseil d'Etat: Epoux Aoukili, March 10, 1995, p. 122;JCP. 1995.II.22431, note Van Tuong; Dalloz 1995. 365, note Koubi.

[8] Mlle Aysel Aksirin c. Recteur de l'académie de Strasbourg, May 3, 1995 ; Revue du droit public, 1995. 1348, concl. Martinez.

[9] Art. L.141-5-1 of the Code de l'éducation.

the banning could be regarded as based on such legitimate grounds as public order and allowing teaching to continue to take place[11]. Such a reasoning could and should have been adopted, instead of the lapidary and combined invocation of "laïcité" and "intérêt général".

1.3 Administration of medical treatment without the patient's consent

Blood transfusions were performed on Jehovah's Witnesses in spite of their explicit refusal, in view of their condition.A number of them brought actions, alleging, among other ground, the breach of Art. 9 ECHR. The Paris administrative court rejected the plea. It held that such an interference with the patient's freedom to manifest his religion or beliefs was based on the physician's *obligation*[12] to protect the the health and, in last resort, the life of the patient[13]. Such a reasoning seems also problematic, since it does not permit the application of the basic principle of proportionality. As to another condition of the compatibilité of limitations with the Convention ("prescribed by law"), such an "obligation" of the physician was mentioned, for the first time by the court in its judgment. On appeal on points of law ("cassation") the Conseil d'Etat quashed the lower court's judgment as affirming such an obligation on too general termes and rejected, on substance, the aplication. It mentioned Art 3. and 5 ECHR but not Art. 9. This is surprising: having quashed the administrative court of appeal's judgment, the Conseil d'Etat was bound to examine the grounds invoked before it. Art 9 was among them[14].

The legal literature on the issue does not generally mention Art. 9, which might seem strange[15].

2/ Other areas

2.1 The violation of Art 9 has been invoked in vain in a number of cases relating to

- tax-law[16]

[10] Refah Partisi v Turkey, February 13, 2003 ; Dahlab v Switzerland , February 15, 2001; Sahin v Turkey, June 29, 2004.

[11] Union française pour la cohésion nationale, October 8, 2004, p.367 ; Revue française de droit administratif, 2004, concl. Keller ; Actualité juridique. Droit administratif, January 10, 2005, note F. Rolin. The same reasoning can be found in a recent judgment of the Strasbourg administrative court: Mlle Akkus, July 25, 2005.

[12] My emphasis.

[13] Paris CAA, June , 1998, Mme X, Dalloz. 1999.277, note Pellissier ; same date, Mme Senanayake c Assistance publique, Gazette du Palais, June 17, Re1999, p. 392, note Bladier ; Revue française de droit administratif, 1998.1231, concl. Heers ; Les Petites Affiches, April 23, 1999, n° 81, p. 10, note Memeteau.

[14] Mme Senanayake, October 10, 2001, p. 514 ; Revue trimestrielle de droit civil, 2002.484, note ; Droit de la famille, 2002.53, note Frion ; Actualité juridique. Droit administratif, 2002.259, note Deguerdre ; Revue française de droit administratif, 2002.p. 146, concl. Chauvaux , note de Béchillon ; Les Petites Affiches, January 15, 2002, p. 11, note Clément. I have commented the judgment in (2002) PL. 579. See also A. Mersch, « Le refus de soins devant le Conseil d'Etat », Droit administratif, July 2002, p. 5.

[15] See, e.g. A. Pariente, « Le refus de soins: réflexions sur un droit en construction », Revue du droit public, 2003.1419; A. Dorsner-Dolivet, « Le consentement au traitement médical : une liberté fondamentale en demi-teinte », Revue française de droit administratif, 2003. 528 ; G. Pellissier, « La vie privée entre volonté individuelle et ordre public : le paradigme du refus de soins », Dalloz.1997.277. The two exceptions are Mersch, loc. cit and L Dubouis, « Le refus de soins : qui, du patient ou du médecin, doit arbitrer entre la vie et Dieu », Revue de droit sanitaire et social, 2002.41.

[16] Strasbourg administrative court, October 18, 1993, Association des Musulmans en Alsace c. Direction des services fiscaux du Haut-Rhin.

- the obligation to produce, upon applying for an ID card, two photographies showing the applicant bare-headed, this excluding the wearing of the headscarf. Such a limitation of the right guaranteed by Art 9-1 was held to be lawful, since it rested on public order grounds and was not disproportionate[17].

- the sitting of a physicians' board of discipline on a Sunday[18]

- education law : cases relating to the inclusion of religious education in the school curriculum in Alsace-Lorraine, where Separation between State and Church does not apply and the faculty, for headmasters of State schools, to authorize leaves of absence on religious grounds[19].

- The dismissal of a public hospital's telephone operator refusing to work on Saturdays on religious grounds (she was a Seventh Day Adventist) in spite of the impossibility for he to be replaced[20].

  A comparison could be drawn here with a decision of the European Human Rights Commission, mentioned by counsel for the school before the High Court in the Denbigh High School case[21]. The applicant alleged that her dismissal for refusing to work on Sundays constituted a violation of her freedom to manifest her religion in worship, practise and observance, contrary to Art. 9-1. Referring to another similar case the Commission held that the applicant had been dismissed for failing to agree to work during certain hours rather than for her religious beliefs as such. The application was held to be manifestly ill- founded under Art. 27-2 ECHR[22].

- the status of consciencious objectors[23]

- The subsidizing, by the Government, of an association whose aim was to disseminate information on (or rather against) certain, religious groups[24].

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[17] Fonds de défense des musulmans en justice.

[18] Esposito, February 23, 2000.

[19] SNES, April 6, 2001 ; Consistoire central israélite de France, April 14, 1995, concl. Aguila ; Revue française de droit administratif, 1995.585 ; Dalloz. , 1995.481, note Koubi ; JCP.1995.II.22437, note Nguyen Van Tuong. The "Commissaire du gouvernement", in his conclusions, analyzed the case law of the European Court of Human Rights. The judgment merely quotes Art. 9.

[20] Gillot, December 16, 1992.

[21] See at § 72

[22] Stedman v UK, Application n° 29107/95, April 9, 1997; 23 EHRR CD 168; see also Commission, December 3, 1996, Kontinen v Finland, DR. B, p. 68.

[23] Chardonneau, June 8, 1990, p. 146. States-parties to the Convention have no obligation to recognize the right to conscientious objection. Those who do may regulate its exercise. Art. L.116-2 of the Code du service national is compatible with Art. 9.

[24] Eglise de scientologie de Paris, February 17, 1992, p. 61 ; Actualité juridique. Droit administratif, 1992. 460, note Devès. The decision upholds a lower court judgment which, it says, "implicitly (?) but necessarily" rejected the argument alleging the violation of Art. 9. Freedom of religion is not mentioned in the judgment.

2-2 The infringement of Art. 9 was not invoked ands was not therefore mentioned in a number of cases relating to the following areas:

a) Civil service law.

Two cases may be mentioned: the opinion of the Conseil d'Etat on the prohibition, for all civil servants, to wear religious signs[25] and the case in which the Conseil d'Etat affirmed the illegality of a decision refusing, in principle, to civil servants a leave of absence on religious grounds for religious holy days other than official holidays[26].

b) University law.

The Conseil d'Etat upheld the quashing, by a a lower administrative court of a decision of the President of the Lille II University forbidding female students wearing the Muslim headscarf to enter the premises of the University. The judgment affirms that the students's freedom of expression, guaranteed by a 1984 statute, includes religious expression, and has limits[27].

c) The use of religious signs by the Administration[28]

A few general remarks on this case law might be in order here.

- The breach of Art. 9 is far from being invoked in cases relating, directly or indirectly, to freedom of religion, which is, in a way, surprising; the cause might be an insufficient awareness of applicants and their lawyers of the scope of this Article and of the relevant case law of the European Court of Human Rights, in spite of the abundant legal literature on this subject.

- When it is invoked, the reasoning of some of the judgments rejecting this plea is sometimes problematic, as illsustrated by somes of the cases mentioned supra. In *Union française pour la cohésion nationale* (2004) the decision should have mentioned one of the grounds cited in Art 9-2, which was easy, and not other ones. In other cases the brevity of the reasoning leaves little place for the four-fold examination, by courts, of the argument bases on the on the infringement of a freedom guaranteed by the Convention: was there a limitation ? If so, was it prescribed by law? If so, was it based on one of the grounds mentioned in the relevant Article of the Convention? And finally, if so, was the restriction proportionate?

[25] Mlle Marteaux, May 3, 2000, p. 169 ; Revue française de droit administratif, 2001.146, concl. Schwartz ; Actualité juridique. Droit administratif, 2000.602, note Guyomar-Collin ; Dalloz, 2000.747, note Koubi ; See also Paris administrative court, October 17, 2002, Ebranimian, Actualité juridique. Droit administratif, 2003.99.

[26] Université de Lille II, July 26, 1996, p.915.

[27] See CAA Nantes, February 4, 1999, Association civique Joué Langneur et autres, p. 498, quashing the decision of a city council to affix a crucifix in the council room, and id, March 11, 1999, Association Une Vendée pour tous les Vendéens, rejecting an application asking the annulment of the decision of the département to adopt a logo representing two hearts with a crown and a cross. The logo was held not to be a religious sign.

[28] Mandla (Sewa Singh) and another and Dowell Lee and other, (1983) 2 AC 548.

II / The decision of the Conseil constitutionnel of November 19, 2004

On October 29, 2004, the President of the Republic, acting under Art. 54 of the Constitution, asked the Conseil constitutionnel whether the authorization to ratify the Treaty establishing a Constitution for Europe, signed the same day in Rome, required a prior revision of the Constitution because it contained clauses incompatible with it. I shall examine here only the part of the decision relating to Art. II-70 concerning, in the Charter of fundamental rights, freedom of religion. I shall sum-up the contents of the decision and then comment on it.

1 / What the Conseil constiturtionnel said here in substance can be summed - up as follows:

Examining the conformity of the Charter with the Constitution, the decision notes that, under Art. II-111 the Charter applies both to the institutions, organs and organisms of the Union and to member States exclusively when they implement Union law. It the goes on to say that it contains, pursuant to Art. II-112, para 5, both rights, directly enforceable before courts, and principles. The latter, according to the CC, are objectives, which may be invoked only against general norms relating to their implementation (II-112-5). It cites a number of these principles (§ 15). In the following para the decision holds, quoting Art.II-112, para 4, that fundamental rights the source of which are constitutional traditions common to member States must be interpreted in harmony with these traditions. Conclusion: this is in acordance with Art.1 -3 of the Constitution which prohibit the recognition of collective rights to any group whatsoever on ground of common origin, language or belief. In the following para, the decision quotes the Preamble of the Charter according to which the latter shall be interpreted by the courts of the Union and those of the member States in taking duly into account the explanations coming from ther Praesidium of the first Convention. The decision also quotes Art. II-112 of the Treaty which says the same thing.

We at last come to freedom of religion. The decision mentions Art.II-70, para 1, which recognizes the right for everyone, either alone or in community with others, to manifest his religion in public in practice. It goes to affirm that, according to the "explanations" mentioned supra, such a right has the same meaning and scope as the one guaranteed by Art 9 ECHR. It may thus be limited on the grounds listed in Art 9-2, which the decision lists. The CC then declares that Art. 9 has "constantly" been implemented by the European Court oh Human Rights, and lastly by the *Sahin v Turkey* decision, "in harmony" with the constitutional tradition of each member State. Thus the Court has affirmed the value of the principle of "laïcité", recognized by several constitutional traditions. In addition the Court leaves to member States a large margin of appreciation in order to devise appropriate measures, taking into account their national traditions, in order to balance what the CC calls "liberté de culte" and the principle of " laïcité". The conclusion is: all this respects Art. 1 of the Constitution, under which "France is a secular ("laïque") Republic". This, the CC affirms, forbids "anyone to invoke his religious beliefs in order not to follow the common rules concerning the relations between public bodies and individuals" (§ 18).

2 / Why did the CC concentrate so much on freedom of religion (as mentioned in Art. II-70), since the Charter adds nothing to Art .9 ECHR ?

Two explanations may be proposed. The first one relates to the French debate on the Muslim headscarf in State schools. 8 months before the decision of the CC, in March 2004,

Parliament adopted the statute of March 15, 2004 banning the wearing, in State schools, "of signs or dresses by which students manifest ostensibly a religious belonging" (now Art.L. 141-5-1 of the Education Code). The statute came into force in September, at the beginning of the school year, while the debate on the meaning of "laïcité", and on " communautarisme" and "multiculturalisme" did not stop. The CC did not pronounce on the statute, since it was not referred to it, the opposition parties having voted for it. As the school year was beginning, did the find it worthwhile or useful to affirm, however indirectly, the constitutional validity if not the necessity of such a prohibition, by the passage contained at the end of para 18 of its decision ? In the general context mentioned above, this might be the case.

The second explanation relates to the two-fold debate that took place, both in France and in a number of European countries, on the mention of religion first in the Charter and then in the Treaty itself.

a) The Charter's Preamble

When the Charter was discussed during the first Convention a heated debate took place on whether its Preamble should mention Europe's religious heritage. France's highest authorities refused absolutely the words "… the cultural, humanist and *religious* heritage". The text finally adopted mentions the "spiritual and moral heritage" of the Union. The debate was resumed during the second Convention when the Charter was included into the Treaty. But it related now to the Preamble of the Treaty itself.

b) The Treaty

The new issue was on whether the Christian tradition of Europe would be mentioned in the Preamble of the Treaty. Several countries asked so. A debate also took place on this point in France, where partisans of a strict conception of "laïcité" felt besieged. Hence the compromise: the text mentions the "cultural, religious and humanist inheritances of Europe", without any mention of specific denominations (Preamble, first phrase).

The same circles expressed some preocupation about Art.I-52 on the status of churches and non- religious organisations, according to which the Union respects and does not have a particular position on such a status under the domestic law of member States. The Union recognizes their identity and their specific contribution and maintains an "open, open, transparent and regular dialogue" with them.

Throughout 2003 and 2004 certain opponents of the ratification of the Treaty alleged that Art. II-70, by its very wording, would threaten "laïcité" and might lead to the dreaded "communautarisme".

3 / What is one to think on the substance of the CC's decision on Art. 9 ECHR ? Most commentators have strongly criticized it.

I shall comment the use of the Preamble of the Charter and that of the European Court of Human Rights's case law.

a) The use of the Preamble of the Charter

The Preamble of the Charter contains a convoluted phrase affirming that it shall be interpreted by domestic and Union's courts "with due regard" to the "explanations" coming from the praesidium of the first Convention, as updated by the praesidium of the second Convention. The text of these explanations is to be found in Declaration 12 appended to the draft Treaty. Under the Declaration, these explanations do not have, per se, legal value (How could they ?) but are a useful tool for the construction of the Charter. It is unusual, to say the least, to find in an Annex to a treaty instructions addressed to the courts on the construction of certain on its clauses, especially when they relate to human rights. This bizarre statement is, as we know, the product of the insistance of certain Member States which were not exactly enthusiastic about the incorporation of the Charter into the Treaty. What is the content of the explanations relating to Art.II-70? We read that the right guaranteed by Art. II-70-1 corresponds to that guaranteed by Art. 9 ECHR. It has the same meaning and the same scope, and the limitations are those stated in Art. 9-2 ECHR. Were two sets of explanations by the praesidium (or praesidia?) of two Conventions really necessary to state the obvious, as shown here by Art. II-112 –4? What is at stake here is the technique used by the drafters of the Charter and indeed the very idea of it- unless one believes on the profound wisdom of what the Bellman says in Fit the first of *The Hunting of the Snark*: "I have said it thrice: What I tell you three times is true".

The CC's decision's emphasis on this clause is a repeated one, added to the mention of Art. II-112-4: inasmuch as the Charter recognizes rights resulting from constitutional traditions common to member States, these rights must be interpreted in harmony with these traditions.

b) The use of the European Court of Human Rights's case law.

- The CC's decision cites, at the beginning, as is the use, the instruments on which it is bases. We find here, in addition to the Constitution, the ECT, the EUT, the ECHR, and a mention of *Leyla Sahin c Turkey*, decided on June 29, 2004. This is the first time the CC mentions a specific judgment of the Court in its decision.One may wonder why it did so.

- This is the more surprising since, at the time of the CC's decision, November 19, *Sahin* was a provisional and therefore an unpublished judgment, in view of the existence of an application to send the case to the Grand Chamber, under Art. 43 ECHR. The case was sent to the Grand Chamber a few days after the CC's decision.To rely heavily on a provisional judgment is very strange.

- The affirmation according to which Art.9 ECHR has been "constantly" implemented by the Court, and recently by *Sahin,* in harmony with the constitutional tradition of each member State is followed by a problematic one: the Court, the CC says, has acknowledged the value of the principle of "laïcité", recognized by several national constitutional traditions. Several remarks here: On religion the Court has always insisted on the diversity of national traditions and constitutional principles, and rightly so.

  Besides, it is not easy to determine, for the application of Art.II-112-4, what are the rights recognized by constitutional traditions *common* to member

States? Is “laïcité” one of them? I do no think so, and indeed the CC seems to have had doubts since it affirms that the principle has been recognized by *several* national constitutional traditions. The only case where “laïcité” was mentioned by the Court is *Refah Partisi and others v Turkey*, February 13, 2003, (§ 93) which relates toArt; 11 and not Art.9. This was quoted by the Court in *Sahin I*, where the Court noted that “laïcité” was one of the founding principles of the Turkish State.

In addition, to base the compatibility of a clause of a Treaty on the present state of the case law of the European Court of Human Rights invites a query: what if this case law changes in the future?

c) The conclusion , in § 18, is a surprising one, for two reasons:

After the exegesis mentioned supra, the CC concludes that Art. II- 70 respects Art. 1 of the Constitution. The decision quotes part of the first phrase of this Article.: “France is a secular Republic”. It does *not* quote the penultimate phrase: “It respects all beliefs”. (« Elle respecte toutes les croyances ») .Why? In its 1989 opinion on the colmpatibility of the wearing of religious signs with the principle of “laïcité”, the Conseil d’Etat affirmed clearly that such a principle cannot and should not be dissociated from that of respect for all beliefs. This affirmation is still valid.

The interpretation of the part of Art.1 of the Constitution quoted by the decision is as follows: it forbids anyone to invoke his religious beliefs in order not to follow common rules relating to relations between public bodies and individuals.With respect (to use the same word) this seems to me to be a total non sequitur, an extremely illiberal one, and which does not correspond to the current law and practice in many areas.

PART II

AN OUTSIDER'S COMMENT OF SOME ENGLISH CASES ON ART.9 ECHR, WITH A PARTICULAR EMPHASIS ON THE DENBIGH HIGH SCHOOL CASE: TAKING FREEDOM OF RELIGION SERIOUSLY?

I shall comment first on a number of cases relating to Art.9 and then on the Denbigh High School case.

I / Art. 9 ECHR before English courts

It might be relevant to comment briefly *Mandla*, decided in 1983. The House of Lords held that the refusal of a school to admit a student because he wore a turban was a discrimination under Art. 1(1)b) of the Race Relations Act 1976[29]. Would such a case be argued and decided to-day on the ground of Art. 9 ECHR, as in *Denbigh*?

Another case relates to criminal law[30]. The only significant case I found since the entry into force of the HRA relates to religious belief and corporal punishment. The issue was the compatibility of s. 548 of the Education Act 1996, as substituted by s. 13 (1) of the School Standards and Framework Act 1998, which bans the infliction of corporal punishment in schools with Art. 9. The applicants, a headmaster of an independent school and other teachers and parents at independent schools asserted that their belief, founded on certain biblical texts, was that mild and loving corporal punishment was an integral part of the teaching and education of their children. The Court of appeal held that there had been no infringement of Art. 9 ECHR or of Art.2 of the First Protocol, because either a) *per* Rix and Arden L.JJ., although the claimants' views on education were religious beliefs for the purpose of Art. 9, s. 548 had not materially interfered with their beliefs since the actual application of the punishment could be performed by the parents themselves, or b) *per* Buxton L.J., the claimants' views was not a belief or a conviction and neither the teachers nor the parents, in inflicting or supporting corporal punishment, manifested their beliefs[31]. What was of special interest for me in the subsequent House of Lords decision[32] are the following affirmations on which the judgment id based:

- the courts decide as a matter of fact whether the beliefs are held in good faith and are not fictitious or capricious but cannot inquire into their validity .

- the manifestation of the belief that corporal punishment, so long as it is of a mild character, is necessary for the proper upbringing of children is capable of

[29] Mandla (Sewa Singh) and another and Dowell Lee and other,(1983) 2 AC 548.

[30] In R v Taylor, The Times, November 15, 2001; (2002) PL 174. Y. was prosecuted for possession of cannabis. The Crown conceded that Rastafarianism was a religion and that the drugs were to be used for an act of worship. The judge ruled that Art. 9-1 applied. The Court of appeal held that the judge had been entitled to rely upon the inferences to be drawn from the UK's subscription to international conventions relating to drugs, that an unqualified ban on possession of cannabis with intent to supply was necessary to combat the public health and safety dangers of drugs. There was a distinction between legislation which prohibited conduct because it related to or was motivated by religious belief, and legislation that was of general application but prohibited, for other reasons, conduct that happened to be encouraged or required by religious belief.

[31] R (Williamson) v Secretary of State for Education and Employment (2002) EWCA Civ 1820; (2003) 1 All ER. 385.

[32] R (on the application of Williamson) v Secretary Of State for Education and Employment (2005) HL 15; (2005) 2 WLR 590.

being protected by Art.9 and the parents' rights under Art. 9 and Art. 2 of the First Protocol are engaged.

- S .548 materially interferes with the claimants's rights under these articles.

- The interference is justified under Art. 9 (2): the statute pursues the legitimate aim of promoting the welfare of children by protecting them from the deliberate infliction of physical force.

II / The Denbigh High School case.

1) Overall view of the case

There is no need to recall here the different historical, constitutional and institutional setting of religious denominations and of the school system in the UK and in France, and I shall concentrate on the case itself. The facts are known: S. Begum, a young Muslim girl aged 12, refused to attend school and to wear the uniform prescribed by her school for Muslim female pupils, as an alternative to the school uniform. She brought an action against the school and claimed that her rights under Art. 9 had been infringed. Bennett, J., held that she had not been excluded from the school and that the school uniform policy promoted a positive ethgos and a sense of communal identity, was proportionate and had a legitimate aim. There had been no violation of Art. 9[33].

The Court of appeal found otherwise. It held that the school had excluded her and had done so because her freedom to manifest here religion under Art. 9-1 ECHR was being limited. While the limitation was in the relevant sense prescribed by law, the school had failed to justify its restriction of her rights under Art. 9. It had failed to approach the matter in the correct way, considering the aim of the policy, the balance of interests and whether the policy was justified. It had started from the position that the policy was there to be obeyed[34].

2) A tentative comment on the case

The case is pending before the House of Lords and I hesitated, for this reason, to comment on it now, before going ahead. I shall present now a number of general remarks on the two judgments (2-1) before commenting on their substance (2-2).

2-1 / General remarks

What was of special interest for me, as a foreign commentator, was the following: the size if the judgments (34 and 22 pages); the speediness of the procedure (4 months for the first judgment; 9 for the second one); the remedy sought: a declaration and, finally the way both judgment analyse and discuss in detail all the facts of the case: the applicant's denomination; the school, its staff and students; the contents of the internal and external consultations organized by the school on the unform policy; the letters exchanged.

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[33] R (Shabina Begum) v The Headteacher and Governors of Denbigh High School, (2004) EWHC 1389 (Admin).

[34] R (On the application of Shabina Begum) v Governors of Denbigh High School ; EWCA Civ 199; 2 All ER 396.

Two other elements were also of special interest, in addition to the very existence of a uniform policy in schools:

a) The legal setting

I noted the preedominace of guidance over statutory rules and the absence of a statute defining what pupils should or should not wear. Guidance, statutory and non statutory, is paramount and is quoted in the judgments. As to the former, DfES circular 10/99 Social Inclusion: Pupil Support, includes the following statement: "6.4 Exclusion should not be used for breaching school uniform"[35]. However Guidance 0087/2003 states: "21. Exclusion should not be used for…c) breaches of school uniform rules, except where these are persistent and in open defiance of such rules"[36]. As to non statutory guidance, DfES circular 0264/ 2002 states: "Cultural, Race and Religious Requirements. 10. Whilst pupils must adhere to a school's uniform policy, schools must be sensitive to the needs of different cultures, races and religions. The Department expects schools to accommodate their needs, within general uniform policy. For example, allowing Muslim girls to wear appropriate dress and Sikh boys to wear traditional headdress - 11 The Department does not consider it appropriate that any pupil should be disciplined for non-compliance with a school uniform policy, which results for them to adhere to a particular culture, race or religion code"[37].

On guidance, I noted Mummery L.J.' wise observation. Agreeing on the need for teachers and governors to be given authoritative written guidance on the handling of human rights issues in schools, he added: "They need clear, constructive and practical advice on how to anticipate and prepare for problems, how to spot them as and when they arise and how to deal with them properly. It would be a great pity, if through lack of expert guidance, schools were to find themselves frequently in court having to use valuable time and resources, which would be better spent on improving the education of their pupils"[38].

b) The extent of the school's consultation and information policy on the school uniform

When a new uniform for Muslim female pupils was introduced, a school uniform working party was created. The uniform was designed by students and the design approved by the governors, parents, staff and the local mosques[39].

"All students, when they choose their school, are taken very carefully through the school unform policy.This is done with parents as well as the pupil. That is done with parents in the October before a prospective pupils starts at the school the following September, and also with the prospective pupil. In the July prior to admission an open evening is held at the school for parents and child where the uniform policy is again explained. A letter is also sent in July to parents of existing pupils which includes a reminder about school uniform"[40].

When S.B. refused to attend school, the latter sought independent advice from Muslim religious authorities on whether its uniform policy offended the islamic dress code.

[35] Court of appeal, at § 20.
[36] Id, art § 21.
[37] High Court judgment, at § 152.
[38] Court of appeal, at § 89.
[39] High Court judgment, at § 42.
[40] Id, at § 44.

2.2 On the judgments and their use of Art. 9 ECHR

Both judgments used Art. 9, but in different ways.

A) The High Court judgment

Bennett, J, held that "it cannot be said the actions or stance of the school amounted to exclusion, either formal, informal, unofficial in any way whatsoever"[41]. A question arises here: in the absence of a formal decision of exclusion, preceded by disciplinary proceedings, Bennett, J. did not order the school either to readmit S.B. or to initiate disciplinary proceedings against her, because the claimants did not, it seems, ask him to do so. Could he have acted otherwise?

A similar situation took place in France in two cases during the fall of 2004. In the first one three youg Sikh students of a lycée were refused admission because they wore the turban, the wearing of which was banned under the new statute. From September 23 until October 11, they were in a limbo. They asked the administrative court of Cergy-Pontoise to bring such a situation to an end. On October 24, 2004 the court ordered the lycée to convene a disciplinary board within 15 days. Their situation, it held, was a grave and manifestly illegal infringement of their rights of defense[42]. In the second case, the head of a lycée in Strasbourg refused a student wearing the headscarf admission into her classroom. She was assigned a place in different room and she followed the courses as she could, while the talks with her family took place. She challenged the legality of such a decision. The administrative court held that the decision was justiciable. In the absence of any indication on the nature, length and contents of such a decision, the court held it was not within the powers of the head of the lycée and quashed it[43].

Back to London: Bennett, J. could have stopped after affirming there had been no exclusion. However he found it necessary to express his views upon the merits of S.B.'s case and did do in the second part of his judgment. Was the limitation of her rights under Art.9 prescribed by law? Yes. Was the aim pursued a legitimate one and if, so, was the limitation proportionate? After quoting extensively the Headmaster's statement and that of the deputy Headmaster on the school uniform policy and its justification, he affirmed that the school's submission that the limitations were necessary for the protection of the rights and freedoms of others was well founded. The school, he added, was a multi-cultural, multi-faith secular school. Its uniform policy promotes a positive ethos ans a sense of communal identity: "Not only does the Shalwar Kameeze satisfy the right of Muslim pupils to manifest their religion but also it is worn by a number of different faith groups such as Hindus ans Sikh female students. Furthermore there is not outward distinction between Muslim female pupils"[44]. The policy adopted aimed at protecting the rights and freedoms of the "not insignificant number of Muslim female pupils who do not wish to wear the jihab and either do, or will, feel pressure on them from inside or outside the school" [45].

Bennet, J., concluded: "The legitimate aim was the proper running of a multi-cultural, multi-faith, secular school. The limitation was also proportionate to the legitimate aim pursued … the adoption of the Shalwar Kameeze by the defendant as the school uniform for

[41] Id, at § 60.
[42] *Le Monde*, October 24-25, 2004.
[43] Strasbourg administrative court, Mlle Akkus,quoted supra n. 11.
[44] High Court judgment, at § 90.
[45] Id, ibid.

Muslim (and other faiths) female pupils was and continue to be a reasoned, balanced and proportionate policy"[46].

B) The Court of appeal judgment

The Court of appeal's starting point was a different one: S.B. had been excluded by the school. Brooke, L.J., blamed the school for having left her in a limbo, which is not allowed by education law: "If the statutory procedures and departemental guuidance had been followed, the impasse would have been of very much shorter duration and by one route or another her school career (at one school or another) would have been put back on track very much more quickly"[47]. In other words, the school is blamed for not having started disciplinary proceedings against her once she was refused entry.

Why was she excluded? Because, the Court held, her freedom to manifest her religion or beliefs under Art.9 was being limited. After considering in great detail the relevant evidence Brooke, L.J., arrived at this conclusion, after quoting the the result of the consultation of different Muslim authorities, including what he called "the mainstream, modern view among Muslims in England" and contrary views[48]. Turning to S.B's beliefs he quoted the European Court of Human Rights decision in *Hasan And Chaush v Bulgaria*: "(The Court) recalls that, but for very few exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs as the means used to express such beliefs are legitimate". A timely reminder.

It thus belongs to the school to justify the limitation of freedom created by the school's uniform code and by the way it was enforced. Hence the key question: was such a limitation necessary on one of the grounds listed in Art. 9-2 and proportionate? Public morals were not mentioned. The judge had dismissed justification on health and safety grounds. The main issue was, again, the rights and freedoms of others. After summing-up the judge's position and his conclusion, Brooke, L.J., turned to the case law of the European Court of Human Rights, namely the *Dahlab v Switzerland* and the *Sahin v Turkey* cases.

In *Dahlab* the Court declared unadmissible a complaint by a primary schoolteacher who had been prohibited from wearing the Muslim headscard at school. The decision mentions the requirements of the protection of the rights and fredoms of others against the conduct of of which the applicant stood accused. The need to protect the principle of denominational neutrality in Swiss schools was treated as a very important factor which militated successfully against the applicant's case. In *Sahin v Turkey*, already mentioned, the applicant, a student, had been denied access to written examinations and to a lecture at the University of Istanbul because she was wearing an Islamic headscarf. The source of the prohibition of the latter was the Turkish Constitution, as interpreted by the Turkish Constitutional court in 1989 and 1991. The European Court dismissed Miss Sahin's complaint placing great weight on the principles of secularism ("laicité") in the Turkish national context, and on the extent of the national margin of appreciation: a fair balance must be struck between the various interests at stake: the rights and freedoms of others, avoiding civil unrest, the demands of public order and pluralism.The interference in the case was based on two principles: secularism and gender equality.

[46] Id, at § 91.

[47] Court of appeal, at § 24.

[48] Id, at § 33.

Context, added Brooke, L.J., is all-important. He went on remarking that "the UK is very different from Turkey. It is not a secular State"[49]. In view of the importance attached by him and the Court to *Sahin*, the absence of any mention of the fact that the case had been, since November 2004, sent up to the Grand Chamber, is very surprising[50]. Going back to the school's practice, he noted that it permitted girls to wear a headscharf, which is likely to identify them as Muslim. He then added: "The central issue is therefore the more subtle one of whether, given that Muslim girls can already be identified in this way, it is necessary in a democratic society to place a particular restriction, on those Muslim girls who sincerely believe that when they arrive at the age of puberty theur should cover thermselves more comprehensively than is permitted by the school uniform policy". And he went on:

"The decision- making structure should therefore go along the following lines: 1) Has the claimant established that she has a relevant Convention right which qualifies for protection under Art.9(1)? - 2) Subject to any justification that is established under Art.9(2), has that Convention right been violated ? - 3) Was the interference with her Convention right prescribed by law in the Convention sense of that expression? - 4) Did the interference have a legitimate aim? - 5) What are the considerations that need to be balanced against each other when determining whether the interference was necessary in a democratic society for the purpose of achieving that aim? -6) Was the interference justified under Art.9(2) ?"[51].

The school did not approach the matter in this way at all and this was the Court of appeal's main reproach against it: nobody considered that S.B. had a right and that the onus was on the school to justify its interference with it. Instead the school started from the premise that the uniform policy was to be obeyed. Conclusion: the school unlawfully excluded her from school. It unlawfully denied her the right to manifest her religion. It unlawfully denied her access to suitable and appropriate education[52].

Mummery, L.J., while concurring, added a thoughtful remark relating to the balance to be struck, thus introducing a cautionary note to the decision: "The process of justification of a limitation on the right to manifest one's religion involves a very careful and wise analysis in the very difficult and sensitive area of the relation of religion to various aspects of the life of the individual living in community with other individuals, who also possess rights and freedoms. The right to manifest one's religion under Article 9 is not necessarily a valid reason for overriding the social responsibilities of the individual holder of the right to others living in the community"[53].

I shall read with great interest the decision of the House of Lords Meanwhile, I would like to present a few final observations on the contents of both judgments: I was somewhat surprised by the affirmation of the High Court judgment according to which S.B. had not been, excluded by the school. As to the court of appeal decision, I had a feeling that the Court blamed the school as much for its method and approach as for the substance of its decision. On substance, may I just add that that I was impressed by the way in which the school introduced its uniform policy and how it went to great length indeed, in view of the local context, in deciding it.

[49] Id, at § 73.
[50] The judgment of the court of appeal is dated March 2, 2005.
[51] Id, at § 75.
[52] Id, at § 78.
[53] Id, at § 86.

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How deep, then, is the Channel ? I am afraid it is too late for me to regret the imprudent sub-title of this report and take it back. After this very partial and tentative analysis of the waters, i. e. what the courts, on both sides, do with Art.9 ECHR when it is invoked by claimants, and pending a further exploration of the bottom of the sea, it seems to me that, at the moment, claims of violation of Art. 9 are explored in greater detail and answered more fully and more in depth on the northern shores of the Channel.

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