“TAKING RELIGION SERIOUSLY”? HUMAN RIGHTS AND HIJAB IN EUROPE—SOME PROBLEMS OF ADJUDICATION

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ABSTRACT

The European Court of Human Rights is regarded by many as the world’s most successful human rights body. The Court’s reputation for boldness in a wide range of areas is rightly deserved, but for many decades it failed to develop its jurisprudence in a meaningful way on Article 9 of the European Convention on Human Rights (ECHR)—the provision which guarantees freedom of thought, conscience and religion. In recent years, however, the Court has had the opportunity to remedy this unsatisfactory state of affairs. With the expansion of the Council of Europe eastwards, the Court has received an unprecedented number of complaints under Article 9 from former Soviet states, and it has used these cases to formulate (to an increasing extent) its own guidelines in this area.

In this paper I seek to provide a critical examination of the way in which the European Court has accorded recognition to freedom of religion and belief in the last decade. My central argument is that, much like the proverbial “curate’s egg,” the Court’s approach to Article 9 of the ECHR has been “good in parts.” One particularly welcome development has, for example, been its willingness to take cognisance of the communal nature of Article 9 of the ECHR.1 Against this backdrop I will discuss the obligations on the state in relation to rights of religious organisations and equivalent groups. A much less positive aspect of the Court’s recent case law has however been its continued failure to accord proper respect to the traditions and practices of minority groups, and I will explore this by examining the Court’s decisions in the area of religious dress.2

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In analysing the recent jurisprudence of the European Court, I will consider the social context in which the Court operates, and take account of the formidable challenges it faces in interpreting the ECHR today in multi-faith Europe. Yet, notwithstanding these challenges, I will argue that a number of criticisms may validly be levelled at the Court. These include a (long standing) tendency to use other Convention provisions to decide cases rather than Article 9; a degree of (apparent) confusion as to the proper role of religion (and equivalent belief) in contemporary Europe; a general unwillingness to accommodate the wishes of those who refuse to confine religion merely to the private arena; and a general tendency to “trivialise” certain (especially unusual) forms of religious belief. It will be argued that, in the light of these criticisms, the extent to which the ECHR affords appropriate protection to those who “take their religion seriously” is open to question.