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COMMENT

# *Lachiri v Belgium* and Bans on Wearing Islamic Dress in the Courtroom: An Emerging Trend

Kaushik Paul
University of Durham

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## INTRODUCTION

In recent years, the wearing of Islamic dress in public spaces and elsewhere has generated widespread controversy all over Europe. The wearing of the hijab and other Islamic veils has been the subject of adjudication before the European Court of Human Rights (ECtHR) on many occasions.[1] The most recent case before the ECtHR as to the prohibition on wearing the hijab is *Lachiri v Belgium*.[2] In this case, the ECtHR held that a prohibition on wearing the hijab in the courtroom constitutes an infringement of Article 9 of the European Convention on Human Rights (ECHR), which guarantees the right to freedom of religion or belief. From the perspective of religious freedom, the ruling of the Strasbourg Court in *Lachiri* is very significant for many reasons. The purpose of this comment is critically to analyse the ECtHR's decision in *Lachiri* from the standpoint of religious liberty.

## FACTS OF THE CASE

In *Lachiri v Belgium*, Mrs Lachiri was a devout hijab-wearing Muslim woman. She became a civil party with several other members of her family in a criminal

1 See, for example, *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001); *Leyla Sahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005); *Kose and 93 Others v Turkey* App no 26625/02 (ECtHR, 24 January 2006); *Kurtulmas v Turkey* App no 65500/01 (ECtHR, 24 January 2006); *El Morsli v France* App no 1558506 (ECtHR, 4 March 2008); *SAS v France* App no 43835/11 (ECtHR, 1 July 2014); *Ebrahimian v France* App no 64846/11 (ECtHR, 26 November 2015); *Barik Edidi v Spain* App no 21780/13 (ECtHR, 26 April 2016); *Belcacemi and Oussar v Belgium* App no 37798/13 (ECtHR, 11 July 2017).

2 *Lachiri v Belgium* App no 3413/09 (ECtHR, 18 September 2018) (hereafter '*Lachiri*'). This judgment is in French only. However, regarding the judgment of this case, the Strasbourg Court has published a press release, available at <https://hudoc.echr.coe.int/eng-press#>, accessed 25 September 2018.


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case in which her brother was killed. In 2007, the accused was committed to stand trial before the Criminal Court on charges of premeditated assault and wounding resulting in unintentional death. Mrs Lachiri and the other civil parties appealed against that decision, submitting that the offence should be classified as murder and that the accused should be tried before the Cour d'Assises. On the day of the hearing before the Indictments Division of the Brussels Court of Appeal, in accordance with the decision of the presiding judge, the court usher told Mrs Lachiri that she could not enter the courtroom unless she took off her hijab. In response to a request for explanation made by Mrs Lachiri's representative, the President of the Indictments Division confirmed that she had taken that decision pursuant to Article 759 of the Judicial Code. Mrs Lachiri refused to comply with the decision and did not attend the hearing. After exhausting domestic remedies unsuccessfully, she went to the Strasbourg Court. Relying on Article 9 of the ECHR, Mrs Lachiri complained that by excluding her from the courtroom Belgium had violated her freedom to express her religion.

## DECISION OF THE STRASBOURG COURT

In this case, the ECtHR confirmed that the wearing of a hijab was an act motivated or inspired by a religion or a religious conviction.[3] Therefore, they held that the expulsion of Mrs Lachiri from the courtroom for refusing to take off her hijab constituted an interference with her right to freedom of religion within the meaning of Article 9 of the ECHR.[4]

As to whether the interference was 'prescribed by law', the court took the view that the restriction was imposed on Mrs Lachiri pursuant to Article 759 of the Judicial Code, which required everyone to remove their headgear before entering the courtroom.[5] With regard to whether the interference satisfied the legitimate aim test, they held that the obligation to appear bareheaded in a court or before the judge was aimed at preventing disrespectful behaviour towards the judiciary and/or interruption to the proper functioning of the court proceedings. That being said, the court concluded that these objectives could be linked to the legitimate aim of 'protection of public order', which was listed as an exception within the meaning of Article 9(2).[6] As to whether the restriction was 'necessary in a democratic society', the court held that the behaviour of Mrs Lachiri, who was an ordinary citizen of Belgium as opposed to a state representative exercising a public function, had not been disrespectful and had not constituted – or

3 *Lachiri*, para 31.
4 Ibid, para 32.
5 Ibid, paras 34–35.
6 Ibid, para 38.

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been liable to constitute – a threat to the proper conduct of the hearing in which she was a civil party.[7] The court therefore, by six votes to one, held that there had been a violation of Mrs Lachiri's right to freedom of religion under Article 9.

It is argued that the Strasbourg Court's ruling in *Lachiri* is very significant for many reasons and particularly for carrying out a stricter proportionality review. This is explored below.

**Taking the applicant's behaviour into account**

In its proportionality analysis, the ECtHR seriously took into account Mrs Lachiri's behaviour in the court premises. The court admitted that Mrs Lachiri's conduct when entering the courtroom was not disrespectful and that her behaviour did not constitute a threat to the proper functioning of the proceedings.[8] Indeed, the wearing of a hijab could not, in itself, be a sign of disrespect for judges or of non-recognition of the authority of a court under any consideration.

One can correctly argue that the court has now established in its case law that, in order to assess whether a ban on wearing Islamic dress in the courtroom violates the wearer's religious freedom, they will take into account his or her behaviour in the court premises. The trend of this approach of the court can be traced back to *Hamidovic v Bosnia and Herzegovina*, where they examined whether an individual's charge of contempt of court for refusing to remove a religious skullcap in the courtroom was a disproportionate interference with his Article 9 rights.[9] In this case Judge De Gaetano held that

> It is difficult to conceive how the applicant's behaviour, in merely keeping his skullcap on as a manifestation of his deeply held religious belief, can be regarded as being either disrespectful towards the court or as engendering disorder or a lack of decorum in the courtroom.[10]

**Taking the applicant's status into account**

Personal autonomy is the 'primary rationale' for the right to freedom of religion.[11] Such autonomy is reflected in an individual's right 'to have or to adopt a religion or belief of his choice' and his or her freedom not to be 'subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice'.[12] Leading experts in the areas of legal, moral and political

7 *Ibid*, paras 44, 46.
8 *Ibid*, para 46.
9 *Hamidovic v Bosnia and Herzegovina* App no 57792/15 (ECtHR, 5 December 2017).
10 *Ibid*, Concurring Opinion of Judge De Gaetano, para 2.
11 F Ahmed, 'The autonomy rational for religious freedom', (2017) 80:2 *Modern Law Review* 238–263 at 239.

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philosophy, such as John Rawls, Joseph Raz and Ronald Dowrkin, have identified the concept of personal autonomy as one of the key reasons for protecting religious freedom.[13] Therefore, it is submitted that, as far as religious affairs are concerned, everyone is entitled to adopt his or her own lifestyle freely and the ECtHR must respect that lifestyle choice unless there is a compelling reason for them to strike it down. Following the court's judgment in *Lachiri*, one can argue that the Strasbourg bodies will now examine the existence of any such compelling reasons by taking into account his or her *status* before overriding the decision to wear Islamic dress in the courtroom.

In *Lachiri*, as noted above, the court characterised Mrs Lachiri as a 'mere citizen'[14] who 'was not a representative of the State engaged in public service and could not therefore be bound, on account of any official status, by a duty of discretion in the public expression of her religious beliefs'.[15] It is argued that the court's view is completely convincing and admirable. Mrs Lachiri was not an official of the court. Broadly speaking, she was a member of the public. Due to her status, she had the right to wear clothing in accordance with her own choice. In other words, she was not obliged to refrain from expressing her religious belief publicly while she was in the courtroom. In the exercise of public function, a government employee may have restrictions on wearing symbols of religious affiliation in order to preserve the neutrality image of the government institution.[16] As a private citizen, Mrs Lachiri had no such duty. She was free to wear any dress that she deemed appropriate.

In the light of the *Lachiri* ruling it can be argued that the Strasbourg Court will take into account the status of an individual to assess whether a ban on wearing Islamic dress in the courtroom violates his or her religious freedom under Article 9. To put it differently, where an individual is exercising a public function in the course of public service employment then a compelling reason may exist to override his or her choice to wear Islamic dress and to compel him or her to wear attire that is not associated with a particular religion.

## Margin of appreciation

The most interesting aspect of the ECtHR's ruling in *Lachiri* is the non-use of the doctrine of the margin of appreciation. The Strasbourg Court's case law on Islamic veils suggests that they had afforded a wide margin of appreciation to the domestic authorities to decide whether and to what extent a restriction on wearing Islamic dress is necessary. Thus, an examination of these cases

12 International Covenant on Civil and Political Rights 1966, Art 18.
13 For a general discussion on this, see C Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford, 2003), pp 29–32.
14 *Lachiri*, para 44.
15 *Ibid.* See also, the ECtHR's press release on this case (n 2 above).
16 See *Ebrahimian v France* App no 64846/11 (ECtHR, 26 November 2015), paras 63–64.

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shows that the court had increasingly prohibited women from wearing the hijab and other Islamic veils. Berry states, 'the right of Muslim women to manifest their religion will continue to be eroded if the ECtHR does not scale back the margin of appreciation afforded to States under Article 9'.[17] Moreover, by citing the doctrine of margin of appreciation, the court had failed to carry out effective proportionality analysis in many cases, including *SAS v France*, *Dahlab v Switzerland*[18] and *Dogru v France*.[19] Therefore, many academic scholars have criticised the application of the margin of appreciation doctrine to the Islamic dress ban cases. For instance, Fokas argues that the application of a margin of appreciation on Islamic veiling ban cases 'imperils [the Strasbourg Court's] ability to exercise supervisory functions and limits diversity and the possibility of viable democracy'.[20]

*Lachiri* is the first Islamic dress ban-related case where the ECtHR did not refer to the margin of appreciation principle. This approach of the court is admirable. This is because there is a lack of consensus across the Member States of the Council of Europe as to whether and to what extent a ban on wearing Islamic dress in courtrooms is necessary. As there is a lack of consensus on this issue among European countries, the court should not afford a wide margin of appreciation to the domestic authorities. In this sense, the court's reasoning in the *Lachiri* case is important.

## CONCLUSION

In the light of the foregoing it can be strongly argued that the decision of the majority in *Lachiri* is very significant and represents a potentially important development in the approach of the Strasbourg Court to Article 9. The *Lachiri* judgment gives us an impression that, from now on, the ECtHR will subject a dress code regulation to a stricter proportionality review. In a December 2017 case, *Hamidovic v Bosnia and Herzegovina*, the court for the first time in its history established that the prohibition on wearing an Islamic skullcap in the courtroom constituted a violation of the Article 9 rights.[21] Now, in *Lachiri*, the court has established that prohibiting a devout Muslim from wearing her hijab in the courtroom also contravenes ECHR rights. In the light of the developments emerging from the *Lachiri* judgment, one can argue that the court has now sent a message to religious minorities that they are welcome in judicial

17 S Berry, 'Eroding religious freedom step by step: France and the Baby Loup case', *EJIL: Talk*, 1 July 2014, available at <https://www.ejiltalk.org/eroding-religious-freedom-step-by-step-france-and-the-baby-loup-case/>, accessed 29 September 2018.
18 See n 1 above for details of these cases.
19 *Dogru v France* App no 27058/05 (ECtHR, 4 December 2008).
20 E Fokas, 'The European Court of Human Rights and minority religions: messages generated and messages received' (2017) 45 *Religion, State and Society* 166–173 at 168.
21 *Hamidovic v Bosnia and Herzegovina*, App no 57792/15 (ECtHR, 5 December 2017).

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institutions with their religious headgear on, and that they will not be arbitrarily expelled from court premises for wearing their religious symbols and attire. Therefore, as far as the religious freedom of minorities is concerned, the ruling in *Lachiri* gives us some reasons for optimism.

It is hoped that, after *Lachiri*, the ECtHR will carry out effective proportionality analysis by refraining from affording a wide margin of appreciation to the domestic authorities and be more prepared to find an infringement of Article 9 if and when a state prohibits the wearing of a minority's religious dress and symbols without any compelling reasons. This is because a truly free and liberal society should accommodate a wide range of customs, beliefs and codes of conduct and must not eliminate pluralism from the social sphere by erasing the cultural or religious practices of religious minorities, as 'pluralism, tolerance and broadmindedness are hallmarks of a democratic society'.[22]

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22 *Chassagnou and Others v France* App nos 25088/94, 28331/95 and 28443/95 (ECtHR, 29 April 1999), para 112.