Limits on the freedom to manifest one’s religion in educational institutions in Uganda and the United Kingdom

Manisuli Ssenyonjo*

This article analyzes the treatment of the freedom to manifest one’s religion in educational institutions in Uganda and the United Kingdom in light of recent judicial decisions by these two states highest courts, the Supreme Court of Uganda and the House of Lords. It focuses on three questions: First, are schools and universities obliged to respect the right of students to show their religion on campus? If so, can the educational institutions question the sincerity or legitimacy of religious beliefs held by students? Second, what are the limits on the freedom to display one’s religion on campus? Third, is the approach adopted by the courts in Uganda and the U.K. consistent with each state’s international human rights obligations?

The right to the freedom of religion is indispensable for pluralism; it is one of the foundations of a democratic society.¹ As noted by the European Court of Human Rights (ECtHR), this freedom undoubtedly 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, skeptics 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.²

Several international and regional human rights instruments protect the right to freedom of religion.³ Article 18 of the International Covenant on Civil

* Senior lecturer in law, Brunel Law School, Brunel University, West London; author, ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW (Hart 2009). I am grateful to the anonymous reviewers for the constructive comments on an earlier draft. Email: Manisuli.Ssenyonjo@brunel.ac.uk


and Political Rights (ICCPR)\(^4\) protects both the right to “have or adopt a religion or belief,” which is absolute, and the right to “manifest” one’s religion or belief, which is qualified because, of course, an individual’s manifestation of belief may impinge on the rights of others. There are similar provisions in the African Charter on Human and Peoples’ Rights,\(^5\) the European Convention on Human Rights (ECHR),\(^6\) and the Inter-American Convention on Human Rights (IACHR).\(^7\) Article 4(2) of the ICCPR and article 27(2) of the IACHR also underscore the importance of the freedom of religion or belief by providing that there can be no derogation from the right to enjoy this freedom, even in times of public emergency or war. The United Nations Human Rights Committee, the expert body charged with monitoring states parties’ implementation of the ICCPR, has observed that freedom of conscience and religion encompasses freedom of thought on all matters, personal convictions, and a commitment to religion or belief, whether displayed “individually or in community with others and in public or private.”\(^8\)

Recently, in the highest courts of both Uganda and the United Kingdom, some students’ freedom of religion, or freedom to practice religion publicly, was pitted against the rights of educational institutions to adopt their own rules.\(^9\) In August 2006, the Supreme Court of Uganda examined the scope of freedom of religion in educational institutions in the case of Dimanche Sharon and others v. Makerere University (the Sharon case).\(^10\) In March 2006, in the U.K., the House of Lords examined the issue in a secondary school context in the case of R (on the application of Begum (by her litigation friend, Rahman)) v. Headteacher and Governors of Denbigh High School (the Begum case).\(^11\)


This article provides a comparative analysis of the two cases by focusing on key aspects of the reasoning used in each. It considers the scope of guarantees of religious freedom—specifically, the freedom to display one’s religious beliefs—within the constitutional frameworks of Uganda and the U.K. In a university or school context, what constitutional rights obligations come into being given the protection of religious freedom? In particular, does a university’s refusal to refrain from conducting classes on days held holy by some religious groups interfere with the right of students to practice their religion openly? Does an institution’s refusal to allow a student to wear religious dress (such as the jilbab) while at school interfere with the student’s right to manifest their religion? If so, can such limitation or interference be justified?

This article addresses those questions as follows: section 1 provides an account of the general constitutional framework within which freedom of religion is protected in Uganda and the U.K.; section 2 describes the factual background of the two cases and provides a summary of the lower courts’ findings; section 3 analyzes key aspects of the reasoning in these cases by comparing the approaches of the Supreme Court of Uganda and the U.K.’s House of Lords; section 4 stresses the importance of legitimate justifications for interference with the freedom to manifest religion, a point stressed by international human rights treaties (such as the ICCPR) to which Uganda and the U.K. are both parties; and section 5 offers some concluding observations.

1. Constitutional frameworks of Uganda and the United Kingdom

Before analyzing the Sharon and Begum cases, we should situate them in their respective constitutional frameworks, which, in both countries, protect the right to manifest the freedom of religion.

1.1. Uganda’s constitutional framework

Since Uganda achieved independence from British rule, it has had four constitutions. They were adopted in 1962, 1966, 1967, and 1995—the last in force at the time of this writing. These constitutions contained bills of rights protecting


13 By February 2009 Uganda’s 1995 Constitution had been amended three times. See the Constitution (Amendment) Act, No. 13 (2000); the Constitution (Amendment) Act, No. 1 (2005); and the Constitution (Amendment) Act, No. 2 (2005). For background, see HENRY FRANCIS MORRIS & JAMES S. READ, UGANDA: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION (Stevens 1966); G. W. KANYEHAMBA, CONSTITUTIONAL AND POLITICAL HISTORY OF UGANDA FROM 1894 TO THE PRESENT (Centenary Publishing 2002).
civil and political rights, including freedom of religion. In 2008, Uganda’s population numbered approximately 31.3 million, of which approximately 85 percent were Christians, while Muslims represented approximately 12 percent. The balance of the population espoused a variety of other beliefs and convictions, including traditional indigenous religions, Hinduism, the Baha’i faith, Judaism, and atheism, all of which are also practiced freely.

The 1995 Constitution includes economic, social, and cultural rights guarantees; although only three specific guarantees (including the right to education) are contained in its Bill of Rights. Article 30, provides that “[a]ll persons have the right to education”; it does not elaborate on what this general right actually means in practice. Some details are spelled out in a section of the Constitution entitled “National Objectives and Principles of State Policy,” which, although it is not regarded as legally binding, guides the state and other actors in applying and interpreting the Constitution with regard to educational rights. It provides that:

(ii) The State shall take appropriate measures to afford every citizen equal opportunity to attain the highest educational standard possible.

(iii) Individuals, religious bodies and other nongovernmental organisations shall be free to found and operate educational institutions if they comply with the general educational policy of the country and maintain national standards.


15 See Uganda, in BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT (2008), available at http://2001-2009.state.gov/g/drl/rls/irf/2008/108397.htm. The report notes that among Christian groups, the Roman Catholic Church had the largest number of followers with 42 percent; the Anglican Church claimed 36 percent; Evangelical and Pentecostal churches were active, and their membership was growing.

16 Id.

17 Id.

18 Other economic, social, and cultural rights included in the Bill of Rights are the right to a clean and healthy environment and some aspects of workers’ rights. Rights such as those to food, housing, and health are confined to the section of the Constitution on “National Objectives and Principles of State Policy,” which is regarded as not legally binding. See generally J. OLOKA-ONYANGO, THE PROBLEMATIQUE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN GLOBALIZED UGANDA: A CONCEPTUAL REVIEW (Human Rights & Peace Center, March 2007).

19 UGANDA CONST. objective I(ii) (1995). A 2005 amendment to Uganda’s 1995 Constitution introduced a new constitutional provision providing that “Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy.” See the Constitution (Amendment) Act No. 1 (2005), art. 8A.

20 Id. objective XVIII.
The Constitutional Court determines questions of constitutional interpretation. Its decisions may be appealed before the Supreme Court, which is the final court of appeal.21

Freedom of religion is guaranteed by article 29(1)(c) of the Constitution, which provides:

Every person shall have the right to freedom to practise any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organisation in a manner consistent with this Constitution.

It is reinforced by article 37, which provides:

Every person has a right as applicable to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others.

Finally, article 7 further clarifies that no particular religion is given pride of place in the Constitution. It states: “Uganda shall not adopt a State religion.” While the Constitution recognizes that “fundamental rights and freedoms of the individual are inherent and not granted by the State,”22 it obliges the state and all nonstate actors to “respect” human rights—including the right to adhere to a religion and to manifest it in practice—in the following terms:

The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons.23

However, article 43(1) provides the following general limitation on the rights and freedoms protected in the Constitution:

In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

Although the Constitution offers no gloss on “public interest,” the definition in Black’s Law Dictionary is instructive:

The general welfare of the public that warrants recognition and protection. Something in which the public as a whole has a stake; especially, an interest that justifies governmental regulation.24

“Public safety, order, health, morals or the fundamental rights and freedoms of others” are matters in which the public as a whole has a stake, as set forth in

21 Id. arts. 131, 132 & 137. The Constitutional Court consists of a bench of five members of that Court, while the Supreme Court consists of a bench of at least seven members of the Court.


23 Id. art. 20(2).

the ICCPR. Clearly, public educational institutions bear certain obligations with regard to the religious beliefs of their students. What, then, are the limits, if any, that may be imposed on the freedom of religion in state schools and universities?

1.2. The United Kingdom’s constitutional framework

Incorporated into the U.K.’s unwritten constitution are the protections of the freedom of religion found in the Human Rights Act 1998 (HRA), which came into force on October 2, 2000. The HRA gives effect to most of the rights enumerated under the ECHR, including article 9, which guarantees the right to freedom of religion in the following terms:

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.

The U.K. had a population of approximately 59.6 million in 2003; 2.7 million of these people were Muslim. Since the events of September 11, 2001, and July 7, 2005, Islamic and Muslim minorities in the U.K. have endured heightened attention in the context of public concern over terrorism. As in most European states, many Muslims in the U.K. face discrimination in employment, education, and housing, leading to their marginalization. However, under article 9(2) of the ECHR, any limitations on religious practices must be shown to be necessary.

It is significant that, under the limitation clauses of articles 8 through 11 of the ECHR, interference with protected rights can only be justified if “necessary in a democratic society”; the term “necessary” in this context puts a high

25 ICCPR, supra note 4, at art. 18(3).
27 See United Kingdom, in BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT (2006). available at http://www.state.gov/g/drl/rls/irf/2006/71416.htm. The 2001 census for the whole of the U.K. reported that approximately 42 million persons (almost 72 percent of the population) identified themselves as Christians. Approximately 1.6 million (2.7 percent) identified themselves as Muslims. The next largest religious groups were Hindu (1 percent), Sikh (0.6 percent), and Jews (0.5 percent). More than 9 million (15.5 percent) respondents stated they had no religion. The census was voluntary, but only 7.3 percent chose not to respond.
justificatory burden on the state. Necessity is “not synonymous with ‘indispensable’ nor has it the flexibility of such expressions as ‘admissible,’ ‘ordinary,’ ‘useful,’ ‘reasonable’ or ‘desirable.’” A measure does not become necessary simply because it has the support or approval of a majority of the population—the court must also consider the rights of minorities.

The requirement of necessity means that any interference must be, on the facts of a particular case, “proportionate to the legitimate aim pursued” and designed to meet a “pressing social need.” The reason given for the interference must be “relevant and sufficient.” While the “relevant reasons” test, which is related to the legitimate aim standard, can readily be met, the “sufficient reasons” test requires a more careful analysis of various factors including the nature, severity, and effects of the infringing measures, in tandem with any expected harm caused to the protected rights.

The HRA also gives effect to article 2 of the first protocol to the ECHR, which states:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

The HRA allows the courts to give further effect to the ECHR, bestowing on them the direct right to take the ECHR and case law into account when interpreting and developing the law; additionally, it enables individuals to rely directly on the ECHR in the domestic courts. For most cases in England and Wales, the House of Lords is the final point of appeal, although a small number may be referred each year to the European Court of Justice, which has jurisdiction on matters of European Community law. The Constitutional Reform Act

---

33 For a discussion of this article, see CLARE OVEY & ROBIN WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 376–387 (Oxford Univ. Press, 4th ed. 2006).
34 For an overview, see STEVE FOSTER, HUMAN RIGHTS AND CIVIL LIBERTIES 145–178 (Pearson Education Limited 2003). In R. v. Offen [2001] 1 W.L.R. 253, Lord Woolf, CJ described the HRA as “a Constitutional instrument introducing into domestic law the relevant articles of the Convention.”
2005 will lead to the creation of a separate Supreme Court of the United Kingdom, to which the judicial function of the House of Lords will be transferred.\textsuperscript{36}

2. Background

2.1. \textit{Dimanche Sharon and others v. Makerere University}

The \textit{Sharon} case involved three appellants—Seventh Day Adventists—who were undergraduate law students at Makerere University (the respondent). They challenged the constitutionality of a policy and certain regulations of Uganda’s premier secular public institution of higher education.\textsuperscript{37} The university required them to attend scheduled lectures and sit examinations on Saturday, their Sabbath, contravening their belief that God’s commandments require complete rest on that day.\textsuperscript{38} The appellants asserted that to do any work on the Sabbath amounts to sin, for which they would be condemned to hell. For Seventh Day Adventists, the Sabbath begins at sunset on Friday evening and ends at sunset on Saturday.\textsuperscript{39} Scripture calls Friday the preparation day—a day to prepare for the Sabbath so that nothing will spoil its sacredness.\textsuperscript{40} On this day those who make the family’s meals must prepare food for the Sabbath so that they, too, may also rest from their labors during the sacred hours.\textsuperscript{41} The university policy and regulations, distributed in advance to students, stated:

\begin{quote}
Students are informed that University Programs may run seven days a week. Since the University has students and members from various religious backgrounds, the University may not heed the interests of a particular group, particularly in the crucial areas of attendance of lectures
\end{quote}

\textsuperscript{36} Constitutional Reform Act, 2005, c. 4, §§23–60. The act provides that the new Supreme Court be established by order of the Lord Chancellor at a later date. \textit{Id.} § 148.

\textsuperscript{37} For an analysis of university reforms, see generally MAHMOOD MAAMANI, \textsc{Scholars in the Market Place—The Dilemmas Of Neo-Liberal Reforms at Makerere University, 1989–2005} (Fountain Publishers 2006).

\textsuperscript{38} See \textit{Exodus} 20:8–11: “Remember the Sabbath Day by keeping it holy. Six days you shall labour and do all your work, but the seventh Day is a Sabbath to the Lord your God. On it, you shall not do any work, neither you, nor your son or daughter, nor your man servant, nor your maid-servant, nor your animals nor the alien within your gates. For six days the Lord make the heaven and the earth, the sea and all that is in them, but he rested on the seventh day. Therefore, the Lord blessed the Sabbath Day and it is holy.” See also \textit{Exodus} 31:17; \textsc{Seventh Day Adventist Church, Fundamental Beliefs}, available at http://www.adventist.org/beliefs/fundamental/index.html (last visited Feb. 3, 2009).

\textsuperscript{39} See \textit{Genesis}1:5.

\textsuperscript{40} See \textit{Mark} 15:42.

\textsuperscript{41} See \textit{Exodus} 16:23; \textit{Numbers} 11:18.
and/or examinations. You are therefore urged to respond to the academic work in the faculty even if it takes place on respective days of worship.\textsuperscript{42}

The appellants contended that they could not attend lectures or sit examinations on Saturdays as this amounted to performing work on the Sabbath. Accordingly, they claimed, the respondent’s policy and regulations violated their constitutional right to freedom of religion.

The appellants had begun by engaging in a dialogue and negotiations with the university, seeking various accommodations such as sitting their examinations outside the hours of the Sabbath or having special examinations administered for those who missed them. They offered to be confined during the Sabbath hours and then to sit the exams after sunset, as soon as the Sabbath concluded.

The respondent contended that Makerere University, as a secular public university, did not favor any particular religion. To carry out its legal mandate of expanding university education and making it available to as many students as possible at the lowest cost possible, the university had formulated a policy of conducting its core activities, such as teaching and examinations, on any day of the week, including Saturdays and Sundays. This policy yielded the following advantages, according to the respondent: (a) university education had been made accessible to a large number of students, including evening and weekend students; (b) there had been an increased enrollment of private students (that is, students bearing the costs of education without government subsidies); (c) the variety of courses offered had increased; (d) the university had generated more revenue; and (e) the cost of university education had decreased.\textsuperscript{43}

Regulations had been formulated to implement this policy\textsuperscript{44} and conveyed to everyone intending to join the university through the instructions that accompanied the letters of admission. The respondent’s position was that the appellants could be accommodated by being allowed to retake any missed examination at the next available sitting; however, they could not sit at different times from the other students, since this could compromise the integrity of the examination results and would entail additional costs. The appellants were also permitted to request changes in their course registrations in light of exam schedules. According to the respondent, it was not feasible to confine Seventh Day Adventist students on Saturdays and then to offer them examinations following the Sabbath; this could be construed as sectarianism, as well as being

\textsuperscript{42} See Sharon v. Makerere Univ., 2006 UGSC 10, Constitutional Appeal No. 2 of 2004 (Supreme Court of Uganda) (judgment of Karokora, J.S.C.) (quoting Makerere University Academic Registrar’s Department Freshers Joining Instructions 1999/2000 Academic Years). This was made under the University and Other Tertiary Institutions Act, No. 7 (2001) (Uganda).

\textsuperscript{43} This was stated in the affidavit of the vice chancellor of Makerere University, Prof. John Ssebuwufu, dated May 7, 2003, in Sharon v. Makerere Univ., 2003 UGCC 6, Constitutional Petition No. 1 of 2003 (Uganda Constitutional Court).

\textsuperscript{44} These were made under the University and other Tertiary Institutions Act (2001), \textit{supra} note 42.
impractical and unconstitutional. Furthermore, other religious groups could also demand similar treatment. Having ruled out that option, the respondent enumerated the negative consequences that would ensue were it to discontinue weekend courses, which it viewed as the only alternative. These included: an extension of the academic calendar, leading to increases in the cost of education; an inability to employ qualified lecturers who could only teach on weekends; decreased revenues, due to reduction in the number of private students; and a loss of staff due to inability to meet their wage demands. Moreover, the respondent warned, more generally, of a “slippery slope” whereby the university would be compelled to reschedule lectures, tests and examinations for any other religious group that so requested.  

When the parties failed to reach an amicable resolution, the appellants missed some mandatory examinations that were conducted on Saturdays, which delayed the completion of their course work and, in some cases, led to their dropping the courses altogether. The students filed a petition in the Constitutional Court, alleging a violation of their constitutional rights, specifically their freedom to practice, profess, maintain, and promote their religion and manifest their Sabbath faith, as well as their right to education.  

The Constitutional Court, after considering the affidavits and evidence filed by both parties, dismissed the petition by unanimous decision of the five Justices of Appeal. The decision of the Constitutional Court was upheld by the Supreme Court. Although each justice of the Constitutional Court issued a separate judgment, all five unanimously found that the respondent’s policies and regulations were not inconsistent with, and did not violate, the appellants’ freedom of religion and the right to education under Uganda’s 1995 Constitution. 

Six main reasons were advanced in support of this decision. First, with respect to religious freedom, Deputy Chief Justice Mukasa Kikonyogo, in the lead judgment, held that, as a public and secular institution, the respondent had “no duty to accommodate some beliefs based on religious tenets.” Second, the Constitutional Court accepted that the policy of the respondent pursued legitimate aims, that it was nondiscriminatory, and did not require the appellants to forego a chief tenet of their religious belief, namely, that they must not work on the Sabbath. Third, the Court noted, without giving

45 University and other Tertiary Institutions Act, supra note 42.
46 It was argued that this was inconsistent with articles 20, 29(1) (c), 30, and 37 of Uganda’s Constitution (1995). These articles are set out in section 1.1 above.
47 These were Mukasa Kikonyogo, Mpagi Bahigine, J.P. Berko, Amos Twinomujuni, and C. Kitumba. Their judgments were made on September 24, 2003. Sharon, Constitutional Petition No. 1 of 2003.
48 Uganda Const. arts. 20, 29(1)(c), 30, and 37.
50 Id.
specific content to the general right to education as articulated in the Constitution, 51 that the right to education protected by article 30 “does not in any way mean the right to attend the respondent University at the students’ own terms.” 52 The applicants had the option of taking courses scheduled on days other than the Sabbath. They had many choices, including transferring to other universities or institutions. 53 Fourth, the Court held that accepting the appellants’ demands would impose an “intolerable burden” on the respondent “in perpetuity.” 54 Furthermore, the Court underscored the fact that students had a “free choice” to pursue or not to pursue their studies at Makerere University. 55 Finally, one of the five justices, J. A. Twinomujuni, went so far as to challenge the appellants’ beliefs, opining that “there are exceptions to God’s commandment on Sabbath” that may permit attending lectures or examinations on the Sabbath. 56

The appellants appealed to the Supreme Court, which dismissed their claim. As found in the Constitutional Court, the central issue in the Supreme Court was whether the respondent’s policy and regulations contravened the appellants’ freedom of religion and the right to education as guaranteed by the Constitution. While the Supreme Court did not question the sincerity of the appellants’ beliefs, it held that the respondent’s policies and regulations were not inconsistent with and not in contravention of articles 20, 29(1)(c), 30, and 37 of Uganda’s Constitution as they pertained to the appellants. 57

2.2. The Begum case

The second case, R (on the application of Begum (by her litigation friend, Rahman) v. Headteacher and Governors of Denbigh High School (the Begum case), was


52 See Sharon v. Makerere Univ., 2006 UGSC 10, Constitutional Appeal No. 1 of 2003 (Supreme Court of Uganda) (judgment of Kitumba, J.A.).

53 Id.

54 See id. (judgment of Berko, J.A.). Justice Berko stated: “In my view to accede to the prayers of the petitioners and make the declarations they are seeking would place an intolerable burden on the University in perpetuity and make the smooth administration of the institution difficult. Therefore there is no way the University would know the number of interest groups that would make similar demands for special treatment.”

55 See id. (judgment of Kitumba, J.A. & judgment of Twinomujuni, J.A.). Justice Kitumba noted: “the Respondent University is not the only University in the country. The petitioners freely chose to go to Makerere University and have, therefore, to abide by the conditions.”

56 See id. (judgment of Twinomujuni, J.A.).

57 The case was heard by a panel of seven Justices of the Supreme Court. These were B.J. Odoki, A. Order, J.W.N. Tsekooko, A.N. Karokora, J.N. Mulenga, G. W. Kanyelihamba, and Bart M. Katurerebe. Their judgment was made on August 1, 2006. Sharon v. Makerere Univ., 2006 UGSC 10, Constitutional Appeal No. 2 of 2004 (Supreme Court of Uganda).
decided by the House of Lords in March 2006. 58 In this dispute, the House of Lords held that the ban on a full-length Islamic dress (jilbab) imposed by a British secondary school did not breach the Human Rights Act 1998 (HRA). 59 Shabina Begum (the claimant) was a Muslim, born in the U.K. to parents who had emigrated from Bangladesh. In September 2000, at the age of nearly twelve, she enrolled at the Denbigh High School in Luton—a multicultural, secular secondary school.

About 80 percent of pupils at this school were Muslim; most were of Bangladeshi or Pakistani heritage, although a number of other religions and ethnic groups were represented. For her first two years at the school, Shabina wore the school’s shalwar kameez without complaint. 60 At some point, however, she decided “she had a genuine belief that the tenets of Islam required her, in her approach to womanhood, to wear a jilbab when in public and that the school shalwar kameez did not suffice.” 61 Shabina (then nearly fourteen) sought to attend the school wearing the headscarf and a long coat-like garment—the jilbab. School authorities demanded that the respondent wear the correct school uniform as a condition for attending school. 62

As a result, for some two years, until she was admitted to another school, Shabina remained out of school. The educational welfare officer tried unsuccessfully to persuade Shabina to accept the uniform and to return to classes. Nonetheless, she remained out of school until September 2004, when she enrolled at Putteridge High School. Although her name remained on the school roll, she contended that the decision of the headmaster and school governors not to admit her while wearing the jilbab (the only garment that met her religious requirements by concealing the contours of the female body) breached two of her rights under the ECHR: the right to “manifest [her] religion … in … practice and observance” (article 9) 63 and

59 Id.
60 Id. ¶ 6. “The school offered three uniform options. One of these was the shalwar kameez: a combination of the kameez, a sleeveless smock-like dress with a square neckline, revealing the wearer’s collar and tie, with the shalwar, loose trousers, tapering at the ankles. A long-sleeved white shirt is worn beneath the kameez and, save in hot weather, a uniform long-sleeved school jersey is worn on top.” Two mosques in Luton, the London Central Mosque Trust and the Islamic Cultural Centre, advised that this uniform did not offend the Islamic dress code in the view of the “vast majority of Muslim scholars” (id. ¶ 13).
61 Id. ¶ 80, per Lord Scott.
62 Id.
not to “be denied the right to education” (article 2 of the first protocol). Judge Hugh Bennett, ruling on Shabina’s application for judicial review at first instance, dismissed the claim; however, the Court of Appeal declared that her rights under article 9, indeed, had been infringed.

The Court of Appeal noted that the sincerity and legitimacy of the claimant’s belief that her religion prohibited her wearing the school uniform was not at issue. It followed that her freedom to manifest her religion or beliefs in public had been limited, and it was for the school, as an emanation of the state, to justify this limitation. The question was whether it was necessary in a democratic society for the school to place a specific restriction on Muslim girls who sincerely believed that, once they attained the age of puberty, they should cover themselves to a greater extent than the school uniform policy permitted.

The Court of Appeal found that the school had not approached the matter in this way but, rather, had started from the premise that its school uniform policy existed to be obeyed and that if the claimant did not like it she was free to attend some other school. Accordingly, because the school had not given to the claimant’s beliefs the weight that they deserved, the school was not entitled to the relief sought. In the end, however, the school appealed to the House of Lords, which then reversed the decision of the Court of Appeal.

3. Key elements of reasoning by Uganda Supreme Court and U.K. House of Lords

In both the Sharon and Begum cases, the focus of the courts was on whether educational institutions could justify limitations placed on manifesting one’s religion, be it by not attending lectures or examinations on the Sabbath (in Sharon) or by wearing religious apparel (in Begum). The point at issue was could these restrictions be based on the relevant limitation clauses set out in article 43(1) of the 1995 Uganda Constitution and article 9(2) of the ECHR. There are four key elements in the reasoning of both courts. The first relates to the sincerity and validity of the belief; the second is the role of individual choice in joining an educational institution; the third is the role of institutional autonomy or the margin of discretion enjoyed by educational institutions to adopt their own rules; and the fourth concerns the freedom to manifest one’s religion—that it is not absolute and

64 R (on the application of Begum (by her litigation friend, Rahman)) v. Headteacher & Governors of Denbigh High Sch., [2004] EWHC 1389 (Admin).


66 Id. ¶¶ 24, 49, 61, 74–79, 82, 83, 90, 94.
must be balanced against the “rights of others.” These key aspects of reasoning, as applied in both cases, are considered below.

3.1. Sincerity and validity of belief

Both courts, for the most part, did not consider it pertinent to question the sincerity of the claimants’ beliefs. In *Sharon*, Chief Justice B. J. Odoki wrote the lead judgment with which all the other members of the Supreme Court agreed. He stated that he was “in general agreement with their [the justices of the Constitutional Court] reasoning and conclusion.” Neither did the Supreme Court question the sincerity of the appellant’s belief “because religion is a matter of faith.” The court relied on comparative decisions from Zimbabwe, Canada, and academic commentary on article 25(1)—the freedom of religion guarantee—of the Constitution of India. All these establish that religion, essentially, is a matter of personal faith and belief. This view was restated by Justice Bart M. Katureebe:

> In my view no Court or anyone else should question this [sincerity of belief], nor did anyone question it…. [The] Court cannot tell the appellants what they should believe. It is what they believe that is important, and I am satisfied that in this case the sincerity of that belief was not under criticism.

The above approach enabled the Supreme Court to avoid making an assessment as to whether the religious beliefs at issue are “mainstream” or “correct.” This can be contrasted to the approach adopted by Justice J. A. Twinomujuni, one of the five justices of the Constitutional Court, who questioned the correctness of the appellant’s beliefs. As noted above, he observed that “there are exceptions to God’s commandment on Sabbath” that may permit attending lectures or examinations on that day. He based this view on Jesus’ teachings in Mark 3:23 that the “Sabbath was made for man and not man for Sabbath” and in Mathew 12:1–3, where Jesus is said to have observed that “it is lawful to do good on the Sabbath.” Thus, he concluded:

> Attending a lecture or doing an examination involves listening, thinking, reading and writing. Are members of the Seventh Day Adventist Church prohibited from listening, thinking, reading or writing on the Sabbath?

68 Id.
69 Id.
71 See id. (judgment of Katureebe, J.S.C.).
72 In Matthew 12:1–3, it is reported that Jesus was asked whether it was lawful to heal on the Sabbath. He replied: “If any of you has a sheep and it falls in the pit on the Sabbath, will you not take hold of it and lift it out? How much more valuable is a man than a sheep! Therefore it is lawful to do good on the Sabbath.”
If their objection for doing this on Sabbath is based on the fact that it will interfere with their worship on Saturday, they should note that the doing of any other good on Sabbath, like the treatment of a sick person or rescuing a distressed person or animal as recommended by Jesus would equally interfere with worship. In my humble opinion, this tends to show that for a good cause, a Christian is permitted to do some good work or to work out of necessity on Sabbath. Attending a lecture or sitting an examination once in a while on Sabbath could fall within the accepted exceptions to the Sabbath commandment.\(^{73}\)

While Justice Twinomujuni’s view might be theologically tenable, it is problematic insofar as it fails to take into account the fact that religious views and interpretations, even within the same religion, might reasonably, comprehensively, and comprehensibly differ even as regards Sabbath. More significantly, do the beliefs that “it is lawful to do good on the Sabbath” or that the “Sabbath was made for man not man for Sabbath” make it necessary to interfere with an individual’s belief, who sees not working on the Sabbath as a religious duty or as a form of expression linked to religious identity?

Interference with the right of individuals right to make their beliefs manifest should not be justified simply on the grounds that these beliefs (that they must not work, attend a lecture, or take an examination on the Sabbath) are contrary to the majority’s established religious view (that it is lawful to do good work, attend a lecture, or sit for an exam on the Sabbath when required).\(^{74}\) Courts and other actors should not discriminate against any religion or belief for any reason, even if they are illogical, newly established, or represent religious minorities that may be the object of hostility on the part of a predominant religious community.\(^{75}\)

Freedom of religion should be understood to exclude “any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.”\(^{76}\) In cases involving issues of the manifestation of religion, a court should not concern itself with the rationality, validity, or attractiveness of someone’s beliefs but only with the sincerity of the believer, since religion is largely a matter of faith.

In the Begum case, the House of Lords rightly accepted that “the respondent sincerely held the religious belief which she professed to hold and that article 9(1) is engaged or applicable.”\(^{77}\) The lords went on to consider whether the

\(^{73}\) Sharon v. Makerere Univ., 2003 UGCC 6, Constitutional Petition No. 1 of 2003 (Uganda Constitutional Court) (judgment of Twinomujuni, J.A.).


\(^{75}\) Id., ¶ 2. See also European Court of Human Rights, Larissis v. Greece [1998] EHRLR 505.


\(^{77}\) R (on the application of Begum (by her litigation friend, Rahman)) v. Headteacher & Governors of Denbigh High Sch., [2006] UKHL 15, ¶ 21, [2006] 2 W.L.R. 719 (Lord Bingham of Cornhill).
respondent’s freedom to manifest her belief by her mode of dress was subject to limitation (or interference) within the meaning of article 9(2). And, if so, whether such limitation was justified under that provision, which required that the limitation be prescribed by law; necessary in a democratic society for a legitimate purpose; and proportionate in scope and effect. The Law Lords’ reasoning was twofold: first, the school’s refusal to allow Shabina Begum to wear a jilbab at school did not interfere with her article 9 right to manifest her religion, according to the majority. Second, even if it did the school’s decision was objectively justified. While there was consensus on the second finding (regarding justification), there were differences of the opinion regarding the first (whether there was interference). 78

The lords found the school’s refusal to allow Shabina Begum to wear a jilbab at school was justified for a number of reasons. These included the fact that the existing policy largely conformed with and was acceptable to “mainstream Muslim opinion”; 79 and that wearing a jilbab was “extraordinary” for teenage girls. 80 The school’s wish was to avoid having students wear clothes that were perceived by some as signifying adherence to an “extremist version of the Muslim religion.” 81 Lord Hoffmann stated, in this regard, that “people sometimes have to suffer some inconvenience for their beliefs.” 82 Implicit in this assertion is the question: Why did Shabina choose to go to school in “extraordinary” religious clothing linked to an “extremist version of the Muslim religion”? As argued above, the question whether religious beliefs are “mainstream” or “correct,” within their religions traditions, should not be for the courts to decide but ought to be left to the individual believer(s). In any case, there is an established view among Islamic scholars and some Muslims that the jilbab is a religious obligation for female Muslims from the age of puberty onward. 83

79 R (on the application of Begum (by her litigation friend, Rahman)) v. Headteacher & Governors of Denbigh High Sch., [2006] UKHL 15, [2006] 2 W.L.R. 719, ¶ 34 (Lord Bingham). The school relied on a statement made by the Muslim Council of Britain on the “Dress code for Women in Islam,” which stated that in Islam “there was no recommended style: modesty must be observed at all times; trousers with long tops or shirts for school wear were ‘absolutely fine.’” Id. ¶ 15.
80 Id. ¶ 83. Lord Scott observed: “The notion that the shalwar kameeze school uniform would not accord with essential requirements of Islamic modesty for teenage girls seems to me an extraordinary one.”
81 Id. ¶ 65 (Lord Hoffmann).
82 Id. ¶ 50.
the *Begum* case, there was insufficient evidence to justify the perception that wearing a *jilbab* signified possible adherence to an “extremist version” (a term that was not defined) of the Muslim religion or to link it to Shabina’s conduct. Indeed, there was no evidence to show that Shabina was an extremist or supported any extremist group. In short, the claim that Shabina’s right to manifest her religion by a *jilbab* in school had been violated was given short shrift because it did not conform to the beliefs of “mainstream” Muslims or, probably, to the beliefs of judges.

### 3.2. Role of individual choice

The role of individual choice by the claimants was also a key factor in both cases. It was accepted in *Sharon* that the appellants and all the other students were “warned of the University policy before joining but before commencing studies” that the institution would conduct its programs seven days a week. With “full knowledge” of the policy, they had consciously chose to enroll and embark on a course of study at Makerere University: they must have known, therefore, that they were binding themselves to abide by the rules and regulations of the university. It was noted that the appellants had the “choice” to join the university and adjust their religious practices to abide by its regulations or to pursue their education where they could adhere to their strict observance of the Sabbath. According to the Court, the university policy and regulations “do not affect anyone who does not voluntarily choose to join the University.” This view also formed an essential part of the reasoning of the Constitutional Court, where the Deputy Chief Justice Mukasa Kikonyogo noted that “there are many universities and other tertiary institutions in Uganda, including Bugema University established by the Seventh Day Adventist Church and in other countries including Kenya.”

Thus, in the Court’s view, the appellants made a free choice to join Makerere University and had to respect its rules regardless of their religious beliefs. In the words of Justice Twinomujuni, “Whether one chooses to worship God on Saturday instead of doing an examination or attending a lecture is a matter of individual choice.”

---

85 See id. (judgment of Mulenga, J.S.C.).
86 See id. (judgment of Tsekooko, J.S.C.).
87 See id. (judgment of Mulenga, J.S.C.).
88 See id. (judgment of Karokora, J.S.C.). At the time, the number of the Seventh Day Adventist community members at Makerere University was about 150 out of 30,000 students.
90 Id. (judgment of Twinomujuni, J.A.).
within or outside Uganda was another possibility open to the appellants. While choosing an institution of higher learning is an important consideration given the age of the appellants, the Court’s analysis did not take into account other factors that could render the so-called choice less free than it might seem. In reality, at the time in question, few other universities in Uganda had recognized programs offering the bachelor of laws degree, the appellants’ goal; besides, there was a question regarding the quality of the other available programs. Needless to say, in light of the lower cost of higher education in Uganda, transferring to other universities outside Uganda was not particularly feasible. In any case, the appellants did not wish to abandon their studies at Makerere University; they simply wanted the university to respect their right to manifest their religious beliefs by not scheduling compulsory activities on Saturdays.

In Begum, the majority in the House of Lords found that “there was no interference with the respondent’s right to manifest her belief in practice or observance” because she had “chosen to attend this school knowing full well what the school uniform was. It was she who had changed her mind about what her religion required of her, rather than the school which had changed its policy.” It was stated that article 9 of the ECHR does not require that one should be allowed to manifest one’s religion at any time and place of one’s own choosing. In the words of Lord Hoffmann:

I accept that wearing a jilbab to a mixed school was, for her, a manifestation of her religion. The fact that most other Muslims might not have thought it necessary is irrelevant. But her right was not in my opinion infringed because there was nothing to stop her from going to a school where her religion did not require a jilbab or where she was allowed to wear one. Article 9 does not require that one should be allowed to manifest one’s religion at any time and place of one’s own choosing.

It is clear from the foregoing that choice played a key role, here, insofar as the claimant was said to have “chosen” this particular school, even though there were other schools where she could wear the jilbab. It should be noted, however, that in this case choice should not have been a primary consideration in light of the relatively young age of the claimant (nearly fourteen years old) and at a lower stage of secondary education. Therefore, it is not surprising

91 See A.B.K. KASOZI, UNIVERSITY EDUCATION IN UGANDA 114–130 (Fountain Publishers 2003).
92 Id. at 38.
93 R (on the application of Begum (by her litigation friend, Rahman)) v. Headteacher & Governors of Denbigh High Sch., [2006] UKHL 15, [2006] 2 W.L.R. 719, ¶ 25 (Lord Bingham), ¶ 50 (Lord Hoffmann), & ¶ 72 (Lord Scott).
94 Id. ¶ 92 (emphasis added).
95 Id. ¶ 50.
that, on the issue of choice, there were differences of opinion. Lord Nicholls and Baroness Hale of Richmond both demurred from the opinion of Lord Hoffmann. According to them, the school’s refusal to allow the claimant to wear a jilbab at school, indeed, did interfere with her article 9 right to manifest her religion, even though the school’s decision was objectively justified. It had the legitimate aim of protecting the rights and freedoms of others. In this respect, Lord Nicholls noted:

I think this [the view that her right to manifest her religion by a jilbab was not infringed] may over-estimate the ease with which Shabina could move to another, more suitable school and under-estimate the disruption this would be likely to cause to her education. I would prefer that in this type of case the school is called upon to explain and justify its decision, as did the Denbigh High School in the present case.96

Baroness Hale, the only female member of the Appellate Committee, also agreed with Lord Nicholls, that “there was an interference with Shabina Begum’s right to manifest her religion,” because97

[t]he reality is that the choice of secondary school is usually made by parents or guardians rather than by the child herself. The child is on the brink of, but has not yet reached, adolescence. She may have views but they are unlikely to be decisive. More importantly, she has not yet reached the critical stage in her development where this particular choice may matter to her… . It cannot be assumed, as it can with adults, that these choices are the product of a fully developed individual autonomy. But it may still count as an interference.98

Thus, while in a university context it may be true that students—considered as adults—freely choose to attend a specific school, this is not necessarily the case with students in secondary school. In addition, it is useful to take into account relevant facts in each case that may have an effect on “choice” in practice. A deeper analysis of choice is desirable in situations involving restrictions on the right to manifest one’s religion in educational institutions.

3.3. Institutional autonomy and margin of discretion

In both cases, the courts took into account institutional autonomy and the “margin of discretion” enjoyed by educational institutions. The enjoyment of academic freedom requires the “autonomy of institutions of higher education.”99

96 Id. ¶ 41 (Lord Nicholls).
97 Id. ¶ 93 (Baroness Hale).
98 Id. ¶¶ 92–93.
Autonomy is that degree of self-governance necessary for effective decision making by institutions of higher education regarding their academic work, standards, management, and related activities.100 In such matters, educational institutions also enjoy what is called a margin of discretion or appreciation, a concept used by the ECtHR that allows the state “a certain measure of discretion, subject to European supervision, when it takes legislative, administrative or judicial action in the area of a Convention right.”101 It implies deference to the expertise of national courts, which are deemed better positioned to assess sensitive issues on which there is no uniformity or consensus across the member states of the Council of Europe. In the U.K. it has been stated that, where “difficult choices” between the rights of the individual and the needs of society are involved, the judiciary may defer to the “considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention.”102 Lord Hoffmann in the Begum case in para 59 quoted the (Chamber) decision of the ECtHR in Leyla Şahin v. Turkey,103 where it was explained that “a margin of appreciation is particularly appropriate when it comes to the regulation by the Contracting States of the wearing of religious symbols in teaching institutions.”

In the Sharon case, Justice Kitumba observed: “The right to education provided by article 30 of the Constitution does not in any way mean the right to attend the Respondent University at the students’ own terms.”104 Implicitly the university authorities enjoy a margin of discretion in deciding the terms upon which education would be provided. Accordingly, students must conform to the terms set by the educational institutions. A similar observation was made more explicitly in the Begum case where Lord Scott stated:

... As to the school’s refusal to relax the uniform rules so as to allow Shabina to attend school wearing the jilbab, that too seems to me to have been well within the margin of discretion that must be allowed to the school’s managers.105

---

100 Id.


102 R v. Director of Public Prosecution, ex parte Kebilene [2000] 2 A.C. 326 at 380–381.


Lord Bingham explained, additionally, that the school authorities are best placed to exercise this margin of discretion given their experience:

Each school has to decide what uniform, if any, will best serve its wider educational purposes... It would in my opinion be irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors, to overrule their judgment on a matter as sensitive as this. The power of decision has been given to them for the compelling reason that they are best placed to exercise it, and I see no reason to disturb their decision.  

While educational institutions should enjoy a degree of autonomy, extending as high a degree of deference to the school authorities as did the House of Lords, in the Begum case, effectively lessened the Court’s role in determining whether the limitation in question was “necessary” under article 9. To state that it would be “irresponsible” for the court to overrule the head teacher, staff, and governors in the case of a jilbab at school effectively undermines the Court’s supervision in terms of the intense judicial scrutiny with which the margin of discretion is supposed to work, “hand in hand,” as it were. It also suggests that experienced school authorities can make no errors of judgment, which is doubtful.  

It should be recalled that the Court of Appeal’s judgment in the Begum case left it to the school to determine whether the wearing of a jilbab should or should not be permitted in the schools. The Court of Appeal held that this determination should take into account the following questions:

1) Has the claimant established that she has a relevant Convention right which qualifies for protection under Article 9(1)?
2) Subject to any justification that is established under Article 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 arm?

---

106 Id. ¶¶ 33–34.

107 Under the ECHR, the ECtHR stresses that the “margin of appreciation,” sometimes called the “margin of discretion” or the “discretionary area of judgment,” is not intended to abrogate the duty of the Court—the margin of appreciation goes “hand in hand with […] European supervision.” See Moscow Branch of Salvation Army v. Russia, App. No. 72881/01, Eur. Ct. H.R., ¶ 76 (2006). See also George Letsas, Two Concepts of the Margin of Appreciation, 26 OXFORD J. LEGAL STUD., 705, 705–732 (2006).

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 Article 9(2)?

The Court of Appeal found that the school had not proceeded along those lines, commenting: “Nobody who considered the issues on its behalf started from the premise that the claimant had a right which is recognised by English law, and that the onus lay on the School to justify its interference with that right. Instead, it started from the premise that its uniform policy was there to be obeyed: if the claimant did not like it, she could go to a different school.”

Thus, of the court found, because the school had approached the issues in this case from an entirely wrong direction, without according the claimant’s beliefs the weight they deserved, the school was not entitled to deny that it had unlawfully excluded her from school and unlawfully denied her the right to manifest her religion. Thus, the Court of Appeal confined itself to rejecting the school’s procedure, leaving the human rights questions unresolved. In fact, the court observed that: “[n]othing in this judgment should be taken as meaning that it would be impossible for the School to justify its stance if it were to reconsider its uniform policy in the light of this judgment and were to determine not to alter it in any significant respect.”

However, as Lord Bingham observed, “[t]he retreat to procedure is of course a way of avoiding difficult questions.” He added that the court “must confront these questions, however difficult,” and he further remarked that the school’s action could not properly be condemned as disproportionate, also affirming that, on reconsideration the same action could very well be maintained, and properly so. Thus, the House of Lords accorded to each school a very wide margin to decide its uniform policy. In so doing, it effectively deferred to each school’s decision in respect of the school dress code, inviting the same criticism leveled at the Court of Appeal for avoiding the “difficult” jilbab question.

---

109 R (on the application of Begum (by her litigation friend, Rahman)) v. Headteacher & Governors of Denbigh High Sch. [2005] EWCA (Civ) 199, ¶ 75.

110 Id. ¶ 76.

111 Id. ¶ 78.

112 Id. ¶ 81.


114 Id.
3.4. Legitimate aim

Both the Ugandan and U.K. courts also considered whether the limitations at issue pursued a legitimate aim (more particularly, a concern with the rights of others) as specified under article 43 of the Uganda Constitution (1995) and article 9(2) of the ECHR. In the *Sharon* case the Supreme Court found that, under the Constitution, holding university programs on all days including Saturdays served the legitimate public aim of increasing access to higher education and was nondiscriminatory.\(^\text{115}\) The chief justice stated that the university’s policies in expanding and academic programs, and increasing students’ intake were aimed at increasing access to University education in accordance with Article 30 of the Constitution. The appellants were not deliberately or discriminatorily denied the right to education or their freedom to religion. Indeed, the respondent took measures to accommodate the appellants special concerns by allowing them to retake examinations, which they had missed on account of their being held on Sabbath day. Consequently, the adverse effect on the rights and freedoms of the appellants was reduced. The appellants’ rights and freedoms were affected in some measure by these policies and regulations, in order to protect the interests of others or the public interest in accordance with Article 43 of the Constitution.\(^\text{116}\)

The court also accepted that the policy was meant to “improve the quality of education.”\(^\text{117}\) Furthermore, the respondent offered the appellants a reasonable accommodation, and that granting the appellants the additional accommodation they requested would cause “undue hardship and expense” to the respondent as well as seriously affect the ability of the respondent to provide accessible, affordable, quality higher education to a diverse and multireligious community.\(^\text{118}\) The court agreed that giving the appellants a greater degree of accommodation would impose “unbearable burden and hardship” on the respondent\(^\text{119}\) and would be tantamount to an “unwarranted disruption of vast Makerere University programs.”\(^\text{120}\) However, while the reasons stated above indicate that the university was pursuing legitimate aims, they do not prove that there was no interference with the appellants’ rights to practice

\(^{115}\) *See Sharon v. Makerere Univ., 2006 UGSC 10, Constitutional Appeal No. 2 of 2004 (Supreme Court of Uganda) (judgment of Odoki, C.J.).*

\(^{116}\) *Id.*

\(^{117}\) *See id. (judgment of Katureebe, J.S.C.).*

\(^{118}\) *Id.*

\(^{119}\) *Id.*

\(^{120}\) *See id. (judgment of Tsekooko, J.S.C.).*
their religion. The reasons advanced only serve to explain that there was justification for the interference.

The Supreme Court held that the respondent did not have to claim a “lawful derogation” (that is, justification for interference with, or limitation of, the appellants’ rights) in accordance with article 43 of the Constitution, since, according to the court, there was no interference with the appellants’ rights in the first place. It was further noted that if it had been necessary to establish a “lawful derogation,” the respondent had succeeded in establishing that any infringement on the appellants’ right to education and freedom of religion was reasonably justified in a free and democratic society in accordance with article 43 of the Constitution because:

The overriding object or purpose of the respondent’s policies and regulation was an important and pressing social or community interest, namely to improve access to quality University education at reasonable costs for all Ugandans. The means adopted by the respondent to implement its policy and regulations were rational, fair and proportional to the objective to be achieved. 121

It was observed that the objective of giving greater access to university education to more citizens than before and at reasonable cost was the sort of “public interest” that the framers of the Constitution had in mind when enacting article 43(1). 122 This approach, which accepts that there was interference but that such interference was demonstrably justifiable in a free and democratic society, is more satisfactory than one that denies the existence of the interference because there is justification for it. This is because such an approach, on the one hand, protects an individual’s human rights and, on the other, requires any institution—whether the state or other actor, such as the university in the instant case—that has limited guaranteed human rights to justify the limitation. By so doing, it gives an appropriate balance between the exercise of an individual’s human rights and the wider community interests. As noted by the chief justice, in this balancing process, relevant considerations will include:

(a) the nature of the right that is limited;
(b) its importance to an open and democratic society based on freedom and equality;
(c) the extent of the limitation;
(d) the efficacy and, particularly, whether the limitation is necessary; and
(e) whether the desired ends could reasonably be achieved through other less damaging means. 123

121 Id.
122 See id. (judgment of Katureebe, J.S.C.).
123 Id. (judgment of Odoki, C.J.).
In balancing the rights of the appellants to manifest their religion with the university objective of making university education accessible, Justice Katureebe observed:

Clearly, much as there might be some burden on the appellants, it was outweighed by the need to promote the public interest by furthering the secular objectives of the respondent. In my view, the stated objective of the respondent to expand University intake at as low a cost as possible to the students as a whole is sufficiently substantial to warrant overriding the concerns of the appellants... I have no doubt in my mind that the means adopted to achieve the University’s objectives were reasonable given the background and the accommodation that was offered to the appellants.¹²⁴

It is notable that the judge avoided referring to “interference” in the appellants’ rights and, instead, spoke of “some burden on the appellants.” His opinion further stated that such a “burden” was outweighed by the need to promote the public interest in furthering the “secular objectives” of the respondent. These “secular objectives” were not defined, and it remains unclear whether they entail freedom of religion, belief, and conscience. It is useful to recall that, in the Constitutional Court, Justice Mpagi-Bahigeine observed that article 7 of the Constitution of Uganda (1995) proclaims: “Uganda shall not adopt a state religion.” She then observed:

This Article therefore frees Ugandans from official dogma and leaves them to worship anything or nothing within Article 20, 29(1)(c) and 37 ... Uganda therefore being a secular state means that the respondent [Makerere University] ... is not circumscribed by the variety of religious beliefs obtaining in the institution.¹²⁵

It is also noteworthy that, although both courts appear to have construed “secular objectives” as legitimate aims in justifying interference with the appellants’ freedom to manifest their religion, there was no substantial inquiry made into what “secularism” actually means. Presumably, this would be necessary in order to establish the duties of a “secular institution” in a “secular state” with respect to freedom of religion. In general terms:

The principle [of secularism] prevented the State [or a secular institution] from manifesting a preference for a particular religion or belief; it thereby guided the State [or a secular institution] in its role of impartial arbiter, and necessarily entailed freedom of religion and conscience. It also served

¹²⁴ Id. (judgment of Katureebe, J.S.C.).

to protect the individual not only against arbitrary interference by the State but from external pressure from extremist movements.\footnote{See Leyla Şahin v. Turkey, App. No. 44774/98, Grand Chamber, Eur. Ct. H.R. ¶¶ 112–114 (2005).}

In this context, secularism is not hostile toward the observance of religious beliefs or practices. It is simply rejects the idea that the state or any secular institution should show a preference for a particular religion or belief. It thus entails the equal treatment of all religions or beliefs. Makerere University did not present any evidence to show that the observance of the Sabbath by the appellants or other students at the university is inconsistent with the secular nature of the institution or with the nature of a secular state. Nor did it show that nonobservance by the students in order to take examinations or partake in other university programs supports the principle. The appellants had no intention of calling into doubt the principle of the secular nature of the university or the state, a principle with which they agreed. There was no evidence to show that the appellants, through their attitude, conduct, or acts, contravened that principle.

Secularism or secular objectives are not threatened, necessarily, by respecting the religious choice of an adult to practice a chosen belief. It appears that the court subscribed to “fundamentalist secularism” as opposed to “liberal secularism.”\footnote{See also Sylvie Langlaude, Indoctrination, Secularism, Religious Liberty, and the ECHR, 55 Int’l & Comp. L.Q. 929–944 (2006); Paul M. Taylor, The Questionable Grounds of Objections to Proselytism and Certain Other Forms of Religious Expression, 3 B.Y.U. L. Rev. 811–835 (2006), available at http://lawreview.byu.edu/archives/2006/3/8TAYLOR.FIN.pdf (last visited February 3, 2009).} Fundamentalist secularism assumes that religion is a private issue in the sense that religious manifestations should be kept within the realm of private areas and the places of worship belonging to the religious communities.\footnote{Langlaude, supra note 127.} In this respect, it may be stated that the court imposed its own conception of secularism at an acknowledged cost to religious freedom. To be a secular institution in a secular state does not mean that the respondent had no duty to accommodate some beliefs based on religious tenets. On the other hand, the appellants had to consider the effect of their demand on the public interest. As one justice of the Supreme Court stated:

It is not in the public interest for a person to emphasize his or her own freedom or right irrespective of how this impacts on the rest of society. To say that examinations be held between 7:30 p.m. and 9:00 p.m. which is the time for evening classes, … but without taking into account what happens to those classes, or how this switch will affect the university administratively or costwise, is in my view, not being cognizant of the public interest.\footnote{Sharon v. Makerere Univ., 2006 UGSC 10, Constitutional Appeal No. 2 of 2004 (Supreme Court of Uganda) (judgment of Katureebe, J.S.C.).}
The Supreme Court of Uganda’s approach, in this case, indicates that the manifestation or expression of religion in educational institutions receives relatively inferior protection from the court (as compared with, say, political and journalistic expression or with the educational objectives of universities) because religious manifestation is considered not central to an open and democratic society. This is not unique to Uganda but has also been the case even in regional human rights courts such as the European Court of Human Rights (ECtHR), as confirmed in the more recent cases of Belgin Dogru v. France and Esma-Nur Kervanci v. France.

In the Begum case, the House of Lords found that the school’s refusal to allow Shabina Begum to wear a jilbab at school was justified for a number of reasons, such as the school’s right to adopt a policy on school uniforms for the sake of “smoothing over ethnic, religious and social divisions”, the fact that the school had allowed headscarves and that it “had taken immense pains to devise a uniform policy which respected Muslim beliefs but did so in an inclusive, unthreatening and uncompetitive way”, and because other girls had “subsequently expressed their concern that if the jilbab were to be allowed they would face pressure to adopt it even though they do not wish to do so.” Clearly, then, the rights of others became a relevant consideration.

Both the Sharon and Begum cases would suggest that when public institutions make decisions in a thoughtful, sensitive, nondiscriminatory, and participatory manner—balancing all the relevant considerations—courts would not lightly interfere, on human rights grounds, in their decisions. In the Begum case, the decision might be justified on the basis that there were other available schools in the area whose rules permitted the wearing of the jilbab. In the Sharon case, the decision might be justified based on the fact that there were alternate universities; that the university policy had been communicated to the appellants before they commenced their studies; and that the policy was intended to achieve constitutionally legitimate aims, namely, increasing accessibility to higher education and improving its quality. However, it is questionable whether courts should base similar cases on the grounds of “secularism” or “secular objectives.”

---

134 Id. ¶ 34 (Lord Bingham).
135 Id. ¶ 98 (Baroness Hale).
136 DOMINIC MCGOLDRICK, HUMAN RIGHTS AND RELIGION — THE ISLAMIC HEADSCARF DEBATE IN EUROPE (Hart 2006).
Secularism is not one of the permissible grounds for limiting human rights. The problem with the fundamentalist secular approach is that it fails to take into account the right to manifest one’s religion in the public sphere and, more specifically, it does not take full account of the situation of the most vulnerable individuals among religious minorities who are subordinated to mainstream religious beliefs. This runs counter to international human rights law and to the established principle of the UN Human Rights Committee, namely, that the “terms ‘belief’ and ‘religion’ are to be broadly construed” to include newly established beliefs or religious minorities. As shown in the next section, it is important to have legitimate justifications for interference with freedom to manifest one’s religion.

4. The importance of having legitimate justifications
Interference with human rights, including freedom to manifest one’s religious affiliation in schools, must have a legitimate justification. Otherwise, the protected rights become meaningless in practice. As noted above, both the Ugandan Constitution and the U.K.’s HRA require just such justifications. In addition, both states have acceded to, and pledged to bring their domestic legislation in line with, several international human rights treaties that stress the importance of freedom of religion and of a proper justification for any interference with the freedom to manifest one’s faith. These include the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child. These instruments indicate that everyone, including children, has a right to freedom of religion. However, external manifestations of religious beliefs (such as refusing to work on a Saturday or insisting on wearing a religious dress in contravention of the school’s uniform policy) are subject to greater limitations under article 18(3) of the ICCPR. However, there is a burden on the state and other relevant actors (such as a university or school) to justify the limitations in a manner that is—according to the language of article

---

137 See ICCPR, supra note 4, art. 27; “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”; Convention on the Rights of the Child, G.A. Res. 44/25, art. 30, U.N. Doc. A/44/49 (Nov. 20, 1989) [hereinafter CRC]; MANFRED NOWAK, CCPR-COMMENTARY 597–667 (Engel, 2nd ed. 2005).


140 See ICCPR, supra note 4, art. 18; ICESCR, supra note 139, art. 13; CRC, supra note 137, art. 14. See also UN, International Human Rights Treaty Bodies: Recent Reporting History under the Principal International Human Rights Instruments, HRI/GEN/4/Rev. 4 (May 15, 2004), 187–188.
18(3) of the ICCPR—“prescribed by law” and “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” As the two instant cases suggest, of all the permissible grounds for limitation, the one most invoked and accepted by the courts is protection of the “fundamental rights and freedoms of others.” Be that as it may, the failure of a state (or relevant nonstate actor at a national level) to justify its limitation of religious freedom should lead to the finding of a violation.

This is clear from the conclusions of the Human Rights Committee in Raihon Hudoyberganova v. Uzbekistan. In this case, the author of the complaint was a student at a state university in Tashkent who claimed that, as a practicing Muslim, she dressed appropriately, in accordance with the tenets of her religion, and that a ban on the wearing of a required hijab by a state university in Tashkent breached her right to manifest her religion under article 18 of the ICCPR. After a number of warnings, the student was excluded from her university in March 1998; she was told that “if she changed her mind about the hijab, the order would be annulled.”

Neither the complainant nor the respondent specified the precise attire the student wore that both parties referred to as “hijab.” The state simply noted that, under the university’s rules (regulating the rights and obligations of the institute’s students), “students are forbidden to wear clothes ‘attracting undue attention’, and forbidden to circulate with the face covered (with a hijab).” In the light of the state’s failed attempt at justification, the majority of the committee found in favor of the complainant, observing that:

the freedom to manifest one’s religion encompasses the right to wear clothes or attire in public which is in conformity with the individual’s faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual’s freedom to have or adopt a religion. As reflected in the Committee’s General Comment No. 22 (para. 5), policies or practices that have the same intention or effect as direct coercion, such as those restricting access to education, are inconsistent with article 18, paragraph 2.

The committee recalled, nonetheless, that the freedom to manifest one’s religion or beliefs is not absolute and may be subject to limitations, which are

---

142 Id. ¶ 2.4.
143 Id. ¶ 4.2.
144 Id. ¶ 6.2.
“prescribed by law” and are “necessary” to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.\(^\text{145}\) In the instant case, the student’s exclusion took place on March 15, 1998, and was based on the provisions of the institute’s regulations. The committee noted that the state had not invoked any specific ground for which the restriction imposed would in the committee’s view be necessary in the context of article 18(3). The state had sought simply to justify the complainant’s expulsion from the university because of her refusal to comply with the ban. Consequently, the committee concluded:

In the particular circumstances of the present case, and without either prejudging the right of a State party to limit expressions of religion and belief in the context of article 18 of the Covenant and duly taking into account the specifics of the context, or prejudging the right of academic institutions to adopt specific regulations relating to their own functioning, the Committee is led to conclude, in the absence of any justification provided by the State party, that there has been a violation of article 18, paragraph 2.\(^\text{146}\)

Clearly this decision was a default decision coming in the absence of any proper justification of the limitation by the state. Had the state advanced a legitimate justification, it is likely that no violation would have been found. Although this is a very limited precedent, it clearly indicates that limitations of the freedom to manifest religion must be based on legitimate justifications.

5. Concluding observations

From this review of the freedom to manifest religion in educational institutions, one may draw a few conclusions. First, a human rights approach to religion and its public manifestation can provide a language, discourse, and, in some cases, institutional structure for resolving freedom of religion disputes in educational institutions. The two cases considered herein—Sharon and Begum—clearly demonstrate the importance of a fair balance between individual rights and wider public interests. The actual protection accorded to freedom of religion and its limits at a domestic level largely depends on the constitutional framework in a particular state. Despite the existence of human rights arguments in favor of freedom of religion or beliefs, the freedom to manifest one’s religion or beliefs is not absolute and may be subject to limitations that are “prescribed by law” or are “necessary” for various reasons.\(^\text{147}\) Within

\(^{145}\) ICCPR, supra note 4, art. 18(3).


\(^{147}\) ICCPR, supra note 4, art. 18(3).
an educational context, the two cases clearly establish that there is no unlimited right to manifest one’s religion in a particular school or university. Thus, one cannot claim such a right at a specific educational institution, especially when there are other available institutions to accommodate an individual’s religious requirements. Courts have preferred to protect the broader objectives of educational institutions more than an individual’s freedom to manifest religion. This approach is understandable given that, in a democratic society where there are several conflicting religious beliefs, it may not always be possible for schools and universities to accommodate every act of religious manifestation at any given time. In any case, courts may defer to the experience, background, and detailed knowledge of the educational administrators, hesitating to interfere with the nondiscriminatory policies of such institutions. However, where interference with religious manifestation is established, the courts should not avoid the question of whether the interference was based on a legitimate aim.

As disputes concerning freedom of religion or beliefs and the limits placed on them in schools and universities appear likely to continue, an approach that focuses more on the importance of legitimate justifications for interference rather than on classifying the beliefs in question as “mainstream,” “extraordinary,” or “correct” may be an important way of containing and managing those issues effectively in a peaceful and democratic manner. Such an approach affords respect for an individual’s beliefs while, at the same time, giving due consideration to other relevant public policy considerations.