

The Contribution of the European Court of Human Rights to the Accommodation of Contemporary Religious Diversity

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Abstract

The present article analyzes how main issues and dilemmas that religious minorities and groups pose and face in contemporary societies in which, in the terms of the European Court of Human Rights, several religions coexist within one and the same population, have been or may be addressed through the lens of the European Convention on Human Rights.

Key words: Freedom of Religion, Religious Diversity, Religious Minorities, Accommodation, European Convention on Human Rights.

Resumen

El presente artículo analiza el modo en el que se han abordado o pueden abordarse, desde la óptica de la Convención Europea de Derechos Humanos, los principales problemas y dilemas que plantean y ante los que se encuentran las minorías y grupos religiosos en las sociedades contemporáneas en las que, en términos del Tribunal Europeo de Derechos Humanos, varias religiones coexisten en el seno de una misma población.

Palabras clave: Libertad religiosa, diversidad religiosa, minorías religiosas, acomodados, Convención Europea de Derechos Humanos.

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1. Definitional questions

1.1. *Freedom of Religion and the European Convention on Human Rights*

The international catalogue of human rights contains many treaties and provisions concerning freedom of religion and beliefs.² Regarding Europe, the first legally binding provision enshrining freedom of thought, conscience, and religion is Article 9 of the European Convention on Human Rights.³ Under this article, everyone has the right to freedom of thought, conscience, and religion.⁴ This right includes freedom to *change* one's religion or belief, and freedom, either alone or in community with others⁵ and in public or private, to *manifest* one's religion or belief, in worship, teaching, practice and observance (para. 1). 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 (para. 2).⁶

² See, Universal Declaration of Human Rights, Art. 18; International Covenant on Civil and Political Rights, Art. 18; Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, Art. 1; American Convention on Human Rights, Art. 12(3). Human rights law has so far avoided a definition of *religion*, except to ensure that it includes the concept of belief. As John Witte Jr. has noted: "This capacious definition of religion in international law has left it largely to individual states and individual claimants to define the boundaries of the regime of religious rights". Unfortunately, continues the same author, individual legislatures "embrace a bewildering array of definitions of religion". Witte Jr., John (1996): "Introduction", in Witte Jr., John and van der Vyver, Johan D. (eds.): *Religious Human Rights in a Global Perspective: Religious Perspectives*, Martinus Nijhoff Publisher, The Hague. The concept of *belief* includes religion but is not limited to its traditional meaning. Belief is thus a broader concept than religion and has been defined legally as "a conviction of the truth of a proposition, existing subjectively in the mind, and induced by argument, persuasion, or proof addressed to the judgment". See, Lerner, Natan (2006): *Religion, Secular Beliefs and Human Rights: 25 years after the 1981 Declaration*, Martinus Nijhoff Publisher, Leiden.

³ The Charter of Fundamental Rights of the European Union, signed on 7 April 2000, as amended by the Treaty of Lisbon, OJ C 303/01, 14 December 2007, also protects freedom of thought, conscience, and religion in the same terms (Art. 10).

⁴ In ECtHR, Appl. No. 24645/94, *Buscarini v. San Marino*, judgment of 18 February 1999, the Court expressly stated that Art. 9 also covers the

The freedoms guaranteed by Article 9 of the Convention are twofold: *internal* and *external*.⁷ *Internal* freedom can only be *unconditional* because it concerns deep-seated ideas and convictions formed in an individual's conscience which cannot, in themselves, disturb public order and consequently cannot be limited by state authorities. However, *external* freedom, despite its considerable importance, can only be *relative*. This relativity is logical inasmuch as, because the freedom in question is the freedom to manifest one's beliefs, public order may be affected or even threatened. Consequently, although the freedom to *hold* beliefs and convictions can only be unconditional, the freedom to *manifest* them can be relative.⁸

1.2. *Freedom of Religion and States' Margin of Appreciation*

Particularly when regulating matters related to intimate personal convictions in the sphere of morals or religion, the Convention system has traditionally made available to the

freedom to *not* hold religious beliefs or practice a religion. Note the different formulation of Art. 18 ICCPR that expressly states: "This right shall include freedom *to have or to adopt* a religion or belief of his choice", but it does not specifically mention "the freedom *to change* his religion or belief", as Art. 9 ECHR (emphasis added).

⁵ A problem of interpretation has emerged regarding the phrase in Art. 9 that sets out the possibility of practising one's religion "either alone or in community with others": after some hesitation, the Commission stated that the two alternatives "either alone or in community with others" could be regarded not as mutually exclusive or as leaving a choice to the authorities but only as recognising that religion could be practised in either form: ECommHR, Appl. No. 8160/78, *X v. the United Kingdom*, decision of 12 March 1981, 22 DR, p. 27.

⁶ The Commission has clarified the content of Art. 9 as follows: "Art. 9 primarily protects the sphere of personal beliefs and religious creeds, i.e., the area which is sometimes called the forum *internum*. In addition, it protects acts which are intimately linked to these attitudes, such as the acts of worship or devotion which are aspects of the practice of a religion or belief in a generally recognized form". ECommHR, Appl. No. 10358/83, *C. v. the United Kingdom*, decision of 15 December 1983, DR 37, p.142.

⁷ See, among others, Renucci, Jean-François (2005): *Article 9 on the European Convention on Human Rights. Freedom of Thought, Conscience and Religion*, Council of Europe Publications, Strasbourg.

⁸ *Ibid.*

states a broad margin of appreciation⁹ because the Court sees this as an area in which there is considerable variation in practice. Indeed, in the field of ethics and religious convictions, there is no uniform European conception of the legitimate aims for state restrictions of certain rights guaranteed by the Convention such as ‘the protection of the rights of others’, ‘morals’ or ‘*ordre public*’.¹⁰ For instance, what is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations.

The Strasbourg Court has taken the line that by reason of their direct and continuous contact with the vital forces of their countries, state authorities, including the national courts, are in principle in a better position than the international judge to give an opinion on the exact content and on the necessity of these restrictions, leaving to the international courts the competence to provide general guidelines and a framework of reference.

Obviously, this does not give the state an unlimited discretion to determine whether a restriction is proportionate to the aim pursued. In fact, if it is true that the Court does reserve for itself the authority to review state actions against principles and limits set forth under the restriction invoked,¹¹ it leaves a certain amount of discretion for the states to decide whether a given course of action is compatible with the Convention requirements. Moreover, it is always open to the Court to narrow that

margin should a more general consensus on the relationship between the state and the manifestation of religion or belief emerge. It follows from this that different responses to similar situations will be acceptable within the Convention framework, providing that they properly reflect a balancing of the particular issues in the contexts in which they emerge. Evans appropriately noted: “This means that the decisions of the Court in relation to Article 9(2) must be treated with extreme caution: for example, just because a restriction on the wearing of a religious symbol has been upheld in one case does not mean that a similar restriction will be upheld in another, where the context may be very different.”¹²

As seen earlier, the fact that the right to manifest religion is not unconditional makes regulation and restrictions possible. Indeed, the Strasbourg Court has repeatedly stated that in a democratic society in which several religions coexist in one and the same population, it may be necessary to place restrictions on this freedom to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected.¹³

The rule allowing restrictions and limitations must be interpreted in light of the Court’s view according to which “although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a *balance* must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.”¹⁴

⁹ The ‘margin of appreciation’ doctrine stems from the understanding that it is beyond the capability of the Court to exercise complete practical or political control over the implementation of the Convention. See, ECtHR, Appl. No. 5493/72, *Handyside v. United Kingdom*, judgment of 7 December 1976. See, among others, Arai-Takahashi, Yutaka (2002): *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, Antwerpen.

¹⁰ See, in particular, ECtHR, Appl. No. 44774/98, *Şahin v. Turkey*, judgment (Grand Chamber) of 10 November 2005, and ECtHR, Appl. No. 42393/98, *Lucia Dahlab v. Switzerland*, decision (on the admissibility) of 15 February 2001.

¹¹ The Court clarified this point as follows: “It is certainly not for the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field. [...] Nevertheless [...] this does not mean that the Contracting Parties enjoy an unlimited discretion [...] the Contracting States may not [...] adopt whatever measures

they deem appropriate.” ECtHR, *Klass and Others v. Germany*, judgment of 6 September 1978, Series A, No. 28, p. 23, para. 49.

¹² Evans, Malcolm D. (2008): *Manual on the Wearing of Religious Symbols in Public Areas*, Council of Europe Manuals, Martinus Nijhoff Publisher, Leiden.

¹³ *Ibid.*, at para. 115. See also, ECtHR, Appl. No. 14307/88, *Kokkinakis v. Greece*, judgment of 25 May 1993, para. 33. It is worth noting that of the four Arts. of the Convention with a similar structure (including, Arts. 8 [Private and family life], 10 [Freedom of expression], and 11 [Freedom of association]), Art. 9 is the only one that does not allow the state to invoke “national security” to restrict the exercise of protected rights. The other legitimate aims of restrictions according to para. 2 of Art. 9 are: public safety; the protection of public order, health, and morals; and the protection of the rights and freedoms of others.

¹⁴ See, ECtHR, Appl. No. 74/1995/580/666, *Valsamis v. Greece*, judgment of 18 December 1996, para. 27. (emphasis added).

Which types, under which conditions, and to what extent these restrictions can be imposed to respect the principle of ‘necessary in a democratic society’ will be the content of the next sections. In fact, although the Court noted that it is not possible to discern throughout Europe a uniform conception of the significance of religion in society, and that even in a single country such conceptions may vary,¹⁵ a number of key concepts have emerged from cases related to the accommodation of religious diversity which, reflecting core Convention values, provide clear benchmarks against which to assess the legitimacy of any restriction.

2. Accommodation of Religious Diversity in Everyday Life

The increased diversity of contemporary societies has multiplied the claims to accommodate diversity in different contexts of everyday life such as work places, public offices and schools.¹⁶ As for the accommodation of religious diversity, for Article 9 to be applied, it is necessary that an act or inactivity of a person fall within the meaning of a form of *manifestation* of religion or belief. As Evans observed, this approach is problematic because it is difficult to see *who is to decide* whether a form of action is to be understood, in a *prima facie* sense, as a manifestation of a religion or belief at all, as well as *on what basis* it can be determined that a person does not understand an issue to be of a religious nature if he or she says that it is.¹⁷

¹⁵ See, ECtHR, Appl. No. 13470/87, *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, Series A, No. 295-A.

¹⁶ For an overview of diversity claims and suggestions from the perspective of the ‘reasonable accommodation’ principle, see, where Québec is concerned, The Consultation Commission on Accommodation Practices Related to Cultural Differences (cochaired by Gérard Bouchard and Charles Taylor), *Building the Future. A Time for Reconciliation*, Report of 22 May 2008, at <<http://www.accommodements.qc.ca/index-en.html>>.

¹⁷ Malcolm D. Evans, *op.cit.*, p.12. This question was central in the case of *Valsamis v. Greece*, in which the Court ruled that a pupil’s one-day suspension from school for having refused to take part in a parade on a national holiday was not a breach of Art. 9 of the Convention. The parents submitted that pacifism was a fundamental tenet of their religion and for-

2.1. Labour and Public Employment

The Strasbourg Court has dealt with cases in which the question was whether a person’s inability to manifest his or her religion or belief was something for which the *state was responsible*, or whether it was instead attributable to *choices which those individuals have freely made for themselves*. For example, a number of cases have considered the question of whether employees may be required to work on days or at times that prevent them from fulfilling their religious obligations. In the case of *X v. the United Kingdom*,¹⁸ it was decided that there had been no interference with the freedom of religion or belief by requiring the applicant, a Muslim teacher, to work at a given time on a Friday afternoon, despite his belief that he should be at prayer because he remained *free to renegotiate his contract or change his employment altogether*. His inability to attend prayers was a result of his choosing to accept a full-time position as a teacher rather than as a result of a restriction placed on him.

A similar approach was taken in the case of *Konttine v. Finland*,¹⁹ in which the applicant was a Seventh Day Adventist who objected to being required to work after sunset on a Friday on the grounds that this was forbidden by his religious beliefs. Similarly, in *Stedman v. the United Kingdom*,²⁰ the applicant’s employer, following a change in national legislation, required the applicant to work on Sunday but the Commission found the applicant’s complaints to be inadmissible because of her contractual obligations. The Commission stated that the applicant was dismissed for failing to agree

bade any conduct associated with war, even indirectly, but the Court (as had the Commission before it) rejected this contention, arguing that “it can discern nothing, either in the purposes of the parade or in the arrangements for it, which could offend the applicants’ pacifist convictions” and concluded that the obligation to take part in the school parade was not such as to offend her parents’ religious convictions. See, ECtHR, *Valsamis v. Greece*, *op. cit.*, para 31.

¹⁸ ECommHR, Appl. No. 8160/78, *X v. the United Kingdom*, decision of 12 March 1981, D.R. 22, 27, para. 36.

¹⁹ ECommHR, Appl. No. 24949/94, *Konttinen v. Finland*, decision of 3 December 1996, D.R. 87, p. 68.

²⁰ ECommHR, Appl. No. 29107/95, *Stedman v. the United Kingdom*, decision of 9 April 1997, D.R.87- A, p. 104.

to work certain hours rather than for her religious belief as such and was *free to resign* and did in effect resign from her employment.²¹

Another interesting case is *Pichon and Sajous v. France*,²² in which the applicants were pharmacists who had refused on religious grounds to sell contraceptives, but the Court took the view that because they were *free to take up a different profession* there was no interference with their freedom to manifest their religion. The Court reiterated that Article 9 of the Convention does not always guarantee the right to behave in public in a manner governed by one's religion or belief and, consequently, not each and every act or form of behaviour motivated or inspired by a religion or a belief is protected by Article 9. The Court considered that, as long as the sale of contraceptives is legal and occurs on medical prescription *nowhere other than in a pharmacy*, the applicants could not give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products because they can *manifest those beliefs in many ways outside the professional sphere*.²³ The pharmacists' conviction by the national courts did not thus constitute interference with the exercise of the rights guaranteed by Article 9.

The restrictive approach of the Strasbourg Court *vis-à-vis* forms of accommodation of religious diversity at work has been confirmed in many other cases, including a case against the United Kingdom in which the Strasbourg judges had to balance an individual's religious beliefs against the interests of the state in the context of *public employment*. More precisely, the case concerned a Muslim teacher in a state school who claimed the right to attend religious service in a mosque located near the school.²⁴ Although the Strasbourg Commission at the time noted that in principle it is up to the individual rather than the state to determine whether to manifest religion alone or 'in community with others', it held that a person should, in the exercise of his freedom to manifest his religion, have to *take into account his particular professional or contractual position*,

that *there is no right to public employment*, that the teacher had *entered into the employment contract of his own will*, and that he had not made a similar claim when posted further away from the mosque.²⁵

The Court also followed this line of reasoning in the *Kalaç v. Turkey* case, in which a military judge was dismissed from his position on account of his membership to the Suleyman community, a religious community that, in the view of the military authorities, was inimical to the proper functioning of a judge.²⁶ In declaring the retirement of the applicant as not in breach of Article 9, the Court stated that in choosing to pursue a military career Mr. Kalaç was accepting of *his own accord* a system of military discipline that by its nature implied the possibility of placing limitations incapable of being imposed on civilians on certain of the rights and freedoms of members of the armed forces. In conclusion, in the Court's view, by voluntarily accepting to pursue a chosen career, the applicant was held to have accepted the consequent necessary limitations on the right to manifest his religious belief.

Obviously, the restrictive, less accommodating approach of the Strasbourg organs cannot be necessarily shared by all Contracting Parties of the Convention. There are indeed cases in which the respondent government displayed a more accommodating approach than the Strasbourg organs. For instance, in a case against the United Kingdom, the applicant, an Indian Sikh, complained that the requirement to wear a crash helmet that obliged him to remove his turban while riding his motorcycle interfered with his freedom of religion.²⁷ The Commission considered that the compulsory wearing of crash helmets was a necessary safety measure for motor cyclists and upheld state interests in health against the individual's religious beliefs. Despite the Strasbourg decision, Sikhs were later granted an exemption to the traffic regulations by the respondent government, the United Kingdom, but in the Commission's opinion, this did not vitiate the valid health considerations on which the regulations were based.

²¹ *Ibid.*

²² ECtHR, Appl. No. 49853/99, *Pichon and Sajous v. France*, decision (on the admissibility) of 2 October 2001.

²³ *Ibid.*, p. 4.

²⁴ ECommHR, Appl. No. 8160/78, *X. v. the United Kingdom*, *op. cit.*, p. 27.

²⁵ *Ibid.*

²⁶ ECtHR, Appl. No. 20741/92, *Kalaç v. Turkey*, judgment of 1 July 1997.

²⁷ ECommHR, Appl. No. 7992/77, *X. v. the United Kingdom*, decision of 12 July 1978, D.R. 14, p. 234.

The Strasbourg organs' rather restrictive approach to accommodate religious diversity at work has been counterbalanced by a leading pronouncement on accommodation of religious diversity in the procedure to obtain a job. The case has become a seminal case in the area of nondiscrimination because it has clarified the difference between the concept of *effective, de facto* equality and the concept of *formal, de jure* equality. The case in question is *Thlimmenos v. Greece*,²⁸ which concerned the refusal to appoint the applicant to a civil service post on the ground of a former conviction for refusing wear a military uniform because of his religious convictions. What was at issue was not the distinction made by domestic law between convicted persons and others for access to a profession but the lack of distinction between convicted persons whatever their offences, and the fact that no account was taken of the applicant's offence being of a special nature because of the religious motivation. The Strasbourg judges therefore considered that Article 14 (Prohibition of discrimination) had been violated in conjunction with Article 9 because the right to not be discriminated against in the enjoyment of the rights guaranteed under the Convention was violated not only when states failed to treat equally persons in analogous situations

but also when states without an objective and reasonable justification failed to treat differently persons whose situations were significantly different.

2.2. Use of Religious Symbols in Public Spaces

Throughout the year 2010, many European countries such as Belgium,²⁹ France³⁰ and Spain³¹ adopted, or are in the process of adopting, legislation aiming at prohibiting the *burqa* and the *niqab* in *public spaces* or solely in public buildings.³² Recently, the Court ruled on a case that may be relevant in the current discussion about the prohibition of religious symbols in public spaces.

The case of *Arslan v. Turkey*³³ concerned a religious group known as *Aczimendi tarikaty* who were convicted, on the basis of the antiterrorism legislation, of appearing on the streets of the city while wearing the distinctive dress of their group: a tunic and a stick. For the Court, it was central that the case concerned punishment for wearing a particular dress style in *public areas that were open to all*, and not, as in other cases, wearing

²⁸ ECtHR, Appl. No. 34369/97, *Thlimmenos v. Greece*, judgment (Grand Chamber) of 6 April 2000.

²⁹ Belgium's lower house of parliament voted on 29 April 2010 to ban clothes or veils that do not allow the wearer to be fully identified, including *burqa* and *niqab*. A cross-party consensus of 136 deputies voted for the measure, with just two abstentions and no opposing votes. At the time of writing, the ban had still to be passed by the Senate. See, at <http://www.spiegel.de/international/europe/0_1518,692212,00.html>.

³⁰ The French Constitutional Council ruled on 7 October 2010 that a bill making it illegal to wear the Islamic *burqa*, *niqab*, or other full face veils in public conforms with the Constitution (Decision no. 2010-613 DC, 7 October). Under the legislation, women who wear the veil can be required by police to show their face, and if they refuse, they can be forced to attend citizenship classes or be charged a fine. The legislation also makes it a crime to force a woman to cover her face, with a penalty of one year in prison and a fine. The bill was approved by the National Assembly in July 2010 and by the Senate in September. It is thought that the law will come into force in Spring 2011. See, at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2010-613DC-en2010_613dc.pdf>.

³¹ On 20 July 2010, the Spanish parliament rejected a proposed *general ban* of the full Islamic veil for women in public places, by a vote of 183 against and 162 for, with two abstentions. The proposal had been put forward by the Popular Party, which characterized it as a measure in support

of women's rights. The ruling Socialist Party opposed the ban, although the government did express support for the notion of banning the wearing of the *burqa* in *government buildings*. This proposal will be part of an upcoming bill on religious issues, which is scheduled for debate in 2011. Meanwhile, a small number of Spanish towns and cities, including in the country's second-largest city, Barcelona, have already banned the wearing of *burqas* and *niqabs* in *municipal buildings*. See, Associate Press Report, 20 July 2010, at <http://www.religlaw.org/index.php?blurb_id=976&page_id=25>.

³² On 23 June 2010, PACE stated that there should be *no general prohibition* on wearing the *burqa* and the *niqab* or other religious clothing, although legal restrictions may be justified "for security purposes, or where the public or professional functions of individuals require their religious neutrality, or that their face can be seen." The unanimously adopted resolution said the veiling of women is often perceived as "a symbol of the subjugation of women to men" but a general ban would deny women "who genuinely and freely desire to do so" their right to cover their face. PACE added that European governments should also seek to educate Muslim women, as well as their families and communities, on their rights and encourage them to take part in public and professional life. See, PACE, *Islam, Islamism and Islamophobia in Europe*, Resolution No. 1743 (2010), 23 June 2010.

³³ ECtHR, Appl. No. 41135/98, *Ahmet Arslan and others v. Turkey*, judgment of 23 February 2010. At the time of writing the judgment was only available in French.

religious symbols in *public establishments* in which religious neutrality might take precedence over the right to manifest one's religion.³⁴ Moreover, it was also relevant for the Court that the applicants were *ordinary citizens* and did not represent the state in the exercise of a *public function*; consequently, they could not be subjected on the basis of an official status "to the discretionary obligation in the public expression of their religious convictions."³⁵

In this case, there was no evidence that the applicants represented a threat to public order or that they had been involved in proselytism by exerting inappropriate pressure on passers-by during their gathering.³⁶ Therefore, the Court considered that the necessity for the disputed restriction had not been convincingly established by the Turkish Government and held that the interference with the applicants' right of freedom to manifest their convictions had not been based on sufficient reasons.

2.3. Wearing Religious Symbols in Public Schools

Almost certainly, the diversity claim that has developed more debates and media attention, especially in France,³⁷ Turkey, and Germany,³⁸ is the wearing of Islamic headscarves

by female Muslim teachers and pupils in public schools and university. The leading cases on the use of the veil in education institutions are the *Dahlab v. Switzerland*³⁹ and *Şahin v. Turkey*⁴⁰ cases in which the concept of secularism was central.⁴¹

Regarding the relationship between state and religion, the Strasbourg Court has frequently emphasised the state's role as "the neutral and impartial organizer of the exercise of various religions, faiths, and beliefs",⁴² that this role is "conducive to public order, religious harmony, and tolerance in a democratic society",⁴³ that the state's duty of neutrality and impartiality is incompatible with any power on the state's part to assess the legitimacy of religious beliefs,⁴⁴ and that the state is required to ensure mutual tolerance between opposing groups.⁴⁵

In the *Dahlab* case,⁴⁶ the applicant submitted that the measure prohibiting her from wearing a headscarf in the performance of her teaching duties infringed on her freedom to manifest her religion. To rule on this case, the Court had to weigh the requirements of the protection of the rights and liberties of others (e.g., the pupils attending her classes) against the conduct of which the applicant stood accused. The Court accepted that it is difficult to assess the impact that a *powerful external symbol* such as the wearing of a headscarf might have on the freedom of conscience and religion of young children, and it questioned whether it might have a proselytising effect,⁴⁷ seeing

³⁴ *Ibid.*, para. 49.

³⁵ *Ibid.*, para. 48, (author's translation).

³⁶ *Ibid.*, para. 51.

³⁷ See, French Law No. 22 of 15 March 2004 (*infra*).

³⁸ See, Rohe, Mathias (2002/4): "On the Applicability of Islamic Rules in Germany and Europe", *European Yearbook of Minority Issues*, 3, pp. 181-197; Selbmann, Frank (2002/4): "Developments in German Case Law Regarding the Freedom of Religion", *European Yearbook of Minority Issues*, 3, pp. 199-216.

³⁹ ECtHR, *Lucia Dahlab v. Switzerland*, *op.cit.*

⁴⁰ ECtHR, *Şahin v. Turkey*, *op.cit.*

⁴¹ Secularism is one possible model of religion-state relation and secularism itself has its variations. Secularism or French *laïcité* is considered one of the principal French Republican values. According to some authors, the French *laïcité* is something more than the simple separation of church and state: it refers to the "institutional dissociation of religion and morals; the creation of secular morals, the transmission of which is ensured by educational institutions." See, among others, Baubérot, Jean (1998): « La laïcité française et ses mutations », *Social Compass*, 45(1), pp. 175-187. See also, Ministère de

L'intérieur et de L'aménagement du Territoire (France) (2005): "Les relations des cultes avec les pouvoirs publics: Rapport de la commission de réflexion juridique", 20 September 2005, at <http://www.olir.it/areetematich/page/ documents/ News_0875_Rapport%20MACHELON.pdf>.

⁴² ECtHR, Appl. Nos. 41340/98, 41342/98, 41343/98 and 41344/98, *Refah Partisi (the Welfare Party) and Others v. Turkey*, judgment (Grand Chamber) of 13 February 2003, para. 91. Amongst the vast literature on this case, see Cumper, Peter (2002/4): "Europe, Islam and Democracy: Balancing Religious and Secular Values under the European Convention on Human Rights", *European Yearbook of Minority Issues*, 3, pp. 163-180.

⁴³ *Ibid.*

⁴⁴ See, *mutatis mutandis*, ECtHR, Appl. No. 27417/95, *Cha'are Shalom Ve Tsedek v. France*, judgment (Grand Chamber) of 27 June 2000, para. 84.

⁴⁵ See, *mutatis mutandis*, ECtHR, Appl. No. 45701/99, *Metropolitan Church of Bessarabia and Others v. Moldova*, judgment of 13 December 2001, para. 123.

⁴⁶ ECtHR, *Lucia Dahlab v. Switzerland*, *op.cit.*

⁴⁷ *Ibid.*, at p. 13.

as it appeared to be imposed on women by a precept laid down in the Koran that was hard to reconcile with the principle of gender equality.⁴⁸

In a controversial passage, the Court considered that it “appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.”⁴⁹ Consequently, it concluded that, in light of the circumstances of the case, in particular the extremely young age of the children for whom the applicant was responsible as a representative of the state, the Swiss authorities did not exceed their margin of appreciation and the measures they had taken were therefore not unreasonable.⁵⁰

Subsequently, the Court had another occasion to review a variation of this theme. The *Şahin* case⁵¹ concerned the prohibition of female students wearing the Islamic headscarf, covering their hair and throat, while attending classes and examinations at Istanbul University; the prohibition was found not to violate Article 9 by a Chamber and Grand Chamber. The applicant, at that time a nursing student, was refused admission to classes following a circular issued by the Higher Education Council stating that it was a disciplinary and criminal offence for students to wear Islamic headscarves in higher education establishments. The Turkish government submitted that the ban was aimed at guaranteeing the principle of secularism laid down in the Constitution as well as guaranteeing the peaceful coexistence of different religions and beliefs in the same community or establishment.

The Strasbourg judges noted that this notion of secularism appeared to the Court to be consistent with the values underpinning the Convention and it accepted that upholding that principle might be regarded as necessary for the protection of the democratic system in Turkey. The Court reiterated the

principle that Article 9 does not always guarantee the right to behave in a manner governed by a religious belief⁵² and does not confer on people who do so the right to disregard rules that have proved to be justified.⁵³

Imposing limitations on freedom in the sphere of wearing religious symbols in teaching institutions may, therefore, be regarded as meeting a pressing social need because this *religious symbol*—the headscarf—has taken on political significance in Turkey in recent years.⁵⁴ Under this perspective, the Court also took into consideration that, on the one hand, there are extremist political movements in Turkey that seek to impose on society their religious symbols and conception of a society founded on religious precepts. On the other hand, the Court noted that in Turkish universities it is undisputed that practising Muslim students are free to perform the religious duties that are habitually part of Muslim observance to the extent that they do not overstep the limits imposed by the organisational requirements of state education, and that in the University of Istanbul in particular, all forms of dress symbolising or manifesting a religion or faith are treated on an equal footing as they are all barred from the university premises. In conclusion, the Court found, unanimously, no violation of the Convention on the part of the Turkish government.⁵⁵

For the Strasbourg judges, the fact that the interference was based, in particular, on two principles—*secularism and equality*—that reinforced and complemented each other was central. The Court noted that this notion of secularism appeared to be consistent with the values underpinning the Convention and it accepted that upholding that principle might be regarded as necessary for the protection of the democratic system in Turkey.⁵⁶

In the *Şahin* case, the Court clearly taken the line that when it comes to states’ regulation of wearing religious symbols in teaching institutions, reference to the state margin of appre-

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ On the dismissal of teachers for their political opinions, see ECtHR, *Vogt v. Germany*, judgment (Grand Chamber) of 26 September 1995, Series A No. 232, concerning the dismissal of a secondary-school teacher on account of her political activities as a member of the Communist Party (DKP) in Germany, and similarly, ECtHR, Appl. No. 9228/80, *Glaserapp v. Germany*, judgment of 28 August 1986.

⁵¹ ECtHR, Appl. No. 44774/98, *Şahin v. Turkey*, judgment (Grand Chamber) of 10 November 2005. See also, ECtHR, Appl. No. 41556/98, *Tekin v. Turkey*, judgment (friendly settlement) of 29 June 2004.

⁵² See, ECtHR, Appl. No. 49853/99, *Pichon and Sajous v. France*, *op. cit.*

⁵³ ECtHR, *Şahin v. Turkey*, *op. cit.*, para. 121.

⁵⁴ *Ibid.*, para. 115.

⁵⁵ *Ibid.*, paras. 115-123.

⁵⁶ *Ibid.*, paras. 104, p.106.

ciation is particularly appropriate because rules in this field vary from one country to another depending on national traditions, and in this context there is no uniform European conception of the requirements of 'the protection of the rights of others' and of 'public order'.⁵⁷

Therefore, for the Court, when questions concerning the relationship between state and religion is at stake, on which opinion in a democratic society might reasonably differ widely, the role of the national decision-making body, along with the consideration of the local context and the use of the margin of appreciation must be given special importance

Judge Tulkens annexed a pertinent and passionate dissenting opinion. She did not believe that the reasons underlying the restriction on the applicant's freedom to wear the Islamic headscarf at the University were relevant and sufficient. She observed that:

Merely wearing the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and 'extremists' who seek to impose the headscarf as they do other religious symbols. Not all women who wear the headscarf are fundamentalists and there is nothing to suggest that the applicant held fundamentalist views. [...] I fail to see how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted.⁵⁸

And further:

'Paternalism' of this sort runs counter to the case-law of the Court, which has developed a real right to personal autonomy on the basis of Article 8. Finally, if wearing the headscarf really was contrary to the principle of the equality of men and women in any event, the State would have the positive obligation to prohibit it in all places, whether public or private.⁵⁹

The principle of secularism was also central to the case of *Dogru v. France*,⁶⁰ in which the Court examined, for the first time, the reforms introduced in France following the Stasi Commission's proposals on the place of Islam in a republican society.⁶¹ The applicant, a Muslim girl who was 11 years old at the relevant time, started wearing a headscarf in the second term of secondary school. When she went to physical education and sports classes she was asked to remove it by her teacher who explained that wearing a headscarf was incompatible with physical education classes. The applicant repeatedly refused to remove it. As a result, she was expelled for breaching the 'duty of assiduity' by failing to participate actively in physical education classes.

The French authorities invited the Court to adopt the same conclusion as in the *Leyla Şahin* case, because the impugned measure was based on the constitutional principles of secularism and gender equality. They submitted that the French conception of secularism respects the principles of the Convention, permitting the peaceful coexistence of people belonging to different faiths while maintaining the neutrality of the public arena.

The Court reiterated that pluralism and democracy are based on a *spirit of compromise* that entails various concessions on the part of individuals to reconcile the interests of the various groups and promote the ideas of a democratic society.⁶² Applying its case law, the Court found that the conclusion reached by the national authorities was not unreasonable.⁶³ In fact, the ban had been limited to the classes of physical education and was imposed in accordance with the school rules on health, safety, and assiduity, which applied to all pupils equally. The Court, then, underlined an important principle, namely that the ban was imposed to protect secularism in state schools and that, *although wearing religious signs*

schools of symbols or attire manifesting a religious affiliation. For a commentary, see, among others, Poggeschi, Giovanni (2002/4): "Religion in France: A Juridical Approach", *European Yearbook of Minority Issues*, 3, pp. 263-271.

⁶² ECtHR, *Dogru v. France*, *op.cit.*, para. 62.

⁶³ *Ibid.*, para. 73.

⁵⁷ *Ibid.*, para. 109.

⁵⁸ *Ibid.*, Dissenting Opinion of Judge Tulkens, pp. 42-52, at para. 10.

⁵⁹ *Ibid.*, para. 12.

⁶⁰ ECtHR, Appl. No. 27058/05, *Dogru v. France*, judgment of 4 December 2008. See also the judgment of the Court in the case of ECtHR, Appl. No. 31645/04, *Kervanci v. France*, judgment of 4 December 2008, which was delivered on the same date.

⁶¹ See, French Law No. 228 of 15 March 2004, pursuant to the principle of secularism, on the wearing in state primary and secondary

at schools was not inherently incompatible with the principle of secularism, it was for the national authorities to decide whether the applicant had exceeded the relevant limits. The Court also observed that the applicant's position had created tension in the school, and the disciplinary process provided for sufficient safeguards that were apt to protect the applicant's interests. For the Court, overall, the expulsion of the applicant, who could continue her schooling by correspondence classes, had not been disproportionate.⁶⁴

In this regard, an important principle formulated by the Court is that states must ensure an *open school environment* that encourages inclusion rather than exclusion, regardless of the pupils' social background, religious beliefs, or ethnic origins. "Schools should not be the arena for missionary activities or preaching; they should be a meeting place for different religions and philosophical convictions, in which pupils can acquire knowledge about their respective thoughts and traditions."⁶⁵ This is a corollary of the duty of neutrality and impartiality on the part of the states that implies that they are forbidden to pursue an aim of indoctrination that might be considered disrespectful of parents' religious and philosophical convictions.

In other terms, this entails the states' obligation to refrain from imposing beliefs, even indirectly, in places on which persons are dependent or in places in which they are particularly vulnerable. For the Court, the schooling of children is a particularly sensitive area in which the compelling power of the state is imposed on minds that still lack (depending on the child's level of maturity) the *critical capacity* enabling them to keep their

distance from a message derived from a preference manifested by the state in religious matters.⁶⁶

2.4. Organization of Public Education: School Environment and Curricula

As seen in the previous sections, an important area in which diversity claims often arise is education. In this regard, the protection afforded by Article 9 has been complemented by other Convention's provisions and certain additional protocols. In particular, Article 2 of the First Additional Protocol specifies that the state has respect for the right of parents to ensure education and teaching in conformity with their religious and philosophical convictions.⁶⁷ This freedom however cannot be unlimited, and if a conflict arises between the parents' convictions and the interests of the children, especially regarding their fundamental right to education, the Strasbourg organs have clearly taken the position that the latter must take precedence.⁶⁸ For instance, in connection with school attendance, protection of the child's right to education takes precedence if it clashes with the parents' convictions, and it was precisely on these grounds that the Strasbourg judges justified their refusal of an exemption from attending school on Saturday requested by parents who were members of the Seventh-Day Adventist Church.⁶⁹

The recent Court's decisions in the case of *Lautsi v. Italy* concerned the practice of the Italian public schools attended by the applicants' children (aged 11 and 13) of displaying a crucifix

⁶⁴ A similar outcome was reached in the case of *Mann Singh v. France* (ECtHR, Appl. No. 24479/07, decision (on the admissibility) of 13 November 2008), in which the authorities refused to reissue the applicant's driving license because he was wearing a turban, as a practicing Sikh, in his identity pictures. The Court found that the measure was limited in nature and was clearly imposed to protect public order and security, given that in road controls, the identification of the driver had to be facilitated to ensure that he was indeed entitled to drive his vehicle. Moreover, in the case of *El Morsli v. France* (ECtHR, Appl. No. 15585/06, decision (on the admissibility) of 4 March 2008) the Court stated that requests to remove headscarves and turbans to enable security checks were justified for the protection of public order. The applicant, a Moroccan national, applied for a visa to enter France to join her French husband but refused to remove her headscarf at the ensuing identity check taking place at the French consulate in Marrakesh. The Court held that the inability of the French authorities

to accommodate the applicant's request to have the check done by a female agent did not exceed their margin of appreciation. See, Cariolou, Leto (2007/8): "Recent Case Law of the European Court of Human Rights Concerning the Protection of Minorities", *European Yearbook of Minorities Issues*, 7, pp. 513-544, at pp. 525-6.

⁶⁵ ECtHR, Appl. No. 30814/06, *Lautsi v. Italy*, judgment (Chamber) of 3 November 2009, para. 47.

⁶⁶ *Ibid.*

⁶⁷ For the exemption from sex education classes, see, ECtHR, Appls. Nos. 5095/71, 5920/72 and 5926/72, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, judgment of 7 December 1976, Series A, No. 23.

⁶⁸ ECommHR, Appl. No. 17187/90, *Bernard and others v. Luxembourg*, decision of 8 September 1993.

⁶⁹ ECtHR, Appl. No. 44888/98, *Martins Casimiro and Cerveira Ferreira v. Luxembourg*, decision (on the admissibility) of 27 April 1999.

in each classroom.⁷⁰ The question for the Court was whether, while imposing the display of crucifixes in classrooms, Italy was able to ensure that education and teaching knowledge was passed on in an objective, critical, and pluralist way and that parents' religious and philosophical convictions were respected.

The Italian authorities justified the obligation to display (or the fact of displaying) the crucifix by referring to the positive moral message of the Christian faith (which *transcended secular constitutional values*), to the role of religion in *Italian history*, and to the deep roots of religion in the *country's tradition*. They attributed to the crucifix a *neutral and secular meaning* with reference to Italian history and traditions that were closely bound up with Christianity. They submitted that the crucifix was a religious symbol but one which could equally represent other values.⁷¹

For the Court—Chamber and Grand Chamber—although the symbol of the crucifix can have a number of meanings, the religious meaning was predominant. However, while the Chamber considered the presence of the crucifix in public schools to be “emotionally disturbing for pupils of other religions or those who profess no religion”,⁷² and deemed it thus contrary to Art. 2 of Protocol No.1, the Grand Chamber found no evidence that “the display of [such a symbol] may have an influence on pupils”⁷³ being, according to the Court, “an essentially passive symbol” as opposed to active teaching on religion or participation in religious activities.⁷⁴

By reversing the Chamber's decision that had prompted the Italian Government to refer the case to the Grand Chamber, the Court ruled by a large majority (fifteen votes to two) that the decision whether or not to allow the presence of crucifixes in public classrooms falls within the state's margin of appreciation

and that, although the regulation confers on Italy's majority religion preponderant visibility in the school environment, this as such does not amount to indoctrination.⁷⁵

The main principle the Court reiterated in this regard is that states, in the efforts to reconcile the functions they assume in relation to education and teaching, which include the setting and planning of the curriculum as well as the organisation of the school environment and the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions, enjoy a broad margin of appreciation limited by the principles of *pluralism and objectivity* and the *prohibition of indoctrination*.⁷⁶ To reach the conclusion that the principle of pluralism and the prohibition of indoctrination were respected in the *Lautsi* case, the Grand Chamber gave particular importance to a series of additional arguments submitted by Italy, in particular: the presence of crucifixes in the classroom is not associated with compulsory teaching about Christianity; it is not forbidden for pupils to wear symbols or apparel having religious connotations; alternative arrangements are possible to support schooling fit in with nonmajority religious practices; optional religious education can be organised in schools.⁷⁷

The Grand Chamber decision in the *Lautsi* case prompted diverging reactions well illustrated by the concurring and dissenting opinions annexed to the judgment. Judge Bonello, for instance, exemplified the reactions in favour of the pronouncement of the Court in these passages:

[A] court in a glass box a thousand kilometres away has been engaged to veto overnight what has survived countless generations. The Court has been asked to be an accomplice in a major act of *cultural vandalism*. [...] Most of the arguments raised by the applicant called

⁷⁰ ECtHR, Appl. No. 30814/06, *Lautsi v. Italy*, judgment (Grand Chamber) of 18 March 2011; judgment (Chamber) of 3 November 2009. It is worth noting that a number of Member States and associations submitted written observations before the Grand Chamber either on behalf of Italy or the applicants. For Italy were authorized observations by the governments of Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, Monaco, Romania, the Russian Federation, and San-Marino (8t of the 10 governments were also granted the right to intervene during the hearing), jointly 33 members of the European Parliament (in a memorandum by Alliance Defense Fund), the European Centre for Law and Justice, Eurojuris, and *Zentralkomitee des deutschen Katholiken*, *Semaines sociales de France* and *Associazioni*

cristiane lavoratori italiani. For the applicants intervened the Greek Helsinki Monitor, *Associazione nazionale del libero pensiero* and jointly the International Commission of Jurists, Interights, Human Rights Watch.

⁷¹ *Ibid.* (Chamber), paras. 34-44.

⁷² *Ibid.* (Chamber), para. 55.

⁷³ *Ibid.* (Grand Chamber), para. 66.

⁷⁴ *Ibid.*, para. 72.

⁷⁵ *Ibid.*, paras. 70-71.

⁷⁶ *Ibid.*, paras. 68-69.

⁷⁷ *Ibid.*, para. 74.

upon the Court to ensure the separation of Church and State and to enforce a regime of *aseptic secularism* in Italian schools. Bluntly, that ought to be none of this Court's business.⁷⁸

Contrary to this approach, Judge Malinverni in his dissenting opinion, after having noted that besides Italy, only in a very limited number of states (Austria, Poland and some German *Länder*) is there express provision for the presence of religious symbols in state schools, whereas in the vast majority of states the question is not specifically regulated, noted:

We now live in a multicultural society, in which the effective protection of religious freedom and of the right to education requires strict State *neutrality* in State-school education. [...] The State should not impose on pupils, against their will and without their being able to extract themselves, the symbol of a religion with which they do not identify.⁷⁹

It has to be acknowledged that the reasoning of the Grand Chamber is partly unconvincing especially with regard to the explanation concerning the difference between the present case and the *Dahlab* case (*infra*) in which the Court considered legitimate the prohibition imposed on a primary teacher of a public school to wear the Islamic veil. For the Grand Chamber the difference lays on the tender age of the pupils in the *Dahlab* case (although the *Lautsi* children were respectively 8 and 13 at the time of the alleged violation of the Convention) and the need to respect the principle of denominational neutrality in schools that a teacher with a *powerful external symbol* was unable to guarantee.⁸⁰ The main divergence lies thus in the different religious symbol under discussion: for the Court, the crucifix on the wall of a classroom by being a 'passive symbol' is less capable of influencing children's minds. The legal reasoning of the Grand Chamber remains rather unconvincing, notably because it departed from most previous case-law of the Court in this field in which the neutrality of either curriculum and school environment was established and assured.

At this stage, it is probably premature to argue that following the *Lautsi* case the Court has relinquished the principle of

neutrality as the apparent contradiction with some relevant case-law of the Court, particularly the *Dahlab* case (*supra*), may suggest. Beyond the enthusiastic and critical reactions that the *Lautsi* Grand Chamber's judgment has elicited, it remains to be seen whether in future cases in which the applicants will be able to provide evidence that they do directly suffer from religious pressure in schools, the Strasbourg Court will find violations of the Convention.

Similar to the *Lautsi* case, the *Folgerø and Others v. Norway* case⁸¹ concerned the duty of the state to fulfill its functions regarding education and teaching in a way that information or knowledge included in the curriculum is conveyed in an objective, critical, and pluralistic manner. The case concerned an application lodged by parents, who were members of the Norwegian Humanist Association, and their children, who were primary school pupils. The applicants complained that despite amendment, which had been introduced as a result of a petition brought to the UN Human Rights Committee,⁸² the subject called Christianity, Religion, and Philosophy contained a clear preponderance of Christianity, the state religion and state church in Norway (of which 86% of the population are members) and was compulsory in the 10-year schooling in Norway. As the Norwegian authorities had amended the KRL subject according to the Views of the UN Human Rights Committee, they refused to grant the applicants' children full exemption from the subject itself.

In the *Folgerø* case, the Court reiterated a principle that is recurrent in many of its pronouncements, namely that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a *balance* must be achieved that ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.⁸³ In particular, regarding the issue object of the case, the Court noted that the setting and planning of the curriculum involves questions of expediency on which it is not for the Court to rule and whose solution may le-

⁷⁸ *Ibid.*, Concurring Opinion of Judge Bonello, paras. 1.4. and 2.4 (emphases added).

⁷⁹ *Ibid.*, Dissenting Opinion of Judge Malinverni Joined by Judge Kalaydjieva, paras. 1, 2 and 8. See also, Conforti, Benedetto (2011) (former Judge of the ECtHR): *Crocifisso nelle scuole, una sentenza che lascia perplessi*, 24 March 2011, at <www.affariinternazionali.it/stampa.asp?ID=1705>.

⁸⁰ *Ibid.*, para. 73.

⁸¹ ECtHR, Appl. No. 15472/02, *Folgerø and Others v. Norway*, judgment (Grand Chamber) of 29 June 2007.

⁸² UN Human Rights Committee, Communication No. 1155/2003, Views of 3 November 2004.

⁸³ ECtHR, *Valsamis v. Greece*, *op.cit.*

gitimately vary according to the country and the era.⁸⁴ However, the Court also reiterated and emphasized the principle of neutrality and the prohibition to pursue an aim of indoctrination.

The Court noted that in the curriculum concerned, approximately half of the items included referred to Christianity alone, whereas the remainder of the items were shared between other religions and philosophies. Moreover, the Court found that the system of partial exemption available to the applicants subjected the parents concerned to a heavy burden with a risk of compelling them to disclose intimate aspects of their religious and philosophical convictions and that the *potential breeding ground for conflict* was likely to deter them from making such requests. The Court thus concluded, though by a narrow majority—nine to eight—that notwithstanding the many laudable legislative purposes stated in connection with the amendment of the curriculum, it did not appear that Norway took sufficient care that information and knowledge included in the curriculum be conveyed in an *objective, critical, and pluralistic manner* as the Convention rights provided.⁸⁵

Finally, the case of *Grzelak v. Poland* is a relevant similar case with a different conclusion.⁸⁶ The case was lodged by parents who did not want their son to follow religious instruction in a public school, but rather attend an alternative course in ethics in accordance with their personal convictions. Due to a lack of other pupils in a similar situation, no alternative courses such as ethics were offered and he had to spend those hours apart from the other pupils. According to his parents, this made him the subject of social ridicule and exclusion. Moreover, on his school reports, he received no grade for religion or ethics because despite various demands by the parents, no interschool ethics were organized due to the small number of interested pupils. The Court noted that in this case, the core of the boy's right to not manifest his convictions was infringed (Art. 14 in conjunction with Art. 9).

However, on the refusal to offer alternative courses in ethics the Court concluded under Article 2 of Protocol 1 (Right to education) that Poland had remained within its margin of appreciation. After all, religious and ethics education were optional and subject to the requirement that a minimum number of students was interested. The practice in Poland of requiring a minimum of seven pupils for such classes was in that sense not deemed unreasonable and thus no violation on that count was found.

3. Conclusions

At the end of the analysis of the Strasbourg case law, which principles can be inferred from the Strasbourg jurisprudence for the most urgent dilemmas surrounding freedom of religion in contemporary societies in which, in the Courts's terms, "several religions coexist within one and the same population" ?⁸⁷

Perhaps, the most important principle the Court formulated is the duty of the state to maintain a climate of *toleration* and *respect* for the rights of others. At the same time, the duty to ensure toleration and respect is to be read together with the duty to remain *impartial*. But on which basis should a climate of toleration and respect and the duty of impartiality be grounded? These are rather general principles that should be anchored to more specific tenets to find application in practical, concrete situations.

The Court has formulated a central corollary of the aforementioned principles in the *Kokkinakis* case,⁸⁸ the 'first real case' on freedom of religion decided by the Strasbourg Court: this is based on the fact that in contemporary, increasingly diversified societies *restrictions of the freedom to manifest religion or belief are legitimate* to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.

revealing that the applicant did not attend this course and thus obliging him to make a public statement as to his beliefs. The Court declared the application to be inadmissible because the applicant did not show that he had suffered such consequences from the school report which could be said to amount to an interference with his rights and freedoms guaranteed by Art. 9 of the Convention.

⁸⁷ ECtHR, Appl. No. 14307/88, *Kokkinakis v. Greece*, judgment of 25 May 1993, para. 33.

⁸⁸ *Ibid.*

⁸⁴ See, *ibid.*, para. 28.

⁸⁵ The Court found a violation of Art. 2 Prot. No. 1, and regarding its final findings, the Court did not find it necessary to carry out a separate examination on Art. 9. ECtHR, *Folgerø and Others v. Norway*, *op. cit.*

⁸⁶ ECtHR, Appl. No. 7710/02, *Grzelak v. Poland*, judgment of 15 June 2010. For a different conclusion, see, ECtHR, Appl. No. 40319/98, *Saniewski v. Poland*, decision (of the admissibility) of 26 June 2001, on the alleged breach of freedom of thought and conscience due to the absence in the applicant's school report of a mark for the course of religion

Restrictions and reconciliation of conflicting interests must be implemented in a way that ensures the fair and proper treatment of minorities while avoiding any abuse of a dominant position. This means that believers must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. The state has the duty to ensure that believers are able to manifest their beliefs by bringing their faith to the attention of others and by trying to persuade others to their point of view. This is what the Court considers a genuine and legitimate missionary evangelism. At the same time, the Court considers that the state pursues a legitimate aim when it seeks to limit ‘improper’ forms of proselytism that run the risk of subjecting individuals to pressure which they might find it difficult to resist.

However, what are the limits that believers and nonbelievers must accept in the Convention system? As noted in the aforementioned, for the Court, the climate of *tolerance* and *respect* is not maintained when antireligious expressions or behavior reach the level of being *gratuitously offensive, incite to disrespect or hatred or cast doubt on clearly established historical facts*; or when there is a *malicious violation of the spirit of tolerance*; or a *hostile environment* is created because this comes close to a negation of the freedom of religion of others and thus, in the Court’s terms, “*it loses the right to society’s tolerance*”.⁸⁹

As for the principle of *impartiality*, this seems to be based on a vision according to which the state should respect all religious beliefs as long as they do not contravene the Convention’s rights, protect freedom of religion, and in cases in which public funding is provided to one or more churches, then other churches should also receive funding in a nondiscriminatory manner.⁹⁰ The principle of impartiality also means that a state is to avoid entering into religious or doctrinal questions in the

associative life of believers and nonbelievers, other than to test them for compatibility with the foundational convention values of democratic governance, pluralism, and tolerance. The state’s duty of impartiality means, in other terms, that the state should refrain from assessing the legitimacy of religious beliefs or the ways in which they are expressed.

The principle of *equality* is another crucial principle when it is necessary to assess an interference with the manifestation of a religion or belief, for instance those concerning the wearing of religious symbols. As was established in the *Thlimmenos* case, the principle of equality requires not only that equal situations are treated equally but also that unequal situations are treated differently. This twofold canon is crucial to understanding the dichotomy of the *de facto* or substantial equality and *de jure* or formal equality.

The case of a general restriction on the wearing of a particular type of clothing or symbol which is of religious significance to some but not to all, such as the prohibition of the use of *burqa* or *niqab* foreseen in a number of European laws or draft laws, raises the question of whether the state is responsible for a *failure to treat differently persons whose situations are significantly different*. Should this be the case, there will be a violation of Article 14 in conjunction with Article 9 unless an objective and reasonable basis is given that justifies a differential treatment. The question thus arises whether, for instance, antiterrorism or public order are legitimate justifications for a general ban of *burqa* or *niqab*. The Court assists the decision-making by drawing a difference, first, between prohibitions that find application in public areas *that are open to all* and those limited to *public establishments*, and second, between prohibitions that apply to *ordinary citizens* and those limited to citizens who exercise a *public function*.

⁸⁹ ECtHR, *Refah Partisi (the Welfare Party) and Others v. Turkey* (Chamber), *op.cit.*, para. 75.

⁹⁰ See the recent *Savez crkava “Rijec zivota” and Others v. Croatia* case (ECtHR, Appl. No. 7798/08, judgment of 9 December 2010), in which the Strasbourg Court found a violation of Art. 14 (prohibition of discrimination) in conjunction with Art. 9 (freedom of religion) in circumstances in which the Government of Croatia failed to provide an objective and reasonable justification for its less favourable treatment—including the right to provide religious education in public schools and nurseries and the right to perform religious marriages with the effects of a civil marriage—of

three Reformist churches (the Applicant Churches) in Croatia. See, also, ECtHR, Appl. No. 40825/98, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, judgment of 31 July 2008. Similarly, in *Darby v. Sweden* (ECtHR, Appl. No. 11581/85, judgment of 23 October 1990), the Court found that the distinction made between nonresident workers and resident workers to be exempted from church tax lacked a legitimate aim under the Convention and thus, a violation of the antidiscrimination clause (Art. 14) was found taken together with Art. 1 of Prot. No. 1 which guarantees the right of property (the Court did not find it necessary to consider the alleged violation of Art. 9).

In the context of bans and limitations, some raise the question whether secularism is actually becoming *intolerant*, especially when individual religious manifestations do not display any signs of political intentions but are performed *bona fide* making these prohibitions difficult to reconcile with the necessity to protect a democratic society.⁹¹

Recalling that the Convention does not always guarantee the right to behave in public in a manner governed by one's religion or belief, between secularism and its corollary, equality, on the one hand, and manifestation of religion, on the other hand, the Court has clearly given precedence to the former: "An attitude which fails to respect that principle [of secularism] will not necessarily be accepted as being covered by the freedom to manifest one's religion".⁹²

Yet, the position expressed by the Court in the *Şahin* case, perhaps more in the direction of a 'strict' form of secularism, has been always referred to Turkey and to the specific situation existing in this country, notably the overwhelming majority of the population belonging to Islam and the existence of fundamentalist religious movements. In all the other cases earlier discussed, the Court has discarded a 'militant' secularism, particularly in the recent *Lautsi* case, and supported a vision according to which the state should respect all religious beliefs as long as they do not contravene the Convention's rights and protect freedom of religion.

From the analysis hitherto conducted on the possible models for religion-state relations and on the case law of the Strasbourg Court, it seems that the Strasbourg Court upholds a pluralist, 'open' secularism model that, as seen, rejects any forms of 'militant secularism' or 'enlightenment fundamentalism', and that for the Court is also an appropriate model to protect nonbelievers, atheists, agnostics and skeptics who, although often neglected, are also covered by Article 9 of the Convention and the other provisions complementing this right.

When implementing the principles governing the right to freedom of religion—respect and tolerance, impartiality and neutrality, secularism and equality—the role of the state is not simply a passive role, as Malcolm Evans noted;⁹³ on the contrary, the Court recognizes the potential need for the state to be *proactive*, emphasizing the role of the state as the *promoter of tolerance* and noting that the state's duty to ensure religious tolerance and peaceful relations between groups of believers may require engaging in *neutral mediation*.⁹⁴ For the Court, this does not amount in principle to state interference with the believers' rights, although the state authorities must be cautious in this particularly delicate area. The role of mediation performed by the state authorities is also clearly beneficial for democratic societies as a whole because it gives opportunities for positive dialogue and a furthering of mutual respect and understanding.

Recalling that the Convention is a 'living instrument' which is to be interpreted in the light of present-day conditions and that the Court can be influenced by the developments of standards shared by member states of the Council of Europe, the processes of interpretation and application of the principles of respect, tolerance, impartiality, and neutrality as well as secularism and equality are also able to address newly emerging issues or reconsider previous Court's approaches. In other words, the interpretative and implementing approaches set out in the Court's jurisprudence are not rigid and immutable but are open to reappraisal and adaptations to new standards, should they emerge among the contracting states of the Convention.

This is particularly appropriate in areas such as the freedom of religion or belief in which states usually enjoy a significant margin of appreciation and where the role of the national decision-making body, together with the consideration of the local context, has always been given special importance. An authentic neutral, nonpartisan role of mediation by the state is perhaps the most valuable and crucial function of the state in our contemporary, increasingly diversified societies. In perform-

⁹¹ See, among others, Lerner, *op.cit.*; Finke, Jasper (2010): „Warum das ‚Burka-Verbot‘ gegen die EMRK verstößt“, *Neue Zeitschrift für Verwaltungsrecht*, 18, pp. 1127-1131.

⁹² ECtHR, *Refah Partisi (the Welfare Party) and Others v. Turkey* (Grand Chamber), *op.cit.*, para. 93.

⁹³ Evans, Malcolm D. (2008): *Freedom of Religion and the Role of the State—More Than Setting an Impartial and Neutral Framework?*, Confer-

ence Proceedings, *Human rights in culturally diverse societies. Challenges and perspectives*, Council of Europe, DG Human Rights and Legal Affairs, The Hague, Netherlands, 12-13 November 2008, at pp.67-69.

⁹⁴ See, ECtHR, Appl. No. 39023/97, *Supreme Holy Council of the Muslim Community v. Bulgaria*, judgment of 16 December 2004, para. 80.

ing this function, the state is sustained and complemented by the Strasbourg Court that ensures not only a supervisory role in the implementation *ex post*, of state policies and legislation, but also an interpretative function *ex ante*, in the elaboration of policies, norms, and judiciary decisions on accommodating religious diversity by providing principles and interpretative rules valuable for the legal production of the member states of the Council of Europe. The increasing number of applications before the Strasbourg Court concerning religious diversity is a clear indication of the growing importance of this topic in the European arena, and this makes the role of the Strasbourg Court more crucial and central than ever before.

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