# INDOCTRINATION, SECULARISM, RELIGIOUS LIBERTY, AND THE ECHR

## I. INTRODUCTION

With its judgment in *Leyla Şahin v Turkey*,[1] the Grand Chamber of the European Court of Human Rights has once again addressed the place of religion within the European Convention system. The Court considers two types of cases. The first focuses on individuals but has repercussions on the relationship between State and religious communities. The Court is much more individualistic in these cases, in that it focuses more on the individual and the protection of the rights and freedoms of others. The Court emphasizes values such as the prevention of indoctrination, neutrality, secularism and laïcité, especially in relation to Islam. The Court tries to promote and enforce a normative order of secularism but this has unfortunate consequences for religious freedom. The second deals with the compatibility of entire domestic regimes regulating religious affairs with the Convention, including questions of legal personality and registration, leadership and property ownership, positive obligations of the State towards the protection of religious communities against third parties, and freedom of religious choice. The aim is to promote tolerance, religious diversity, pluralism and a market place within religious beliefs. It will be shown that these two strands in the caselaw do not always sit happily together.

## II. THE PREVENTION OF INDOCTRINATION

In *Dahlab v Switzerland*,[2] and *Leyla Şahin v Turkey*, it is evident that the Court upholds policies on the prevention of religious indoctrination and pressure. The State has a wide margin of appreciation in matters of religious freedom,[3] and it is even wider in the protection of the rights and freedoms of others. These cases show that the Court is less willing to be critical on occasions when the State intervenes to protect people from others' manifestation of their religious beliefs, especially in application of the principle of respect.[4] Malcolm Evans explains that according to the principle of respect, believers are to enjoy the respect of those who hold to other forms of religious belief, or of no religious belief at all. This includes protecting the sensibilities of believers, as in *Wingrove v UK* and *Otto-Preminger v Austria*,[5] and protection from the views of believers, as in *Kokkinakis v Greece* and *Larissis v Greece*.[6] This means that the Court must balance different sets of rights: Evans thus points out that 'the claim that an activity is a bona

[1] *Leyla Şahin v Turkey*, Application 44774/98 (2005).
[2] *Dahlab v Switzerland*, Application 42393/98, admissibility decision (2001).
[3] See *Cha'are Shalom Ve Tsedek v France*, Application 27417/95 (2000).
[4] On the principle of respect, see MD Evans 'Believing in Communities, European Style' in N Ghanea (ed) *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Martinus Nijhoff Leiden/Boston 2004) 133–155, at 140–144.
[5] *Wingrove v UK*, Application 17419/90 (1996); *Otto-Preminger v Austria*, Application 13470/87 (1994)
[6] *Kokkinakis v Greece*, Application 14307/88 (1993); *Larissis v Greece*, Applications 23372/94-26377/94-26378/94 (1998).

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fide manifestation of religion or belief is not a 'trump' card: it is merely a factor to be taken into account when balancing up conflicting interests'.[7]

In *Dahlab*, the Court laid down some principles concerning the relationship between children and religion. The applicant was a primary school teacher who converted to Islam, started wearing the Islamic headscarf (including during her professional duties), and was dismissed for doing so. She argued that the measure prohibiting her from wearing the headscarf in the performance of her teaching duties infringed her freedom to manifest her religion.[8] In the heart of the judgment, the Court said:

> The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore 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. Accordingly, weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony, the Court considers that, in the circumstances of the case and having regard, above all, to the tender age of the children for whom the applicant was responsible as a representative of the State, the Geneva authorities did not exceed their margin of appreciation and that the measure they took was therefore not unreasonable.

The Court had regard for the 'tender age of the children', aged between four and eight. It found that at that age, children wonder about many things and are more easily influenced than older pupils. Also, because it was 'a powerful external symbol', a ban was permitted and the Court found that the restriction on the teacher's manifestation of her religious beliefs was justified. It is also worth pointing out that the wearing of the Islamic headscarf by a teacher during teaching duties is an issue that has also arisen in Germany.[9]

Here again this appears to be linked to the principle of respect mentioned earlier, in order to ensure that the 'proselytized' (ie the children), stand up to the 'proselytizer' (ie the teacher). Moreover, this is what Natan Lerner calls a 'captive audience' case,[10] as the children were, firstly, very young and secondly, at school and under the authority of Mrs Dahlab. The State argued that preventing the applicant from wearing the Islamic headscarf while teaching was necessary in order to preserve religious harmony in the school. This was accepted, although there had been no complaints from any child or parent or from Mrs Dahlab's colleagues about her behaviour during the four years she

[7] Evans (n 4) 141.

[8] She further complained that the Swiss courts had erred in accepting that the measure had a sufficient basis in law and in considering that there was a threat to public safety and to the protection of public order. She observed that the fact that she wore an Islamic headscarf had gone unnoticed for four years and did not appear to have caused any obvious disturbance within the school.

[9] Kopftuch-Urteil [Headscarf Decision] (24 Sept 2003), BVerfGE 108, 282; NJW 56 (2003), 3111. See AF von Campenhausen 'The German Headscarf Debate (2004) 2 Brigham Young University Law Review 665–99; D Schiek 'Just a Piece of Cloth? German Courts and Employees with headscarves' (2004) 33(1) Industrial Law Journal 68–73.

[10] N Lerner *Religion, Beliefs and International Human Rights* (Orbis Book MaryKnoll NY 2000) 110–16.

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had worked there as a teacher, wearing the headscarf. No disturbance of order at the school caused by Mrs Dahlab's headscarf had been registered.[11]

In the Court's view children need special protection, especially when they are at school, notably because they are entrusted to the teacher's care. Accordingly they should not be proselytized at school. This suggests that children should be taught in a context of religious harmony, and this may also make it necessary to protect children against different religious viewpoints from those they might already hold.

This case gives us an insight into what the Court sees as indoctrination. It implied that wearing the Islamic headscarf in front of young children at school has an impact on children's freedom of conscience and religion, and actually is a form of indoctrination and proselytism. The Court favours the right to have one's religious beliefs respected. This includes, in the Court's view, a right to be taught in a neutral context and to be free from proselytism at school, or what Antje Pedain refers to as 'the negative right of the pupils and their parents to be free from exposure to unwanted religious influences'.[12]

The prevention of pressure and indoctrination was also considered by the Court in *Leyla Şahin v Turkey*. This case concerned university students but was influenced by *Dahlab*, notably because the Court used the principle of respect. The issue of headscarves in educational institutions has also arisen in the domestic jurisdictions of several European countries, such as the United Kingdom,[13] and France.[14] The case can also be contrasted to a recent communication of the UN Human Rights Committee, *Raihon Hudoyberganova v Uzbekistan*.[15]

Leyla Şahin was, at the material time, a fifth-year medical student at the University of Istanbul. She came from a traditional family of practising Muslims and considered it her religious duty to wear the Islamic headscarf. In 1998 a circular from the Vice-

[11] IT Plesner 'The European Court on Human Rights between fundamentalist and liberal secularism' (Strasbourg Conference), available at <http://www.strasbourgconference.org/papers/Plesner%27s%20Strasbourg%20paper%20(revised).pdf> (page 7).

[12] A Pedain 'Do headscarfs bite?'(2004) 63(3) CLJ 537–40, 537.

[13] For a recent House of Lords' decision on a local school uniform policy, the right to wear a headscarf, a Muslim pupil's refusal to comply with school uniform policy and the meaning of 'constructive' expulsion, *R (on the application of Begum (Shabina)) v Denbigh High School Governors* [2006] 2 WLR 719 (22 Mar 2006).

[14] Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics (JO n° 65 du 17 mars 2004 page 5190)—Law n° 2004-228 (15 March 2004) prohibiting children in public schools from wearing clothing and insignia that 'conspicuously manifest a religious affiliation' (Official Journal n° 65, 17 Mar 2004, page 5190)

[15] *Raihon Hudoyberganova v Uzbekistan*, Communication 931/2000 (2005). The Committee considered both freedom of manifestation under Article 18(1) and freedom from coercion under Article 18(2). The Committee considered 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 considered that to prevent a person from wearing religious clothing in public or private may constitute a violation of Article 18(2). The Committee noted that the State party did not invoke any specific ground for which the restriction imposed on the author would in its view be necessary in the meaning of Article 18(3). 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 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 was led to conclude, in the absence of any justification provided by the State party, that there had been a violation of Article 18(2).

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Chancellor of the University stated that students with beards or wearing the Islamic headscarf would be refused admission to lectures, courses and tutorials. Later on the applicant was denied access to various lectures and written examinations because she was wearing a headscarf, and eventually, she was excluded from the University.

She submitted that the ban on wearing the Islamic headscarf in higher-education institutions constituted an unjustified interference with her right to freedom of religion, and, in particular, her right to manifest her religion. The Court had regard to the protection of the rights and freedoms of others and the absence of pressure and indoctrination, gender equality, and arguments derived from the principles of secularism and laïcité. The Court found that the applicant's freedom to manifest her religious beliefs in wearing the Islamic headscarf had been interfered with, but it concluded that the measure was necessary in a democratic society. Accordingly, there was no breach of Article 9. The Court used the principle of respect when dealing with the rights and freedoms of others, and it said:

> when examining the question of the Islamic headscarf in the Turkish context, there must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it.[16]

*Şahin* can be likened to *Dahlab* insofar as the Court restricts the manifestation of the religious beliefs of the applicant in order to protect the rights and freedoms of others. The Court gives a very wide meaning to indoctrination and pressure, and this has difficult repercussions for the individual believer. The Court sees Miss Şahin as being on the verge of indoctrinating other students. Also, it does not seem to pay attention to the applicant's religious beliefs and the sense of identity she can derive by wearing the Islamic headscarf.

A parallel can be drawn with the House of Lords' decision in *R (on the application of Begum (Shabina)) v Denbigh High School Governors*.[17] The school said that it had been approached by non-Muslim pupils saying that they were afraid of people wearing the jilbab, as they perceived this form of dress to be associated with extreme views. It had also been approached by some Muslim girls saying that that they did not wish to wear the jilbab, as this would identify them as belonging to extreme Muslim sects. If fear is clearly not a good reason to ban the headscarf, it may well be that only real evidence of strong communal pressure could be a legitimate reason.[18] This shows that there are similar arguments at different levels, whether the distinction is between girls wearing the Islamic headscarf and those not wearing it, or between girls wearing one form of the Islamic headscarf and girls wearing a form seen to be more in conformity with requirements of the Muslim faith. This argument related to pressure was also accepted by the House of Lords, which considered that the school was entitled to consider that the rules about uniform were necessary for the protection of the rights and freedoms of others.[19]

[16] *Leyla Şahin v Turkey*, Application 44774/98 (2005), para 115.

[17] [2006] 2 WLR 719 (22 Mar 2006). It concerned Miss Begum, a pupil at a secondary school where the majority of pupils were Muslims. The school uniform allowed the shalwar kameeze with the headscarf. However, the applicant argued that this was not sufficient and that her Muslim beliefs required her to wear the jilbab, which is a more covering form of dress. This was not accepted by the school, and she was told not to come back to school until she stopped wearing the jilbab.

[18] A Scolnicov 'A dedicated follower of (religious) fashion?' (2005) 64 CLJ 527–9, 528–9.

[19] Especially paras 58 and 94.

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The House of Lords also dismissed Miss Begum's application on other grounds. Lord Bingham, Lord Hoffmann and Lord Scott all considered that there was no breach of her freedom of manifestation, especially because there was nothing to prevent her from going to a school where her religion did not require her to wear a jilbab or where she was allowed to wear one.[20] All five Law Lords agreed that in any case the restriction was justified. In particular, the school took immense pains to devise a uniform policy that was accepted by mainstream Muslim opinion, therefore the measure was not disproportionate.[21]

The European Court's position on the prevention of indoctrination and pressure is problematic for the individual believer. The absence of religion in educational institutions, or more specifically religious symbols or religious education may convey the idea that the school system is a bearer of majority values, even Judeo-Christian, under the appearance of impartiality.[22] Also, if a State does not give an appropriate place to religion in public schools, would it violate its obligation to neutrality in the direction of the areligious or anti-religious?[23] It has also been pointed out that some Muslims, not all of which are stricto sensu Islamists, contend that what is taught at the public school is—under an appearance of neutrality—the imposition of Christian values on children and teenagers.[24] Moreover, the fact that the Court reasons in terms of pressure and indoctrination raises even more questions. The problem with the Court's approach is that it defines indoctrination far too broadly. In *Şahin* the mere fact of wearing a headscarf is seen as indoctrinating others, although it involved adults at university level. In *Dahlab* it is unclear whether the Court's position is limited to very young children or whether it also applies to older and more mature ones. It is also unclear whether signs of proselytism or indoctrination should be actively looked for, who is in charge of determining what constitutes harm, and what is the balance to be observed. In past education cases dealing with the indoctrination of school pupils by the State, the Court used a test that favoured the State and where the threshold of indoctrination was very high.[25] The Court will only find that there is indoctrination when the State actively tries to indoctrinate children. However in recent cases the Court also uses this indoctrination

[20] Lord Nicholls and Baroness Hale disagreed and argued that there was an interference with her freedom of manifestation.

[21] Paras 58–94 (per Lord Bingham).

[22] For example, see *Mandla v Dowell Lee* [1983] 2 AC 548. In a case involving a turban-wearing Sikh child with unshorn hair, a uniform requirement of short hair and caps for boys, and unlawful indirect discrimination, the headmaster's objection to the turban on the ground that he sought to run a Christian school, accepting of all religions and races is particularly interesting. He argued that the Christian character of the school would not be accurately reflected by the inclusion of the non-Christian turban as part of the uniform, that the turban was an outward manifestation of a non-Christian faith and that it amounted to a challenge to that faith.

[23] G Robbers 'Religion in Public Schools' (Strasbourg Conference), available at: <http://www.strasbourgconference.org/papers/Religion%20in%20Public%20Schools.pdf> (page 2).

[24] G Haarscher 'Muslim Minorities and Democracy: Battle of Memories v. Genuine Integration' (Strasbourg Conference), available at:<http://www.strasbourgconference.org/papers/Haarscher.pdf> (page 10).

[25] See *Kjeldsen, Busk Madsen and Pedersen v Denmark*, Applications 5095/71-5920/72-5926/72 (1976); *Martins Casimiro and Cerveira Ferreira v Luxemburg*, Application 44888/98, admissibility decision (1999); *Jimenez Alonso and Jimenez Merino v Spain*, Application 51188/99 (2000). Whereas State indoctrination that does not respect parental religious and philosophical convictions in education and teaching is prohibited, parents cannot object to a neutral curriculum, and their convictions must not conflict with the fundamental right of the child to education. Accordingly the threshold is so high for parents that it does not mean much anymore.

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test, but the threshold of indoctrination is very low and works against the individual. This includes, for example, the mere wearing of the headscarf. Is it possible that it extends to more general religious expression? Looking at *Begum* for example, it is unclear what pressure would be. Would it be active physical or psychological pressure to compel other girls to wear the headscarf, or simply the introduction of two classes of Muslims, some Muslim girls being seen as an 'inferior' class of Muslims? Even if such communal pressure is the case, it is unclear whether this should lead to the restriction of wearing the Islamic headscarf, or simply to 'disciplining' the girls pressurizing the others.

These cases show that avoiding pressure and indoctrination is particularly important for the Court, as it is within other European countries. However, the Court does not seem to take into consideration the fact that it gives indoctrination a very broad meaning, and that its approach has negative repercussions on religious freedom. Notably, there is an acute disregard for the religious beliefs of an individual believer, and this position does not take into account the impact on religious communities, of which individual believers form a part.

## III. NEUTRALITY, SECULARISM, AND LAÏCITÉ

In addition to indoctrination, the Court also deals with the issue of neutrality, secularism and laïcité. The case of *Çiftçi v Turkey*,[26] dealt with access by a child to a form of religious education, but is more revealing of the general stance of the Court to children and religion. National legislation provided mandatory religious education classes from primary school onwards, but required pupils to have finished their elementary education in order to be able to attend Koranic classes. The applicant's son was under 12 at the time: he had not finished his primary education, and the father unsuccessfully applied for an exemption. The Court found that the issue was the child's right to education under Article 2 of the First Protocol (P1-2) and dismissed the claim as being manifestly ill-founded.

The Court held that requiring children to have finished primary education before attending Koranic classes was aimed at their acquisition of a certain level of 'maturity'. Under Article 2 of Protocol 1, the State undertakes to have respect for the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions. The Turkish system provided that children who did not fulfil the requirements provided by the legislation could always attend religious education in primary schools linked to the national education system, and this was being challenged in the case. However, the Court found that this requirement was not an attempt at indoctrination aimed at preventing religious education. On the contrary, it added:

> The Court considers that, far from amounting to an attempt at indoctrination, that statutory requirement is in fact designed to limit the possible indoctrination of minors at an age when they wonder about many things and, moreover, when they may be easily influenced by Koranic study classes.

The first set of questions raised by the Court relates to the extent of the respect due to parental convictions, and it found that the right to education of the applicant's son had not been violated. Secondly, with its statement on indoctrination, which really is

[26] *Çiftçi v Turkey*, Application 71860/01, admissibility decision (2004).

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the thrust of the case, the Court confirmed its stance on maintaining neutrality in the education of children. The Court used quite strong language when it said that the requirements were aimed at preventing the indoctrination of children, as they were of an age when they asked many questions as well as being easily influenced by Koranic classes. The Court's position suggests that a form of religious schooling can be contrary to the child's right to education. It is also suggested that the legislative requirement was adopted in the context of containing fundamentalism,[27] which the Court might have wanted to confirm.

In the Court's view a complementary religious upbringing can be indoctrinating, but the decision is not very clear. The Court thinks that a complementary religious upbringing can be indoctrinating when children are too young, and it endorsed a minimum age limit of 12 for attendance at Koranic classes. The decision of the Court suggests that a complementary religious upbringing is not appropriate for children before they reach a certain age. This shows that the Court's approach has shifted from respecting parental convictions in education to protecting the child against indoctrination, including parents and private religious education classes; in doing this it permits a form of 'neutrality' in the education of children. The problem is that the Court does not define what it means by neutrality. However, we can wonder whether neutrality really exists in matters of faith, especially because religions are fundamentally different.[28] Accordingly, considering that there is no agreement on what neutrality is or on whether it is achievable, one wonders what the Court means by it. Anat Scolnicov argues that making a neutral choice in education is making a choice and she adds:

> Liberals wish to provide children with a neutral education, but encounter a problem of defining neutrality in education. Can we choose neutrality in education as a meta-value, without choosing neutrality as a value in itself? Can neutrality be imparted as a negative capability—do not be prejudiced against any religious viewpoint, rather than a positive capability—be neutral in your religious and philosophical convictions?[29]

In *Çiftçi* the Court tries to protect children from the influence of religion, perhaps until they are old enough to understand. It tries to control the influence imposed on them and supports what it thinks is in their best interests. However, the result reached is inappropriate because it puts too much emphasis on neutrality (although it is very difficult to define), and because children cannot be brought up in a neutral fashion. Moreover, neutral education at school might not be favourable to the religious upbringing of

[27] N Öktem 'Religion in Turkey' (2002) 2 Brigham Young University Law Review 371–403, 397. Niyazi Öktem points out that mandating eight years of secular education for all children was one among other measures introduced by the Government in 1997 in order to contain fundamentalism.

[28] See J Rivers 'Religious liberty and education: coping with diversity', International Conference Human Rights and Our Responsibilities Towards Future Generations: an Inter-Religions Perspective, organized by the Future Generations Programme in collaboration with UNESCO and the Mediterranean Academy of Diplomatic Studies at the Foundation for International Studies (Valletta, Malta, 6–8 May 1999). Julian Rivers points out that 'there is no such thing as neutrality in matters of faith. To pretend that there is, is to deny the existence of fundamental differences and ultimately to devalue the faiths themselves. However, there can be consensus and compromise, and neutrality is to be understood in this sense'.

[29] A Scolnicov 'Children's right to freedom of religion in a multi-religious society', paper presented at the 2001 International CESNUR Conference 'The spiritual supermarket: religious pluralism in the 21st century' (London, 19–22 Apr 2001), available at <http://www.cesnur.org/2001/london2001/scolnicov.htm> (footnotes omitted) (last visited 9 Jan 2006).

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children and what counts as neutrality may be hostile to religious communities. For example, it does not take into account the interests of the Islamic community that its children are taught the Koran at an early age. In conclusion, the Court fails children in relation to their religion when it decides that neutrality is the way forward in the education and religious education of children.

In *Şahin* the Court went further and dealt with Turkey's argument that it had to ban the Islamic headscarf because of the principles of secularism and laïcité. The Grand Chamber agreed with the Turkish Constitutional Court that secularism, as the guarantor of democratic values, was the meeting point of liberty and equality. It was one of the fundamental principles of the Turkish State, in harmony with the rule of law and respect for human rights. For this reason, preventing the applicant from wearing the Islamic headscarf was justified. The Grand Chamber agreed with the approach taken by the Section Chamber, and it emphasized gender equality, the impact that the Islamic headscarf (which is presented or perceived as a compulsory religious duty) may have on those who choose not to wear it, and the political significance that the headscarf had taken in recent years. The Grand Chamber said:

> Having regard to the above background, it is the principle of secularism, as elucidated by the Constitutional Court [. . .], which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.[30]

However the position of the Court has been seriously criticized. In her dissent, Judge Françoise Tulkens of Belgium questioned the general and abstract appeal to secularism, and doubted that the ban was proportionate. She agreed that secularism was an essential principle but said that it did not release the Court from carrying a full analysis of the necessity and the proportionality of the ban.[31] In the facts, she found that the Court had not supported its analysis with concrete examples. She found problematic that the Court simply accepted that wearing the headscarf contravened the principle of secularism as in doing so, it took position on an issue that had been the subject of much debate across Europe. The Court did not address the applicant's argument that she did not dispute the principle of secularism, it did not distinguish between school pupils and students, and it also did not show that the applicant wore the headscarf in order to provoke a reaction, to proselytize or undermine the convictions of others. Judge Tulkens also pointed out that the Court did not point to anything that could have suggested fundamentalist views on the part of Miss Şahin, and it did not prove that the ban promoted sexual equality. In the end, she found that the Court had not shown that the ban was proportionate.

The imposition of secularism is considered by a majority of the Court an appropriate way to regulate religious freedom. This position, if taken further, also seems to involve 'protecting' some groups of people from the religious views of others. It acknowledges the imposition of a one-size-fits-all policy on religious clothing at

[30] *Leyla Şahin v Turkey*, Application 44774/98 (2005), para 116.

[31] It is worth pointing out that on the issue of proportionality, the Court never really analysed the issue, whereas less restrictive alternatives would have been possible.

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university, despite the applicant's personal motivations,[32] and what can be described as Turkey's particular brand of militant secularism.[33] The acceptance of this version of secularism by the Court leads to a conception of religious freedom that relegates religion to the private sphere of the individual only, to the detriment of other views of religious freedom which are equally valid. For example, Ingvill Thorson Plesner pointed out that making

> this notion of secularism a superior principle with which the state policies and definition of rights should be in compliance, may undermine human rights and hence conflict with the dual purpose that secularism is—or should be—aiming to secure in the first place; the equal freedom and rights of all inhabitants to live according to their conceptions of 'the good', and peaceful coexistence in a plural society.[34]

Rather than the mere non-intervention of the authorities and the Court in the religious beliefs of the applicant in wearing the Islamic headscarf, it appears that the Court imposes its own interpretation of the meaning and merits of the Islamic headscarf, and supports a much stronger privatization of religious expression.[35] Ingvill Thorson Plesner accordingly suggests that the Court has shifted from a liberal to a fundamentalist form of secularism.[36] Liberal secularism, or open laïcité, defines religion as a private issue in the sense that it is neither a public responsibility nor right to enforce a religious (or non-religious) doctrine or practice on its citizens, because religion and belief is a matter of personal conscience and identity. Liberal secularism does not prohibit individual manifestations of religion or belief in the public sphere or even inside public institutions. This was reflected in the Court's case-law until recently. However she points out that the Court seems to have shifted its case-law to fundamentalist secularism, or strict laïcité, which assumes that religion is a private issue in the sense that religious manifestations should be kept within the realm of private areas, like private homes and the places of worship of the faith communities. This implies a divide between the public and the private sphere, and has serious implications for the right to freedom of religion or belief.[37]

The Court appears to accept the principle of secularism as defined in *Refah Partisi (The Welfare Party) and Others v Turkey*.[38] Both in *Refah Partisi* and *Şahin* the Court accepted Turkey's definition and gave a signal to other State parties that the Turkish approach to secularism gives good guidance also for their legal systems. However, as Jeremy Gunn has pointed out, the Court never explains exactly what this 'secularism' is, despite finding that Turkish secularism appeared to be consistent with the Convention. The closest that the Court comes to describing the doctrine of secularism

[32] Pedain (n 12) 539: notably the fact that she complies with a duty that follows from her relationship with Allah/God.

[33] ibid 540.

[34] Plesner (n 11) 5-6.

[35] ibid 15.

[36] ibid.

[37] On different conceptions of laïcité in France, see MM Idriss 'Laïcité and the banning of the "hijab" in France' (2005) 25 Legal Studies 260–295, 261–262. He distinguishes an interpretation of laïcité according to which the exercise of religion is permissible in private but where the French State will not openly support a particular religion within the public sphere, in the interests of non-discrimination, and another interpretation (and one, he argues, which seems to prevail in most governmental and educational institutions) that is far more aggressive and where the state will strive hard to maintain its religious neutrality by curtailing religious freedom, in the interests of public order.

[38] *Refah Partisi (The Welfare Party) and others v Turkey*, Applications 41340/98-41342/98-41343/98-41344/98 (2003).

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is when it suggests that secularism means something like State 'neutrality' with regard to religion and perhaps the separation of the 'public and religious spheres'. But once again the Court does not engage in any inquiry as to whether these two terms, 'neutrality' and 'separation', in fact accurately describe the Turkish system, a rather serious failure for a court that had decided to accept Turkish secularism as 'consistent' with the Convention.[39] Moreover, it has been argued that to speak as if a close relationship between religion and State precluded democracy is simply wrong.[40]

More generally certain aspects of religious freedom, notably religious symbols, are seen in some contexts to oppose the State and laicism. For example, the Turkish authorities argued that when educated women wear the Islamic headscarf, it is a deliberate opposition to the secularist and laicist foundations of the State. The Court did not accept the applicant's contention that wearing the headscarf was not an expression of her opposition to the principle of secularism enshrined in the Constitution, but it still chose to see the headscarf as such a threat. The Court thus contributes to stigmatizing the religious practice of women wearing the headscarf as incompatible with the principle of secularism.[41] Furthermore, banning the headscarf can hardly be seen as an expression of the will to tolerate other persons' conceptions of the good and their way of life, and the Court's approach to the headscarf also reflects its own culturally biased and rather negative interpretations.[42]

These cases show a complete disrespect for the individual's religious beliefs and relegate them to the private sphere only. In particular, the legitimacy of certain religious practices is restricted, more specifically the use of religious symbols such as the Islamic headscarf. Moreover, this development is even stranger in the light of the second major strand of caselaw. To expose this tension it is necessary to consider how the Court has also recently adopted a much more community-oriented approach.

## IV. THE PLACE AND ROLE OF RELIGIOUS COMMUNITIES IN THE COURT'S CASE-LAW

In the recent past, the Court has been called on to deal with 'questions concerning the compatibility of entire legal regimes regulating religious affairs within a state'.[43] It has been wary of State intervention, State non-recognition and lack of protection of religious communities.

Firstly, the Court has considered State interference in the leadership of religious communities. In *Serif v Greece*, it argued that 'punishing a person for the mere fact that he acted as the religious leader of a group that willingly followed him can hardly be considered compatible with the demands of religious pluralism in a democratic society'.[44] The two cases of *Hasan and Chaush v Bulgaria*, and *Supreme Holy Council of the Muslim Community v Bulgaria*, were brought (oddly enough) by two rival leaders who both complained that the authorities had arbitrarily intervened in the affairs of the Muslim community in Bulgaria. The Court found a breach of Article 9 in both cases,

[39] TJ Gunn 'Fearful Symbols: The Islamic Headscarf and the European Court of Human Rights' (Strasbourg Conference), available at: <http://www.strasbourgconference.org/papers/Sahin%20by%20Gunn%2021%20by%20T.%20Jeremy%20Gunn.pdf> (page 16).

[40] AE Mayer 'The Refah Case: Did Islam and Islamism Distract the ECHR from Appraising the Merits of the Case?' (Strasbourg Conference), available at: <http://www.strasbourg conference.org/papers/The%20Refah%20Case.pdf>

[41] Plesner (n 11) 9. [42] Plesner (n 11) 9. [43] Evans (n 4) 144.

[44] *Serif v Greece*, Application 38178/97 (1999), para 51.

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and stated that State measures favouring a particular leader of a divided religious community or seeking to compel the community, or part of it, to place itself under a single leadership against its will would constitute an infringement of the freedom of religion.[45]

Secondly, quite apart from issues of leadership, the Court has considered cases about the non-recognition of religious communities, relating to the creation, recognition and sometimes registration of religious organizations as legal entities. In countries where such requirements are needed, legal entity status confers privileges and benefits to religious communities. When the required status is not granted, it may be much more difficult for religious communities to operate efficiently within the framework given by the State, such as the ability to engage in legal acts. For example in *Metropolitan Church of Bessarabia and others v Moldova*,[46] the applicant church was Orthodox and attached to the Romanian rather than the Russian Patriarchate. The Government refused to recognize the Church on the grounds that it was not a religious denomination in the legal sense but a schismatic group within the Metropolitan Church of Moldova. It argued that the dispute could be resolved only by the Romanian and Russian Orthodox Churches, and that any recognition of the Metropolitan Church of Bessarabia would provoke conflicts in the Orthodox community. The Court found a breach of Article 9 on the grounds that the refusal of the State amounted to a lack of neutrality and impartiality.

The problem is also acute in Russia under the 1997 Federal Law on Freedom of Conscience and Religious Associations,[47] and more recently, two cases have been declared admissible by the Court. In *Church of Scientology Moscow and others v Russia*,[48] and *Moscow branch of the Salvation Army v Russia*,[49] the Church of Scientology and the Salvation Army complained that they had followed the procedures and requirements to be re-registered under the law but that the authorities had refused to grant them legal entity status. Moreover, further legal action also ended up with the dissolution of the Jehovah's Witnesses in the city of Moscow.[50] Therefore, the question of recognition of the existence of religious and belief communities is not a condition that has to be fulfilled before manifestation may occur, but is an integral part of the process of facilitating the manifestation of religion or belief.[51] The issue has also

[45] *Hasan and Chaush v Bulgaria*, Application 30985/96 (2000), paragraph 78; *Supreme Holy Council of the Muslim community v Bulgaria*, Application 39023/97 (2004), para 96.

[46] *Metropolitan Church of Bessarabia and others v Moldova*, Application 45701/99 (2001).

[47] 1997 Federal Law on Freedom of Conscience and Religious Associations (Federal Law No 125-F3). See TJ Gunn 'Caesar's Sword: The 1997 Law of the Russian Federation on the Freedom of Conscience and Religious Associations' (1998) 12 Emory International Law Review 43–99; J Brossart 'Legitimate Regulation of Religion: European Court of Human Rights Religious Freedom Doctrine and the Russian Federation Law on Freedom of Conscience and Religious Organizations' (1999) 22 Boston College International and Comparative Law Review 297–321.

[48] *Church of Scientology Moscow and others v Russia*, Application 18147/02 (2004)

[49] *Moscow branch of the Salvation Army v Russia*, Application 72881/01 (2004)

[50] *Religious Community of Jehovah's Witnesses in the City of Moscow*, Judicial Chamber for Civil Cases of the Moscow City Court (16 June 2004, Civil Case No 33-9939)

[51] See MD Evans 'Freedom of Religion or Belief and Permissible Limitations' (17–18 July 2003) *OSCE Supplementary meeting on freedom of religion or belief* (Hofburg, Vienna), Document ODIHR.GAL/57/03. Also, see C Durham 'Facilitating freedom of religion or belief through religious association laws' in T Lindholm, WC Durham and BG Tahzib-Lie (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Leiden 2004) 321–405, 321; LS Lehnhof 'Freedom of Religious Association: The Right of Religious Organizations to

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been arisen before the Court in Bulgaria,[52] and the Human Rights Committee in Belarus.[53]

Thirdly, the Court has dealt with property-related issues. In *Greco-Catholic parish Sâmbăta Bihor v Romania*,[54] the Court dealt with a disagreement between the Orthodox and Catholic communities over the possession of premises. The Catholic community (the applicant) complained that the refusal of the appeal court to judge the application regarding alternative religious services between Greek-Catholic and Orthodox communities breached the freedom of faith of the Greek-Catholic believers in the parish. The Court has declared the complaint admissible. The idea of possessing premises is linked to legal personality,[55] and to the enjoyment of freedom of manifestation, which may lead the Court to recognize the importance for believers to meet and gather together, especially in a designated building.

Fourthly, the Court has dealt with the persecution of religious communities by third parties. In *97 members of the Gldani congregation of Jehovah's Witnesses and four others v Georgia*,[56] the Court dealt with attacks suffered by the religious community of the Jehovah's Witnesses. During a meeting, they were violently attacked by a defrocked Orthodox priest and his followers, and they notably complained of a breach of their right to manifest their religion under Article 9. The Court has declared the complaint admissible. There is a strong link between freedom of manifestation and the exclusion of any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate, although it is unclear yet what the Article 9 claim will lead to. However it may motivate the Court to decide that the State has a positive duty to ensure that religious communities are able to exercise their right to freedom of manifestation, especially when it involves the breach of another Convention article.

Finally, the Court has recently been faced with cases involving, directly or not, the freedom to have or to adopt the religion or belief of one's choice. In *Šijakova and others v the Former Yugoslav Republic of Macedonia*,[57] the applicants' children, all of whom were over the age of 18, joined the monastic order of the Macedonian Orthodox Church, of which the applicants themselves are practising members. They alleged that their children left their homes and joined the monastic order without the applicants' prior knowledge or consent. In 1998 the applicants lodged a complaint before the Constitutional Court, requesting it to assess the constitutionality of the internal rules of the Church. They claimed, inter alia, that they had been deprived of their right as parents to receive care from their children in the event of illness or in old age, because

Obtain Legal Entity Status Under the European Convention' (2002) 2 Brigham Young University Law Review 561–609.

[52] *Lotter and Lotter v Bulgaria*, Application 39015/97 (2004): case involving the refusal of the authorities to re-register the Jehovah's Witnesses' organization in Bulgaria and the authorities' attempt to expel the applicants (members of the Jehovah's Witnesses) from the country. Following a friendly settlement between the authorities and the applicants, which included the registration of the Jehovah's Witnesses as an association, the case was struck out of the list.

[53] *Sergei Malakhovsky and Alexander Pikul v Belarus*, Communication 1207/2003 (2005).

[54] *Greco-Catholic parish Sâmbăta Bihor v Romania*, Application 48107/99 (2004).

[55] eg, *Canea Catholic Church v Greece*, Application 25528/94 (1997).

[56] *97 members of the Gldani congregation of Jehovah's Witnesses and four others v Georgia*, Application 71156/01 (2004).

[57] *Šijakova and others v the Former Yugoslav Republic of Macedonia*, Application 67914/01, admissibility decision (2003).

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the religious canons allegedly forbade contacts between monks and their parents. They further argued that the internal regulations of the Church were incompatible with a number of constitutional rights. The Constitutional Court rejected the complaint on the ground that it did not have jurisdiction to review the constitutionality of the Church's internal rules. It also reiterated the right of every individual to express his religious beliefs freely and to decide on the manner in which to practise his faith.

The Court found the complaint inadmissible under Article 8 because there had been no interference by a public authority.[58] The applicants also alleged a violation of their rights under Article 9, asserting that if they expressed an opposing thought or the slightest disagreement with their children in holy orders the latter would consider them heretics and possessed by the devil. The applicants also maintained that if they were to change their religious convictions and beliefs that could result in a complete termination of their relations with their children. The Court rejected the complaint for non-exhaustion of domestic remedies. It is difficult to comment as the Article 9 claim has not been examined by the Court. There was no State action, and the issue whether the freedom to have or to adopt the religion or belief of one's choice calls for a positive undertaking by the State is unresolved. However, considering the traditional position of the Court on pluralism and the 'market place' in religious belief,[59] it is unlikely that it will call for a positive undertaking on the part of the State. At least, the Court has made clear in the past that it is not possible to use violence to prevent people from joining the religion or belief of their choice.[60] The issue of minor children joining a religion or a religious community without their parents' prior knowledge or consent has never arisen before the Court, and remains unresolved.

The Organization for Security and Cooperation in Europe (OSCE),[61] and the Council of Europe,[62] have also dealt with issues related to religious communities, and this shows that there is a new dimension to Article 9 across Europe. The recent case-law highlights the fact that the Court has been developing a new approach to religious freedom, which is much more community-oriented. This is an important move, because it emphasizes the significance of collective religious freedom, essential for a religious community, by opposition to religious freedom as being only a matter for the individual believer. Also there is a difference between individuals and religious communities. Quite simply, an individual has a personal sphere of religious liberty, whereas the very

[58] The Court stated: 'the issue of maintaining contacts and communication between parents and children who are not minors, and the respect and affection they extend to each other, is a private matter, which concerns and depends on the individuals bound in a family relationship, the lack of which, and the reasons for and origins of such lack, do not call for a positive undertaking by the State and cannot be imputable to it. Even assuming that Article 8 of the Convention may be understood to guarantee the right of the applicants to receive support and care from their children as they grow old and in the event of sickness and infirmity, the applicants' complaint in this connection is premature'.

[59] Evans (n 4) 145.

[60] *Riera Blume and others v Spain*, Application 37680/97 (1999).

[61] *Guidelines for review of legislation pertaining to religion or belief*, prepared by the OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion or Belief in consultation with the European Commission for Democracy through law (Venice Commission), adopted by the Venice Commission at its 59th Plenary Session (Venice, 18–19 June 2004), welcomed by the OSCE Parliamentary Assembly at its Annual Session (Edinburgh, 5–9 July 2004).

[62] For example, see A Gil-Robles, Commissioner for Human Rights *Conclusions on the seminar concerning Church-State relations in the light of the exercise of the right to freedom of religion* (Strasbourg, 10–11 Dec 2001).

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existence of religious communities is a public matter and has an external dimension, which means that some sort of relationship with the State is needed. For example, the importance of collective religious liberty has been emphasized by Julian Rivers:

> Collective religious liberty is not simply an aggregation of individual members' interests. Rather, it is the set of rights, immunities, privileges, and powers held by a religious association as such. Collective religious liberty in this sense is the liberty of a community of people sharing a common religious faith to organize themselves and structure their corporate life according to their own ethical and religious precepts.[63]

When cases are brought by religious communities and concern their very existence, the Court is willing to intervene, and it does not leave a great margin of appreciation to the State. Indeed, it is more eager to restrict the actions of the State that are not considered to be in accordance with Article 9 and the *forum internum* or *externum* of the religious community. It is true that a number of decisions so far are only at the admissibility level. However, this should not be mistaken as unimportant, as they give an indication of the Court's general stance towards communities. This new approach points out that participation in the life of a religious community is important and is a manifestation of one's religion. Accordingly, the new approach by the Court has an impact, not only on religious communities, but also on individual believers of which they form a part.

## V. THE IMPACT OF NEUTRALITY AND SECULARISM ON RELIGIOUS COMMUNITIES

However, despite this part of the case-law being much more community-oriented, religious communities still suffer from the Court's approach to neutrality and secularism. In particular, there is intrusion and interference within the more substantial aspects of the religious freedom and religious identity of communities. Ingvill Thorson Plesner argues that:

> The practice and argumentation of Turkey in the Refah case hence does not only conflict with the liberal tradition regarding individual manifestations of religious identity in the public sphere, but also with the liberal tradition of respecting a certain legal autonomy for religious groups—a principle that had otherwise been supported by the Court.[64]

When mentioning the legal autonomy of religious groups, she notably refers to the fact that most Western countries have long traditions for respecting the self-governance of these groups in certain matters of faith and doctrine. She gives the examples of Catholic, Protestant and Jewish traditions regarding marriage and divorce, or employment policies of church and other faith communities. Developing what Plesner said on *Refah Partisi*, it is possible to argue that the whole of the Court's recent caselaw on neutrality and secularism is problematic and has serious implications for the religious freedom and identity of communities more generally. Other examples include planning and building regulations, and participation in public services and political debate.

With this approach regarding neutrality and secularism, the Court tries to redefine what is acceptable or not in matters in religious practice. There is, however, considerable risk of the judge simply imposing a subjective value or belief system upon an applicant, and a risk of an assessment of beliefs and manifestations based upon what is

[63] J Rivers 'Religious liberty as a collective right' in R O'Dair & A Lewis (eds) *Law and Religion* (OUP Oxford 2001) 227–46, 231.
[64] Plesner (n 11) 5.

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considered by that individual to be reasonable.[65] Moreover, by relegating religion to the private sphere the Court may restrict the freedom of religious communities to manifest their religion in community or in public. It appears then that the case-law is taking a strange and worrying direction. The main aspect of the case-law is the emphasis on the prevention of indoctrination, neutrality, secularism and laïcité. However, the Court does not seem to realize the negative consequences that this has on religious communities. There is a dichotomy in the Court's approach: it recognizes the principle of non-intervention of the State in the internal procedures of religious communities while at the same time restricting the legitimacy of certain religious practices.

Javid Gadirov, taking the example of the State prohibiting the wearing of religious clothes in schools under the banner of laïcité, says that the main misunderstanding seems to be that the determination of what is secular and what is religious is delegated to the State. It seems that instead of recognizing the 'dignity' of religious orders and their commands by deferring at least part of this decision to the religious body, the State imposes the view of its own normative order, a secular one, which is intolerant from the liberal perspective.[66]

Across Europe, it is accepted that there are different legal regimes regulating religion, and some systems have introduced a sort of classification of religions. We can ponder whether this could be a solution for the Court. In *Refah Partisi* it made the following statement:

> the Convention institutions have expressed the view that the principle of secularism is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention.[67]

Therefore, the Court lays down a more general limitation on religious freedom. Religions that do not respect the rule of law, human rights and democracy will not be covered by the protection of Article 9. In others terms this means that under the Convention system, it is not legitimate to join religions that do not accept human rights, it is only legitimate to join 'acceptable' religions or ideologies. It appears then that the Court is developing a typology of what is acceptable or not. However, the classification of religions can have difficult consequences for religions. It is a disturbing trend in the Court's case-law, as the understanding of what is acceptable or not, especially in matters of religious freedom, differs widely.

In the end, what is the point in recognizing some form of 'external' freedom of religion if the Court does not allow religious communities to engage in a number of religious practices or to hold their own 'ethical and religious precepts', simply because they are held not to be in accordance with neutrality and secularism? Unfortunately the Court's use of its discretion seems to interfere with this more substantial aspect of religious freedom. It contradicts itself, and seems to be destroying with one hand what it has built with the other.

[65] S Knights 'Religious symbols in the school: freedom of religion, minorities and education' (2005) 5 EHRLR 499–516, 510.

[66] J Gadirov 'Plurality of Legal Systems and Religious Freedom' (Strasbourg Conference), available at: <http://www.strasbourgconference.org/papers/Plurality%20of%20Legal%20Systems%20and%20Religious%20Freedom.pdf>

[67] *Refah Partisi (The Welfare Party) and others v Turkey*, Applications 41340/98-41342/98-41343/98-41344/98 (2003), para 93.

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## VI. CONCLUSION

The two strands of case-law show that both individuals and religious communities are key actors in religious freedom cases. However, the way the Court deals with cases concerning individuals has difficult consequences for religious communities. In recent cases the Court has regulated religious freedom, yet it has also come to restrict a number of religious practices. Under the banner of tolerance and pluralism, the Court has assessed that some religious practices were not in conformity with secularism and the prevention of indoctrination. Of course, the Court only responds to the cases that are brought before it. Yet we are left with the clear impression that the Court is trying, increasingly, to impose its own conception of secularism at an unacknowledged cost to religious freedom.

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