

Promoting Peace, En‘forcing’ Democracy? The European Court of Human Rights’ Treatment of Islam

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Abstract

Contemporary Europe is undoubtedly a largely secular region where the notion that secularism and ‘progress’ are intertwined has long held sway. Religion in the public sphere is, for many Europeans, associated with emergent or conservative societies, whereas secularism is equated with modernism and seen as an indispensable component of modern governance. Recently, both domestic and European Court of Human Rights (ECtHR) case-law has highlighted the obvious tensions that arise in the manifestation of religion in the European public sphere.

While Article 9 of the European Convention on Human Rights affords everyone the right to freedom of thought, conscience and religion (while allowing for certain limitations as imposed by domestic authorities), in matters related to religion, ECtHR has adopted a deferential attitude towards domestic authorities in the determination of the parameters of this right. This is reflected in the fact that it was not until 1993, some thirty-five years after the Court commenced operating, that a violation of Article 9 of the Convention was found. The Court’s jurisprudence on the Article is therefore somewhat troubling and nowhere is this more aptly illustrated than in the jurisprudence relating to the wearing of the Islamic headscarf. Recent case-law in fact suggests that in that the wearing of the headscarf is viewed both as being incompatible with the principle of gender equality and in direct opposition to the principle of secularism.

Through the lens of recent Article 9 jurisprudence, this paper will assess the trends emerging in the European Court’s consideration of Islam. Discussion of relevant cases will include Dahlab v. Switzerland, Karaduman v. Turkey, Leyla Şahin v. Turkey, Refah Partisi (The Welfare Party) and Others v. Turkey as well as analysis of cases occurring at the domestic level, most notably the Teacher Headscarf Case of the German Constitutional Court and the English decision of R (on the application of Begum (by her litigation friend, Rahman)) v. Headteacher and Governors of Denbigh High School.

This paper also seeks to challenge the ECtHR reasoning in the area of expression of religion (and particularly where that religion is Islam) by analysing the question

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of religion in the public sphere in the broader European context. There is in fact increasing evidence to suggest that Europe is undergoing a period of de-secularisation, a reality routinely ignored by the European Court of Human Rights.

Introduction

The question of religion in the public sphere in Europe is a complex and contentious one, particularly where the religion prevalent in the public sphere is that of Islam. As a region which has traditionally espoused secularism as an essential tenet of functioning democracy, the current global phenomenon of desecularisation sits uneasily with many in Europe. This paper argues that this anxiety is also evident in the judgments of the European Court of Human Rights in its consideration of Islam. The paper begins with a brief overview of religion in Europe and in the second part, analyses the Court's treatment of issues concerning Islam in the public sphere. It is contended that the views adopted by the Court are incompatible with a consistent reading of Article 9 of the European Convention on Human Rights, the article which guarantees freedom of religion.

A: Religion in the Public Sphere: The European Context

Contemporary Europe is undoubtedly a largely secular region where the notion that secularism and 'progress' are intertwined has long held sway. Religion in the public sphere is, for many Europeans, associated with emergent or conservative societies, whereas secularism is equated with modernism and seen as an indispensable component of modern governance. Unlike the United States, for example, where religious belief and public expression of religious sentiment by political leaders is arguably a prerequisite for electoral success, "[a] secular liberalism is deeply ingrained in the self-understanding of most Europeans and in the interpretations of most scholars of European politics."¹ (Katzenstein, 2006: 1-34) Issues such as the potential EU accession of Turkey, a majority Muslim country, to a Christian Europe, or an historically Christian Europe at the very least, has proved controversial therefore, as it not only prompts questions about the desirability of such an accession, "but also and more fundamentally because it brings up long dormant dilemmas *internal* to Europe regarding how religion and politics relate to each other." (Hurd, 2006: 401-418)

1. See also T Inglis, 2000: 1-15, noting that secularists any relation between religion and politics in contemporary society as "a lingering residue of religious fundamentalism which, under the strain of Western rationality, will eventually fade and disappear."

The Secularisation and Desecularisation of Europe

The process of privatising religion and confining it to the sphere of civil society can be said to have begun as early as the Protestant Reformations of the sixteenth century.¹ Nonetheless, it is worth noting that when commentators speak of secular Europe, they largely refer to secular Western Europe, as Eastern Europe cannot be said to have undergone the process of secularisation to the same degree as countries in the West. A central tenet of the secularisation thesis suggests that with the onset of modernity comes the demise of traditional forms of religion. In fact, the secularisation thesis developed within a European framework; as Europe's economic and political life developed, religion diminished in public significance and whilst religious sentiment may have continued to exist, it was increasingly confined to the private sphere. (Davie, 2006: 23-34)

Whilst opinions may vary as to the extent to which secularisation actually resulted in the abandoning of religious beliefs, there is consistent evidence to suggest that we are now in a period of desecularisation, which is affecting not only Europe but is in fact a global phenomenon. As Berger suggests, the idea that modernisation necessarily leads to a decline in religion, both in society and in the minds of individuals, has turned out to be false.² In fact, internationally, it is the more conservative or orthodox movements which have resurged in recent years, suggesting a possible backlash against modernisation and its trappings.³ What is perhaps surprising is that it is not new religious movements which are coming to the fore in this period of desecularisation, or, as Casanova terms it, deprivatization of religion⁴, but rather the traditional established religions which are being reinvigorated.

1. See: Nexon, 2006: 256-282. Nexon notes that the doctrines of Martin Luther involved a "privatization of religion, and a strong separation of the profane from the sacred" (emphasis omitted).

2. See: Berger, 1999: 1-19.

3. See: Berger, 1999: 1-19, Berger asserts that religious movements and institutions that have tried to conform to a perceived modernity are in decline almost everywhere. For example, in the United States, mainline Protestantism has declined while Evangelicalism has risen concomitantly, whereas the conservatism of John Paul II resulted in an increase in converts and a renewed enthusiasm among native Catholics. Equally, following the collapse of the Soviet Union, there was a revival of the Orthodox Church in Russia while the most rapidly growing Jewish groups in Israel and the Diaspora, are Orthodox. Also, "[t]here have been similarly vigorous upsurges of conservative religion in all the other major religious communities – Islam, Hinduism, Buddhism – as well as revival movements in smaller communities (such as Shinto in Japan and Sikhism in India).

4. See: Casanova, 1994: 5. Casanova defines 'deprivatization of religion' as meaning that "religious traditions throughout the world are refusing to accept the marginal and privatized role which theories of modernity as well as theories of secularization had reserved for them."

Sociologists of religion could scarcely have predicted the extent to which an increasingly secular Europe could be newly affected and concerned with issues related to religion.¹ The increase in religion as an area of contention in contemporary European politics has arguably been provoked by two factors; the accession of a number of Eastern European countries, which did not undergo the same process of secularisation that prevailed in Western and Central European countries during the second half of the twentieth century, and the immigration to the European Union of migrants of non-Christian (and specifically, Muslim) faith. If Europe is to embrace its largest 'other faith' religion, then it may be time to reassess the motivation behind its strict secularism.²

Freedom of Religion in Europe

Both domestic and European Court of Human Rights case-law reflects the obvious tensions that arise in the manifestation of religion in the European public sphere. Two recent domestic European cases in particular – the *Teacher Headscarf Case* of the German Constitutional Court³ and the English House of Lords case *R (on the application of Begum (by her litigation friend, Rahman)) v. Headteacher and Governors of Denbigh High School* - highlight this issue.⁴ Even more worrying is the fact that the worrying judicial opinion in these cases has effectively been sanctioned by the European Court of Human Rights.

The European Convention on Human Rights (ECHR) affords everyone the right to freedom of thought, conscience and religion but provides that

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1. Casanova notes that the majority of sociologists of religion have abandoned the paradigm of increasing and unfettered secularisation “with the same uncritical haste with which they previously embraced it[...] sociologists of religion now feel confident to predict bright futures for religion.”
 2. See: Fokas, 2007: 1-16. Fokas asserts that Islam in Europe is in a state of flux, but so is religion in general “and it is useful to recognise how these two dimensions affect one another: understanding, in other words, how European policies impact upon Muslim communities and individuals, but also how activities and discourse of Muslim individuals and groups influence changing conceptions and policy considerations on the place of religion in the European public sphere. Discussion of religion’s proper place in the European public sphere have not found much of a formal discursive space within the EU thus far, but one may wonder how long these conversations will be delayed, given their increasing salience in so many EU member states.
 3. See: BVerfG, 2BvR 1436/02 of 24 September 2003, Available at: http://www.bundesverfassungsgericht.de/en/decisions/re20030924_2bvr143602en.html
 4. For discussion of these cases See: C Langenfeld and S Mohsen ‘Germany: The Teacher Head Scarf Case’ (2005) 3.1 Int’l Journal of Constitutional Law 86-94 and M M Idriss ‘R (Begum) v. Headteacher and Governors of Denbigh High School: A Case Note’ (2005) 10 Jud. Rev. 296-302.

the right may be subject to certain limitations as imposed by domestic authorities.¹ In matters related to religion, however, the European Court of Human Rights (ECtHR) has adopted a deferential attitude towards domestic authorities in the determination of the parameters of this right. This is reflected in the fact that it was not until 1993, some thirty-five years after the Court commenced operating, that a violation of Article 9 of the Convention was found. This, as commentators have noted, suggests that “[t]he sensitivity of religious issues has long chilled any ardour that the European Court of Human Rights might have had to address cases involving Article 9.”² (Janis and Kay and Bradley, 2008:323)

In its assessment of cases involving Article 9 of the Convention, the European Court considers whether limitations or restrictions on the right transgressed the state’s margin of appreciation by examining whether the interference was prescribed by law; whether it pursued a legitimate aim under Article 9(2); and whether the measures taken were necessary in a democratic society. In *Kokkinakis*, the Court stressed the importance of the rights protected by Article 9.³ Whilst a comprehensive overview of the Court’s jurisprudence on freedom of religion has been provided elsewhere,⁴ it is worth noting that the commentary on Article 9 jurisprudence

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1. Article 9 provides “1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.”
 2. The case concerned was *Kokkinakis v Greece*, Judgment of 23 May 1993, 17 EHRR 397. For a comprehensive overview of freedom of religion under the European Convention, See C Evans *Freedom of Religion Under the European Convention on Human Rights* (OUP Oxford 2001).
 3. The Court noted “As enshrined in Article 9 (art. 9), freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.” See *Kokkinakis v Greece*, Judgment of 23 May 1993, 17 EHRR 397, para. 31.
 4. See: for example, J Martínez-Torrón ‘Limitations on Religious Freedom in the Case Law of the European Convention on Human Rights’ (2005) 19 Emory Int’l L. Rev. 587-636; C Ovey and RCA White *The European Convention on Human Rights* (4th edn OUP Oxford 2006) 300-317; K Cavanaugh ‘Islam and the European Project’ (2007) 4.1 Muslim World Journal of Human Rights 1-2011-17; MW Janis, RS Kay and AW Bradley *European Human Rights Law: Text and Materials* (3rd edn OUP Oxford 2008) 323-373.

suggests that there has been a remarkable display of reticence in upholding the commitment to religious freedom outlined in Article 9 of the Convention.¹ Against this backdrop, a number of relatively recent cases, in particular, merit discussion.

B: Religion in the Public Sphere

‘Beyond the Veil’

It is the Islamic headscarf (or *hijab*) that is now the most readily identifiable visual symbol of religion in the public sphere. The jurisprudence of the European Court of Human Rights on the issue is troublesome; in that it would now appear that the wearing of the headscarf is viewed both as being incompatible with the principle of gender equality and in direct opposition to the principle of secularism.

Prior to the decision in *Leyla Şahin v. Turkey*², questions relating to religion in the public sphere had been raised directly before the European Convention supervisory organs.³ These cases explored a diverse range of issues, including the impact of a dominant religion on state practice towards minority religions;⁴ limitations on religious freedom in the name of state neutrality;⁵ and the wearing of the Muslim headscarf in public spaces, where this is regulated.⁶ A seminal case emanating from the Court

1. Ovey and White assert that while most commentators would agree with the Court’s view that governments should work to promote pluralism and tolerance in situations of religious tension and therefore be allowed a wide margin of appreciation to place restrictions on the freedom to manifest religion of belief, “it is the more mundane cases – the teacher who wishes to wear the Islamic headscarf to school, the children whose Jehovah’s Witness parents do not wish them to attend a militaristic parade – that the Court has demonstrated a certain lack of empathy for the believer, and has appeared only to pay lip-service to the commitment to religious freedom proclaimed in such judgments as *Kokkinakis v. Greece*.” Ovey and White (n 16) 316.

2. See: Application no. 44774/98, judgment of 10 November 2005.

3. For an overview of these cases, See Cavanaugh, 2007: 11-17.

4. See: *Kokkinakis v. Greece*, application no. 14307/88, judgment of 23 May 1993.

5. See: *Metropolitan Church of Bessarabia v. Moldova*, application no. 45701/99, judgment of 13 December 2001; *Serif v. Greece*, application no. 38178/97, judgment of 14 December 1999; *Agga v. Greece*, application no. 38178/97, judgment of 14 December 1999; *Supreme Holy Council of the Muslim Community v. Bulgaria*, application no. 39023/97, judgment of 16 December 2004; and *Hasan and Chaush v. Bulgaria*, application no. 30985/96, judgment of 26 October 2000.

6. See: *Karaduman v. Turkey*, application no. 16278/90, admissibility decision of 3 May 1993; *Dahlab v. Switzerland*, application no. 42393/98, admissibility decision of 15 February 2001; and *Leyla Şahin v. Turkey*, application no. 44774/98, judgment of 10 November 2005.

concerns the latter category and indeed the decision in *Şahin* has prompted much debate, with one commentator even going so far as to suggest that the decision,

[...] evidences a general fear of Islam’s potential to disrupt the democratic project of the ECHR as well as a particular fear of Turkey – a distrust in Turkey’s ability to Europeanise its *laik*-Muslim state and to ensure that Islamic fundamentalism does not become part of the Turkish Republic. Part of this distrust also stems from Turkey’s own inability to create a symbiotic relationship between its secular state and its historic Islamic roots. With Islam searching for a definable position in the legal and political orders of Europe while continuing to challenge the *laik* nature of the Turkish state, the European Court of Human Rights simply avoided these legal ambiguities and complexities in the *Şahin* judgment by turning the headscarf into a symbolic enemy of the Court’s democratic jurisprudence.¹ (Belelieu, 2005-2006: 573-623)

The wearing of the Islamic headscarf in the public sphere has become an area of contention within the EU and Europe broadly speaking. In March 2004, in a move that was widely perceived as targeting headscarves in particular, a law was introduced in France that banned all conspicuous religious symbols in public schools in an effort to preserve secularity.² Two years later, the House of Lords in England delivered a unanimous decision in the *Begum* case, noted above.³ These developments are reflective of the approach adopted by the Strasbourg machinery, which, as the following cases highlight, continually defers to domestic states’ practices, in cases concerning Article 9 of the Convention.

Secularism and Freedom of Religion in Public Education

Prior to the *Şahin* case, the headscarf issue came before the Strasbourg machinery in two applications, both of which were declared inadmissible. In

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1. See: also A Vakulenko ‘Islamic Dress in Human Rights Jurisprudence: A Critique of Current Trends’ (2007) 7.4 Human Rights Law Review 717-739.
 2. Loi no 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 (Law No. 2004-228 of 15 March, 2004 concerning, as an application of the principle of the separation of church and state, the wearing of symbols or garb which show religious affiliation in public primary and secondary schools.) For an interesting account of the reasoning behind the introduction of the law and its repercussions, See JR Bowen 2006.
 3. See: *R (on the application of Begum (by her litigation friend, Rahman)) v. Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

the first case, *Karaduman v. Turkey*,¹ the applicant was a university graduate who could not obtain a certificate confirming her qualifications because the rules of the university required that she submit a photograph with an uncovered head in order for the certificate to be issued. The applicant alleged a breach of Article 9 of the Convention as to appear without a headscarf would have been incompatible with her religious beliefs; and Article 14 of the Convention as the administrative authorities distinguished between Turkish female students and female students of foreign nationality who were not subject to the same restrictions impinging on their freedom of religion.²

In the Commission's consideration of the merits of *Karaduman's* arguments, it first looked at whether the measure complained of constituted an interference with the exercise of freedom of religion. In doing so, it appeared to place importance on the fact that the applicant had chosen to study at a secular university and by doing so had submitted to those university rules which may make the freedom of students to manifest their religion subject to certain restrictions.³ The Commission also considered the ruling of the Turkish Constitutional Court that had previously held that the act of wearing a headscarf in Turkish universities may constitute a challenge to those who do not wear one.⁴ The Commission was of the view that a university degree certificate is intended to certify a student's capacities for employment purposes, with the requirement of the photograph being for identity purposes; "it cannot be used by that person to manifest his religious beliefs."⁵ It followed therefore that, having regard to the requirements of a secular university system, the regulation of students' dress and the refusal of administrative services where they failed to comply did not constitute an interference with freedom of religion and conscience.⁶ Accordingly, the part of the

1. See: Application no. 16278/90, admissibility decision of 3 May 1993.

2. See: *Karaduman v. Turkey*, application no. 16278/90, admissibility decision of 3 May 1993, 104. Article 14 states: "The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

3. See: *Karaduman v. Turkey*, application no. 16278/90, admissibility decision of 3 May 1993, 108.

4. See: *Karaduman v. Turkey*, application no. 16278/90, admissibility decision of 3 May 1993, 108.

5. See: *Karaduman v. Turkey*, application no. 16278/90, admissibility decision of 3 May 1993, 109.

6. See: *Karaduman v. Turkey*, application no. 16278/90, admissibility decision of 3 May 1993, 108.

application dealing with Article 9 of the Convention was deemed manifestly ill-founded within the meaning of Article 27(2) (now Article 35(3)) of the Convention.¹ The applicant’s allegation of discrimination was deemed not to have been raised before the domestic proceedings and therefore was not examined by the Commission.

The reasoning of the European Commission in *Karaduman*, albeit under-developed, provides the first indication of the firm public/private divide that would emerge in the Convention machinery’s assessment of cases invoking Article 9.² In 2001, the European Court of Human Rights delivered its admissibility decision in the case of *Dahlab v. Switzerland*.³ The applicant in this case was a teacher in a public primary school in Switzerland who had converted from Catholicism to Islam and had worn a headscarf while working for five years before she was requested to refrain from doing so while carrying out her professional duties by the Directorate General for Primary Education. The basis of the Directorate’s prohibition on the wearing of the headscarf was that such a practice contravened section six of the Public Education Act and constituted “an obvious means of identification imposed by a teacher on her pupils, especially in a public, secular education system”.⁴ The applicant appealed the decision of the Directorate to the Geneva cantonal government, which dismissed the application on the grounds that teachers must “endorse both the objectives of the State school system and the obligations incumbent on the education authorities,

1. See: *Karaduman v. Turkey*, application no. 16278/90, admissibility decision of 3 May 1993, 108.

2. Vakulenko notes that the decision in *Karaduman*, [...] reinforces the perception of headscarves as an essentially political, publicly orientated religious statement (the reference to ‘certain religious fundamentalist currents’ being particularly telling), discounting any possible ambivalence about the meaning of headscarf wearing. Second, the ECmHR did not appear to believe that headscarf wearing as such fell within the scope of Article 9 ECHR (which was the primary legal basis on which the case was decided). Third, the ECmHR’s language of ‘choice’ suggests a firm presumption that individuals function as rational agents free from structural constraints. There is no discussion of whether the applicant had a realistic option of obtaining the same kind of education at a private institution, and whether any such alternatives were of the same quality or prestige.” See: Vakulenko, 2007:183-199.

3. See: Application no. 42393/98, admissibility decision of 15 February 2001.

4. See: *Dahlab v. Switzerland*, application no. 42393/98, admissibility decision of 15 February 2001:2. Section 6 of the Public Education Act of 6 November 1940 stated: ‘The public education system shall ensure that the political and religious beliefs of pupils and parents are respected’

including the strict obligation of denominational neutrality”.¹ This decision of the Geneva cantonal government was upheld by the Swiss Federal Court, which found that the decision was fully in accordance with the principle of denominational neutrality in schools, “a principle that seeks both to protect the religious beliefs of pupils and parents and to ensure religious harmony.” (*Dahlab v. Switzerland*, 2001: 2)

The applicant submitted that the measure prohibiting her from wearing a headscarf in the performance of her teaching duties infringed her freedom to manifest her religion, as guaranteed by Article 9 of the Convention and further alleged a violation of Article 14 on the grounds that the prohibition imposed by the Swiss authorities amounted to discrimination on the ground of sex because a man belonging to the Muslim faith could teach at a State school without being subject to any form of prohibition.² The reasoning of the Court in *Dahlab* is considerably more detailed than that offered by the Commission in *Karaduman* and, as Vakulenko suggests, “is generally regarded as a critical point in the development of the ECHR jurisprudence on ‘Islamic headscarves.’” (Vakulenko, 2007: 188)

The Swiss government contended that the aims pursued in banning the wearing of the headscarf were legitimate and were among those listed in Article 9(2) of the Convention; the measures prohibiting the applicant from wearing the headscarf while working were based on the principle of denominational neutrality in schools and, more broadly, on that of religious harmony.³ The prohibition was also necessary in a democratic society because the applicant, in her work as a civil servant, represented the state and therefore her conduct should not suggest that the state identified itself with a particular religious denomination.⁴ That, the government submitted, was especially valid where allegiance to a particular religion “was manifested by a *powerful religious symbol*, such as the wearing of an Islamic headscarf.” (Vakulenko, 2007: 188)

In the applicant’s submissions, she argued that the principle of secularism in state schools meant that teaching should be independent of religious faiths but should not prevent teachers from holding beliefs

1. See: *Dahlab v. Switzerland*, application no. 42393/98, admissibility decision of 15 February 2001: 2.

2. See: *Dahlab v. Switzerland*, application no. 42393/98, admissibility decision of 15 February 2001:2.

3. See: Vakulenko, 2007: 188.

4. See: Vakulenko, 2007: 188.

or from wearing any religious symbols whatever.¹ The applicant pointed to the fact that she had worn a headscarf in class since March 1991, which had not concerned the school's head teacher, his immediate superior or the district inspector whom she had met regularly; that her teaching was secular in nature and had never given rise to any problems or complaints from pupils or their parents; and that the Geneva authorities had consequently been in full knowledge of the facts in endorsing, until June 1996, the applicant's right to wear a headscarf.² It was only at that point and without stating any reasons, that the authorities required her to stop wearing the headscarf.³ Additionally, contrary to the government's submissions, she had no choice but to teach within the state school system. In practice, state schools in Geneva had a "virtual monopoly" on infant classes and the limited private schools in Geneva, were not non-denominational and were governed by religious authorities other than those of the applicant and therefore were not accessible to her.⁴ The applicant further asserted that it had never been established that her clothing had had any impact on pupils and that the mere fact of wearing a headscarf was not likely to influence the children's beliefs.⁵

The Court began its consideration by noting that the right protected in Article 9 of the Convention represents one of the foundations of a "democratic society" within the meaning of the Convention but that it may be necessary to restrict the right in societies in which several religions coexist within one and the same population "in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected." (*Dahlab v. Switzerland*, 2001: 11) The reasoning of the Court in the instant case is worrying in a number of respects.

First, the Court appeared to disregard the applicant's argument that she had worn the headscarf in class between March 1991 and June 1996 without any adverse effects or complaints from either the pupils or her

1. See: *Dahlab v. Switzerland*, application no. 42393/98, admissibility decision of 15 February 2001: 10.

2. See: *Dahlab v. Switzerland*, application no. 42393/98, admissibility decision of 15 February 2001: 10.

3. See: *Dahlab v. Switzerland*, application no. 42393/98, admissibility decision of 15 February 2001: 10.

4. See: *Dahlab v. Switzerland*, application no. 42393/98, admissibility decision of 15 February 2001: 10.

5. See: *Dahlab v. Switzerland*, application no. 42393/98, admissibility decision of 15 February 2001: 10.

employer. The European Court appeared content to acquiesce in the conjecture of the Swiss Federal Court that the fact that there had been no complaints from parents or pupils to date did not mean that none of them had been affected: “[s]ome may well have decided not to take any direct action so as not to aggravate the situation, in the hope that the education authorities will react of their own motion.” (*Dahlab v. Switzerland*, 2001: 4) Second, the applicant’s argument that she was the victim of discrimination on the ground of sex in contravention of Article 14 of the Convention receives but a cursory examination from the Court. By noting that “the measure by which the applicant was prohibited, purely in the context of her professional duties, from wearing an Islamic headscarf was not directed at her as a member of the female sex but pursued the legitimate aim of ensuring the neutrality of the State primary-education system,” (*Dahlab v. Switzerland*, 2001: 14) the Court seemed entirely to ignore the particular circumstances of the case. Finally, and perhaps most tellingly, is the fact that the ECtHR accepted without reservation the government’s argument that the headscarf constitutes a “powerful external symbol” and furthermore, argued that 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.” (*Dahlab v. Switzerland*, 2001: 13) This statement not only contradicts the definition of improper proselytism advanced by the Court in *Kokkinakis v. Greece*¹ but is also sets up the headscarf as being incompatible with the abstract ideal of gender equality and clearly “ignores the complexity and ambivalence of the applicant’s attitude towards her headscarf-wearing.” (Vakulenko 2007: 189)

With the rulings in the admissibility decisions discussed above, the fact that the *Leyla Şahin v. Turkey* case came to be heard and decided on

1. See: Application no. 14307/88, judgment of 23 May 1993. In *Kokkinakis*, the Court defined improper proselytism as including “the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others.” See: *Kokkinakis v. Greece*, application no. 14307/88, judgment of 23 May 1993, para. 48. There was certainly no allegation that *Dahlab* and ever engaged or intended to engage in such activity nor that it would be possible to do so through simply wearing a headscarf and so the comments of the Court in this regard appear wholly arbitrary.

its merits must in itself be welcomed. In this case the European Court appeared to broaden its consideration of the reasons for which an essentially illiberal secularist agenda may be pursued by member states. In *Karaduman* and *Dahlab* the prevailing reason for allowing the restrictions rested on both the protection of the secular state education system and the protection of children from undesirable exposure to religious sentiment in the classroom. *Şahin* sees the Court move to rather paternalistic territory in which the headscarf is proffered as a powerful symbol those women may feel obliged to wear. Although this aspect of the judgment is couched in the language of gender equality, the decision of the Court undoubtedly gives credence to the increasing tendency of states parties to ban religious symbols in the public sphere, thereby encroaching on religious freedoms.

The background to the *Şahin* case has been well-documented elsewhere.¹ In finding that there had not been a violation of the applicant's rights under Article 9 of the Convention, the Court seemed particularly swayed by the rulings of the Supreme Administrative Court and the Turkish Constitutional Court on the issue of the headscarf and secularist policy more broadly. The Court reverted to the principle established in *Valsamis v. Greece*² that by reason of their direct and continuous contact with the education community, the university authorities are in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course.³ Furthermore, the Court, having found that the regulations pursued a legitimate aim, could not apply the criterion of proportionality in a way that would make the notion of an institution's "internal rules" devoid of purpose and accordingly the interference in issue was justified in principle and proportionate to the aim pursued.⁴

The applicant had also alleged a violation of Article 2 of Protocol No. I to the Convention, asserting that the decision to refuse her access to the University when wearing the Islamic headscarf, amounted to a violation of her right to education under the Article read in light of Articles 8, 9,

1. See: for example, BD Bleiberg 'Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in *Leyla Şahin v. Turkey*' (2005-2006) 91 Cornell L. Rev. 129-170.

2. See: Application no. 74/1995/580/666, judgment of 18 December 1996.

3. See: *Leyla Şahin v. Turkey*, 2005: 121.

4. See: *Leyla Şahin v. Turkey*, 2005: 121-122.

and 10 of the Convention.¹ The Court departed from the finding of the Chamber that no separate issue arose under Article 2 of Protocol No. I and examined the applicant's complaint under this Convention Article separately. In doing so, it first noted that there is no doubt that the right to education as provided for in the first sentence of Article 2, Protocol No. 1 refers also to higher education.² The Court noted that Contracting States enjoy a margin of appreciation in the regulation of educational institutions under Article 2 of Protocol I and are not bound by an exhaustive list of 'legitimate aims' as is the case for Articles 8-11 of the Convention.³ Restrictions, however, must be proportionate to the legitimate aim pursued and must not conflict with other rights enshrined in the Convention and its Protocols. The Court accepted that the regulations on the basis of which the applicant was refused access to various lectures and examinations for wearing the Islamic headscarf constituted a restriction on her right to education, notwithstanding the fact that she had had access to the University and been able to read the subject of her choice in accordance with the results she had achieved in the university entrance examination.⁴ Nonetheless, in the instant case, the Court noted that the right to education could not be divorced from the

1. See: Article 2 of Protocol No. I to the Convention provides: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions." Article 8 provides: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." Article 10 provides: "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

2. See: *Leyla Şahin v. Turkey*, 2005: para. 134 -141.

3. See: *Leyla Şahin v. Turkey*, 2005: para. 154.

4. See: *Leyla Şahin v. Turkey*, 2005: para. 157.

conclusion reached by the Court with respect to Article 9, as criticism of the regulation concerned took the same form as the restriction complained of under Article 9, which the Court had already found to be foreseeable and pursued the legitimate aim of preserving the secular character of educational institutions.¹

With regard to the principle of proportionality, the Court had found in its examination of Article 9 that “a reasonable relationship of proportionality between the means used and the aim pursued,” placing importance on the fact that the measures in question did not hinder the students in performing the duties imposed by the habitual forms of religious observance and that the decision-making process for applying the internal regulations satisfied, so far as was possible, the requirement to weigh up the various interests at stake.² Lastly, the Court was of the opinion that it would be unrealistic to imagine that the applicant was unaware of Istanbul University’s internal regulations restricting the places where religious dress could be worn or had not been sufficiently informed about the reasons for their introduction. Therefore, the applicant could reasonably have foreseen that she ran the risk of being refused access to lectures and examinations if, as subsequently happened, she continued to wear the Islamic headscarf after 23 February 1998.³ As a result, the restriction did not impair the very essence of the applicant’s right to education and did not conflict with other rights enshrined in the Convention or its Protocols; there was, therefore, no violation of the first sentence of Article 2 of Protocol No.1.⁴

Regarding the applicant’s alleged violations of Articles 8 and 10 of the Convention, the Grand Chamber followed the decision of the Chamber and found that no separate issue arose under these Articles as the relevant circumstances were the same as those it had examined in relation to Article 9 and Article 2 of Protocol No. I, in respect of which it had found no violations.⁵ With respect to Article 14 of the Convention, taken individually or together with Article 9 of the Convention or the first sentence of Article 2 of Protocol No. 1, the Court noted that the applicant did not provide detailed particulars in her pleadings before the Grand Chamber. Moreover, the regulations on

1. See: *Leyla Şahin v. Turkey*, 2005: para. 157-158.

2. See: *Leyla Şahin v. Turkey*, 2005: para. 159.

3. See: *Leyla Şahin v. Turkey*, 2005: para. 160.

4. See: *Leyla Şahin v. Turkey*, 2005: para. 161-162.

5. See: *Leyla Şahin v. Turkey*, 2005: para. 163.

the Islamic headscarf “were not directed against the applicant’s religious affiliation, but pursued, among other things, the legitimate aim of protecting order and the rights and freedoms of others and were manifestly intended to preserve the secular nature of educational institutions.” (*Leyla Şahin v. Turkey*, 2005: para 165) Accordingly, the reasons which led the Court to conclude that there has been no violation of Article 9 of the Convention or Article 2 of Protocol No. 1 incontestably also applied to the complaint under Article 14, taken individually or together with the aforementioned provisions and therefore there was no violation of Article 14 of the Convention.¹

The decision of the Grand Chamber undoubtedly implies that the view of the Court is that secularist policy is compatible, if not a prerequisite for achieving the Convention’s fundamental aim of promoting and protecting human rights and appears to accept without question the assertion of the Turkish Constitutional Court that “secularism, as the guarantor of democratic values, was the meeting point of liberty and equality.”² The *Şahin* case again aptly illustrates what is undoubtedly an overly deferential attitude of the Court to states parties’ assertions in cases concerning Article 9 of the Convention. This deference is acutely evident in particular in the cases specifically concerning the wearing of the headscarf with the paradoxical result that as Turkey, in this instance, attempts to bring its human rights protection into line with that of EU member states, its illiberal secularist policies appear to be implicitly encouraged by the ECtHR. The Court’s uncritical analysis of assertions regarding the importance of the ban on the wearing of the headscarf to upholding secularism is especially disappointing. Bleiberg suggests that the problem lies in how the Court itself views secularism.³

1. See: *Leyla Şahin v. Turkey*, 2005: para. 165-166.

2. See: *Leyla Şahin v. Turkey*, 2005: para. 113.

3. See: Bleiberg 2005-2006: 152 (references omitted), noting “[...]the ECHR merely reiterates the Turkish Constitutional Court’s holding and unquestioningly accepts it at face value. The ECHR never independently analyzed Turkey’s Constitution or critically inquired into the basis of the headscarf’s incompatibility with secularism – an analytical flaw particularly bothersome considering that the founding father of Turkish secularism believed the headscarf did not conflict with the principle of secularism and that Turkey did not institute a headscarf ban until the 1980s. Thus, the ECHR could have found the Turkish Constitutional Court’s interpretation of secularism – one that denies a right to an individual – a violation of human rights, while simultaneously upholding the importance of secularism in Turkish democracy.”

In fact only one of the judges of the Court was uncomfortable with the interpretation of the restriction on the applicant's right to wear a headscarf; in her dissenting opinion, Judge Tulkens expresses dissatisfaction with the Court's reasoning in relation to the two fundamental concerns on which this case was decided, secularism and gender equality. Judge Tulkens clearly did not agree with the majority opinion that the imposition of secularism is a suitable means of regulating freedom of religion and found the manner in which the Court accepted at face value the assertions of the Turkish government that the wearing of the headscarf was incompatible with the principles of secularism to be problematic. The judge further pointed to the lack of evidence that the applicant either intended to undermine the convictions of others through wearing the headscarf or that there had been any disruption in teaching or in everyday life at the University, or any disorderly conduct, as a result of the applicant wearing the headscarf.¹ Judge Tulkens also referred to that fact that in the Court's judgment in *Gündüz v. Turkey*², the Court held that there had been a violation of freedom of expression in a case where a Muslim religious leader had been convicted for violently criticising the secular regime in Turkey, calling for the introduction of the Sharia and referring to children born of marriages celebrated solely before the secular authorities as "bastards": "Thus, manifesting one's religion by peacefully wearing a headscarf may be prohibited whereas, in the same context, remarks which could be construed as incitement to religious hatred are covered by freedom of expression."³

The European Court is not alone in its interpretation of the perceived perils of religious symbols in the public sphere, however, and its attitude should perhaps be unsurprising considering that some of the European states expressly forbid expression of religious identity in the public sphere. But the approach of the European Court can be contrasted with that taken by the United Nations Human Rights Committee in the case of *Raihon Hudoyberganova v. Uzbekistan*⁴, delivered in the same year as the European Court's ruling in the *Şahin* case. In the instant case, on similar facts to those in *Şahin*, the Human Rights Committee found a violation of Article 18 of the International Covenant on Civil and Political Rights,

1. See: *Leyla Şahin v. Turkey*, 2005: para. 8.

2. See: Application no. 35071/97, judgment of 4 December 2003.

3. See: *Leyla Şahin v. Turkey*, 2005: para. 9.

4. See: Communication No. 931/2000, U.N. Doc. CCPR/C/82/D/931/2000 (2004).

which protects the right to freedom of religion.¹ The decision of the Committee, coming as it did in the same time period as the decision of the European Court in *Şahin*, raises questions as to how the Human Rights Committee would have dealt with the issues raised in *Şahin* were they considered under Articles 18 and 19 of the CCPR. Boyle has suggested that the HRC “would be likely to take a different view (to the ECtHR in *Şahin*) if it was possible to take a complaint to it” because of its reasoning in *Hudoyberganova v. Uzbekistan* and also because of the fact that the HRC maintains that it does not apply a margin of appreciation.²

The Jurisprudence of Fear? Recent Developments at the ECtHR

Evidence that the European Court of Human Rights is moving closer to the attitude adopted by the Human Rights Committee in *Hudoyberganova v. Uzbekistan* cannot be gleaned from the 2007 decision in *Kavakçı v. Turkey*.³ Although a violation of the Convention was found (Article 3 of Protocol I), the Court did not engage with the applicant’s

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1. See: International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. Article 18 provides: “1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”
 2. See: ‘Interview with Professor Kevin Boyle’ in ‘*Leyla Şahin v. Turkey*’ www.zaman.com, cited in D McGoldrick *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing Oxford 2006) 169. But *cf.* McGoldrick’s assertion that the non-resort to the margin of appreciation by the HRC may be “no more than a matter of semantics” and also that notwithstanding the decision of the HRC in *Hudoyberganova v. Uzbekistan*, “it is unlikely that the HRC’s interpretation of the ICCPR would give significantly different answers to the headscarf-*hijab* issue in Turkey to those the European Convention institutions have given, and in particular, to the 22 judges of the Court who found no violation.” It is currently not possible to make a complaint against Turkey to the Human Rights Committee as Turkey has not ratified the individual complaint procedure under the First Optional Protocol to the Covenant.
 3. See: Application no. 71907/01, judgment of 5 April 2007 (judgment only available in French; translations provided in this section are that of the author and are unofficial).

arguments regarding the headscarf and again capitulated to Turkey’s assessment of the importance of secularism in that country.¹

The Court’s reluctance to engage with the applicant’s arguments raised under Article 9 of the Convention is perhaps yet another example of its reticence to get involved in a broader discussion about secularism, what it entails and when or if the stringent protection of the principle can lead to a violation of rights under the Convention. Indeed, there was no engagement at all by the Court with the fact that the applicant had been ejected from parliament and prevented from taking the parliamentary oath *because* she was wearing the headscarf. Whilst the applicant in this case had a successful outcome in that the Court did rule in her favour, proponents of the freedom to wear the Islamic headscarf as a manifestation of religious belief will take little comfort from the reasoning of the Court.

En‘forcing’ Democracy: Refah Partisi (The Welfare Party) and Others v. Turkey

The ruling of the European Court of Human Rights in the case of *Refah Partisi (The Welfare Party) and Others v. Turkey*² upholding the decision of the Turkish Constitutional Court to close *Refah Partisi*, undoubtedly reflects broader European concerns regarding a possible rise in so-called ‘political Islam’ in Turkey and Europe.

The facts of the *Refah Partisi* case have been outlined elsewhere³ but the Court’s examination of the case is, however, troublesome in a number of respects. It began by assessing whether the decision to ban *Refah* was an interference with the rights of *Refah Partisi* under Article 11 of the Convention and concluded that there was, in fact, an interference with the applicants’ right to freedom of association.⁴ With a “notably brief

1. See: *Kavakçı v. Turkey*, 2007:para. 43. Noting “The Court notes that the temporary restrictions imposed on the applicant’s political rights had been intended to preserve the secular character of the Turkish political system. Given the importance of this principle for the democratic system in Turkey, the Court considers that the contested measure pursued legitimate aims, namely the prevention of disorder and the protection of the rights and freedoms of others.” The original French text states: « La Cour note que les limitations temporaires apportées aux droits politiques de la requérante avait pour finalité de préserver le caractère laïc du régime politique turc. Vu l’importance de ce principe pour le régime démocratique en Turquie, elle estime que la mesure litigieuse visait les buts légitimes de défense de l’ordre et de protection des droits et libertés d’autrui. »

2. See: Application no. 41340/98 & 41342-4/98, judgment of 13 February 2003. The case was taken by four applicants; *Refah Partisi*, Necmettin Erbakan, the chairman of *Refah Partisi*, Şevket Kazan, a vice-chairman of *Refah* and Ahmet Tekdal, also a vice-chairman of *Refah*.

3. See: Schilling, 2003-2004: 501-515.

4. See: *Refah Partisi and Others v. Turkey*, 2003: 50.

analysis,”¹ the European Court concluded that the applicants had not presented sufficient evidence to suggest that *Refah* had been dissolved for reasons other than those cited by the Constitutional Court and having taken into account “the importance of the principle of secularism for the democratic system in Turkey” agreed with the position advanced by the government and concluded that *Refah*’s dissolution pursued several of the legitimate aims listed in Article 11.²

Perhaps the most pertinent part of the judgment, however, concerns the Court’s assessment of secularism, democracy and Islam. Previously, in the *United Communist Party* case, the Court had made an interesting statement, indicative perhaps, of the lengths to which it would go to ‘uphold democracy’ in the future.³

In *Refah*, the Court also reaffirmed that freedom of thought, conscience and religion, protected by Article 9 of the Convention is one of the foundations of a ‘democratic society’ within the meaning of the Convention.⁴ Nonetheless, the Court noted that the principle of secularism is “one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy” (*Refah Partisi and Others v. Turkey*, 2003: para. 93) and went on to justify the dissolution of *Refah* as being within the power of preventive intervention on the part of the State and as being consistent

1. See: Schilling 2003-2004: 510.

2. See: *Refah Partisi and Others v. Turkey*, 2003: 67. The aims included protection of national security and public safety, prevention of disorder or crime and protection of the rights and freedoms of others.

3. The Court noted “Democracy is without doubt a fundamental feature of the European public order [...] That is apparent, firstly, from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights [...] The Preamble goes on to affirm that European countries have a common heritage of political tradition, ideals, freedom and the rule of law. The Court has observed that in that common heritage are to be found the underlying values of the Convention [...] it has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society [...] In addition, Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is “necessary in a democratic society”. The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from “democratic society”. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it.” See: *United Communist Party of Turkey and Others v Turkey*, 1998: para. 45.

4. See: *Refah Partisi and Others v. Turkey*, 2003: para. 90.

with a State’s positive obligations under Article 1 of the Convention to secure the rights and freedoms of persons within their jurisdiction.¹ Furthermore, the dissolution of *Refah* was deemed to have met the ‘pressing social need’ of averting the danger to democracy, which *Refah* were found to hold and accordingly the decision to dissolve the party was a proportionate response to the legitimate aim of upholding democracy and the principles of secularism.² In agreeing with the decision of the Turkish Constitutional Court, the ECtHR followed “the logic of collapsing unity, democracy and progress” employed by the domestic Court, which had indicated that *Refah* was a “political representation of the general Islamist threat” (Koğacioğlu, 2004: 433-462):

The root of the Islamist threat was in its being backward-looking, threatening to steer Turkey away from the road of progress. According to the Court, the major threat *Refah* represented was to the laicism principle of the constitution. At the hands of the Court, laicism became not merely the tenet of separation of religious and governmental spheres, or even of state control over religion, but also a crucial embodiment of the idea of progress. In turn, laicism functioned as a means of enhancing national unity. (Koğacioğlu, 2004: 455)

A number of concerns have been raised about the European Court’s reasoning in the *Refah* case. Among these are the fact the Court paid no attention to the constitution of *Refah Partisi*, which made no reference to either Sharia or Islamic law forming the basis of the Turkish system; and also the contention that even if the proposals of *Refah* were inconsistent with the principle of secularism set out in the Turkish Constitution, the European Court should refrain from being “the judge of secularism” and concentrate instead on ensuring the freedom to associate and publicly debate ideas, as provided for in Article 11.³ Schilling further asserts that the Court added two additional obstacles to its consideration of *Refah*’s arguments that were not present in previous dissolution cases, namely the likelihood that *Refah* would have been successful in its attempts to impose its own programme were it to achieve an overall majority as opposed to functioning within coalition government and the assumption that *Refah*’s leaders knew the risk associated with their conduct.⁴

1. See: *Refah Partisi and Others v. Turkey*, 2003: para.103.

2. See: *Refah Partisi and Others v. Turkey*, 2003: para.132, 135.

3. See: Schilling, 2003: 511-512.

4. See: Schilling, 2003: 513.

It follows, then, that the approach of the ECtHR in *Refah* may set the same precedent for other cases from Turkey or any other country grappling with issues relating to religion in the public sphere, particularly if the religion in question is Islam. That the Court will continue to adopt an inflexible approach to this issue was left in little doubt by its endorsement of the Chamber's opinion on Sharia, which found it to be incompatible with the fundamental principles of democracy as set forth in the Convention:

Like the Constitutional Court, the Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts[...] In the Court's view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.¹ (*Refah Partisi and Others v. Turkey*, 2003, para. 123)

There is much to criticise in the Court's judgment in *Refah* but this statement in particular appears entirely to go beyond the bounds of what the Court was being asked to examine in this case. Boyle has suggested that

1. Boyle notes that the "stridency of the European Court's assessment of Islamic law and shariah is regrettable. In effect the Court seems to say that shariah, *tout court*, is incompatible with universal rights, or at least European ideas of democracy and rights [...] the judgment represents an unsympathetic dismissal of what is a central element of a 1400-year-old civilization, comprising today the cultures of in excess of a billion people, and the religion of at least 100 million Muslims in the Council of Europe countries. The Court makes no effort, in its thinking or language, to separate the vast majority of Muslim people and their religious practices from extremists." See: Boyle, 2003: 1-16.

it was “unnecessary and unhelpful” for the Court to engage with Sharia at all but, since it had apparently been convinced of such a necessity,

[...] it might have sought expert pleadings, for example by means of an amicus curiae brief, which at the very least would have brought to the Court’s attention the considerable ongoing debate within Islam on shariah and democracy and those aspects of Islamic law that are in conflict with international human rights standards. It might have understood better the difference between political Islam and the faith of the vast majority of followers of Islam. (Boyle, 2003: 13)

Boyle has also rightly criticised the Court’s “incidental assessment of Islam” and its “intemperate and injudicious language” in which it “indulged in a wholly unnecessary and inappropriate critique of this religion, which has over 100 million followers in the European legal space of forty-five States over which the Court exercises jurisdiction.” (Boyle, 2003:4) For all the importance the Court purports to attach to democracy, the decision to uphold the dissolution of an elected party in government that, it is suggested, “did not challenge democracy as such, but rather sought to question an ideology imbued in the institutions of the State and enforced by the Turkish military” (Boyle, 2003: 12) undoubtedly led to one of the Court’s most undemocratic results to date.

C: Conclusion

In Europe, the privatisation of religion is considered a *sine qua non* for a modern secular democracy (signalled by an embracing of the concept of militant democracy) and events in countries such as Turkey, where an Islamic party, the *AKP* have been elected and the accession of more outwardly ‘religious’ Eastern European countries to the EU, rest uneasily with some European neighbours, who have, since the Enlightenment, assumed religion’s relegation to the private sphere, despite the very real evidence to the contrary in numerous EU states. The issue is of course complicated even further when the public manifestation of religious beliefs are those of Islam as it is perceived as an essentially “un-European” religion.¹ As Casanova rightly notes,

[...] when it comes to Islam, secular Europeans tend to reveal the limits and prejudices of modern secularist toleration. One is not likely to hear among liberal politicians and secular intellectuals

1. See: Casanova, 2007: 65-93.

explicitly xenophobic or anti-religious statements. The politically correct formulation tends to run along such lines as “We welcome each and all immigrants irrespective of race or religion as long as they are willing to respect and accept our modern liberal secular European norms.” (Casanova, 2007: 65-93)

Thus, whilst the European Commission may criticise the inadequate protection of religious rights in Turkey and elsewhere,¹ it is evident from the case-law of the European Court of Human Rights, that Europe’s guarantee of religious freedoms is hardly the appropriate yardstick by which such protection should be measured. The Court’s examination of Islam, be it direct such as in the headscarf jurisprudence, or the ‘incidental assessment’ provided in the *Refah* case has been wholly unsatisfactory and provides worrying guidance to those countries who look to the European Court as the upholder of fundamental rights and freedoms.



1. The 2008 report of the European Commission on Turkey’s Progress Towards Accession concluded: “A legal framework in line with the ECHR has yet to be established, so that all non-Muslim religious communities and Alevis can function without undue constraints. Turkey needs to make further efforts to create an environment conducive to full respect for freedom of religion in practice and to carry out consistent initiatives aimed at improving dialogue with the various religious communities.” See: Turkey 2008 Progress Report, SEC(2008) 2699 final, Brussels, 5 November 2008, 19.

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