European Court of Human Rights

State and Religion, Schools and Scarves, An Analysis of the Margin of Appreciation as Used in the Case of *Leyla Sahin* v. *Turkey*, Decision of 29 June 2004, Application Number 44774/98.

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Introduction

In the case of *Leyla Sahin* v. *Turkey* of 29 June 2004, the European Court of Human Rights decided in favour of Turkey. The banning of headscarves at the University of Istanbul did not violate Article 9 of the European Convention on Human Rights (ECHR). Some years before the European Court already declared inadmissible a complaint by a Swiss teacher of younger children who was fired because she was not willing to leave off her headscarf while teaching.[1] The complaint was manifestly ill founded. In other European countries the wearing of headscarves by teachers and pupils has lead to political and legal discussions and actions as well. In France, new legislation based on the so-called *Stasi*-report[2] forbids pupils in primary and secondary state schools to wear clearly visible religious symbols. The reasons behind this act of parliament were problems allegedly caused by the wearing of headscarves. In Germany, the Federal Constitutional Court decided that a ban on headscarves for teachers needs a basis in an act of parliament of the German states. It is up to the legislatures of the *Länder* to decide if such a ban should be issued.[3] In the Netherlands, existing equal treatment law has been interpreted in such a way that teachers and pupils in state schools are allowed to wear headscarves.

So we see in Europe a wide variety of regulations concerning the wearing of headscarves at state schools. Therefore, it is understandable that the European

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[1] ECtHR 15 Feb. 2001, Appln No. 42393/98, *Dahlab* v. *Switzerland*.

[2] Commission de réflexion sur l'application du principe de laïcité dans la République, <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf>.

[3] Decision 24 Sept. 2003, BverGE 108, 282.

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Court of Human Rights grants national authorities a wide margin of appreciation in this field. After stating the facts and the most relevant considerations of the Court in the *Leyla Sahin* case, this article will try to account more substantially for this margin of appreciation by sketching the historical, legal and constitutional background of the various national regulations. It will examine three aspects of this variety: the relationship between state and religion, the special position of the school systems and the meanings attributed to the headscarf: is it just a religious symbol or is it an anti-western sign of discrimination? The focus is not only on the case-law of the European Court on Human Rights, but also on the law of France, Germany, the Netherlands and Turkey. In comparing these countries, it will be inevitable to make generalisations. After all, the relationship between state and religion and the regulation of education are highly complicated matters.

Leyla Sahin v. *Turkey: the facts and main considerations*

Leyla Sahin, born in 1973, comes from a traditional family of practising Muslims and considers it her religious duty to wear the Islamic headscarf. She spent four years studying medicine at the University of Bursa where, according to her, wearing a headscarf caused no problems. In August 1997, she enrolled at the University of Istanbul. On 23 February 1998, the Vice-Chancellor of Istanbul University issued a circular with the following stipulation:

> By virtue of the Constitution, the law and regulations, and in accordance with the case-law of the Supreme Administrative Court and the European Commission of Human Rights and the resolutions adopted by the university administrative boards, students whose 'heads are covered' (wearing the Islamic headscarf) and students (including overseas students) with beards must not be admitted to lectures, courses or tutorials.

Thereafter the applicant, who refused to take off her scarf, was denied access to written examinations and lectures. She started a procedure to have set aside the circular of February 1998. The Istanbul Administrative Court dismissed her application and the Supreme Administrative Court her appeal.

The ECHR proceeded on the assumption that the regulations in issue, which placed restrictions of place and manner on the right to wear the Islamic headscarf in universities, constituted an interference with the applicant's right to manifest her religion (par. 71). The Court therefore had to consider whether the interference was 'prescribed by law', pursued a legitimate aim and was 'necessary in a democratic society' within the meaning of Article 9(2) of the Convention.

The law was 'accessible and sufficiently precise in its terms to satisfy the requirement of foreseeability'. From 23 February 1998 onward, it could have been

clear to the applicant that she was liable to be refused access to lectures if she continued to wear the headscarf (par. 81). Having regard to the circumstances of the case and the terms of the domestic courts' decisions, the Court found that the impugned measure primarily pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order (par. 84).

To assess the necessity of the interference, the Court started with some general considerations concerning the possibility of restrictions of freedom of religion in a pluralist society:

> The Court notes that, in the decisions of *Karaduman v. Turkey* (no. 16278/90, Commission decision of 3 May 1993, DR 74, p. 93) and *Dahlab v. Switzerland* (no. 42393/98, ECHR 2001-V), the Convention institutions found that in a democratic society the State was entitled to place restrictions on the wearing of the Islamic headscarf if it was incompatible with the pursued aim of protecting the rights and freedoms of others, public order and public safety. In the *Dahlab* case cited above, in which the applicant was a schoolteacher in charge of a class of small children, it stressed among other matters the impact that the 'powerful external symbol' conveyed by her wearing a headscarf could have and questioned whether it might have some kind of proselytising effect, seeing that it appeared to be imposed on women by a precept laid down in the Koran that was hard to reconcile with the principle of gender equality. (par. 98)

Subsequently, the Court discussed the margin of appreciation:

> In determining the scope of the margin of appreciation left to the States, regard must be had to the importance of the right guaranteed by the Convention, the nature of the restricted activities and the aim of the restrictions (…). Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance. (par. 101)
> A margin of appreciation is particularly appropriate when it comes to the regulation by the Contracting States of the wearing of religious symbols in teaching institutions, since rules on the subject vary from one country to another depending on national traditions (...) and there is no uniform European conception of the requirements of 'the protection of the rights of others' and of 'public order' (…). It should be noted in this connection that the very nature of education makes regulatory powers necessary … (par. 102)

The Court subsequently noted that the interference was based on two principles which reinforce and complement each other: secularism and equality (par. 104). In this context the Court noted that:

> In its judgment of 7 March 1989, the (Turkish, AN) Constitutional Court stated that secularism in Turkey was, among other things, the guarantor of democratic values, the principle that freedom of religion is inviolable – to the extent that it stems from individual conscience – and the principle that citizens are equal before the law (…). Secularism also protected the individual from external pressure. (par. 106)
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> The Court further notes the emphasis placed in the Turkish constitutional system on the protection of the rights of women (…). Gender equality – recognised by the European Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe (….) was also found by the Turkish Constitutional Court to be a principle implicit in the values underlying the Constitution (…). (par. 107)
>
> In addition, like the Constitutional Court (…), the Court considers that, 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. As has already been noted (…), the issues at stake include the protection of the 'rights and freedoms of others' and the 'maintenance of public order' in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith. Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since, as the Turkish courts stated (…), this religious symbol has taken on political significance in Turkey in recent years. (par. 108)
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> The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts (…). It has previously said that each Contracting State may, in accordance with the Convention provisions, take a stance against such political movements, based on its historical experience (…). The regulations concerned have to be viewed in that context and constitute a measure intended to achieve the legitimate aims referred to above and thereby to preserve pluralism in the university. (par. 109)

Finally, the Court unanimously held that there has been no violation of Article 9 of the Convention:

> In the light of the foregoing and having regard in particular to the margin of appreciation left to the Contracting States, the Court finds that the University of Istanbul's regulations imposing restrictions on the wearing of Islamic headscarves and the measures taken to implement them were justified in principle and proportionate to the aims pursued and, therefore, could be regarded as 'necessary in a democratic society'. (par. 114)

State and religion in Europe

The history of Europe shows strong bonds between church and state. The authority of the sovereign was often religiously founded and his highest duty was to defend the true faith. In this context, advocating religious dissent was easily considered as a form of sedition. Church and state were often working together in persecuting religious dissenters.

After the Reformation, many governments were confronted with substantial religious minority groups. Eventually, this situation led to the recognition of the need for some form of pragmatic tolerance. Moreover, in the same period the distinction between state and society was accentuated and writers started to think of religion as a private matter. Granting freedom of religion in the private domain therefore might be wise and proper. In the works of John Locke, all these considerations – tolerance, religion as a private matter, and the importance of upholding a private domain – come together. It may be noticed however that the first law providing for some form of freedom of religion is to be found in the Netherlands. In 1579, seven Dutch provinces, defending themselves against Spain, agreed to form a Union. Part of the agreement of these Seven United Provinces was the stipulation that the authorities would not interfere with a person's inward convictions.[4]

That way, in the 16th and 17th century, began the age-long process of separation of state and religion. This so-called secularisation process has not been carried through in all European countries with the same pace and strictness. Nowadays, we see in Europe a huge variety of relationships between state and religion.[5] Many countries still have an established church. Greece, Denmark and Norway may serve as examples. In England, the Queen is the highest official in the Anglican Church and she appoints Anglican bishops, on nomination by the Prime Minister. The Italian Constitution separates church and state by giving a special status to the Catholic Church: the state and the Catholic Church are each within their ambit independent and sovereign.

Judged by the first sentence of the preamble of its Constitution, Ireland is an example of a country with close constitutional bonds between religion and the state: 'In the Name of the most Holy Trinity, from Whom all authority and to Whom is our final end, all actions both of men and states must be referred'. This declaration may be somewhat mitigated by Article 4 of the Constitution, which

[4] In the long run the Peace Treaty of Augsburg (1555) may have been more important in the evolution of religious liberty within Europe. However, it stipulated only that the German rulers could determine if the Catholic or the Lutheran religion was to be adopted within their territories.

[5] Carolyn Evans, *Freedom of Religion under the European Convention* (Oxford 2001) p. 19 et seq.

states that all powers of government, legislative, executive and judicial, derive, under God, from the people.

On the other side of the spectrum lies France, probably the best example of a country wherein the secularisation process has been completed. The French Revolution severed all existing ties between state and church. However, during the Restoration period these links were partly restored. The present day secular constellation originates in 1905, when Article 2 of the *Loi de séparation des Églises et de l'État* [Act on the separation of Churches and the State] stipulated: 'the state does not recognize, salary or subsidize any religion'. By now the principle of secularity (*laïcité*) is incorporated in the first Article of the French Constitution of 1958: 'France is an indivisible, secular, democratic and social Republic'. This principle is not regarded as anti-religious. It is supposed to be just the other way round: the secularity of the public domain is seen as a precondition for freedom of religion outside the public domain. As it happens, the first Article of the Act of 1905 provides for the right to freedom of religion. In the Stasi-report, we find this line of reasoning as well: 'Freedom of religion outside the public domain implies that in exchange one has to respect the public domain that all can share'.

In Germany, the situation is different. While the Constitution itself states that there is no established church, the preamble of the Constitution opens with a reference to the responsibility of the German people to God (and men). This reference is interpreted as a recognition of the importance of freedom of religion. In a more general way, the whole Constitution of 1949 is considered to be a system of values that is, at least partly, inspired by Christian culture.[6] After decades of progressive secularisation of the people, the basis for that constitutional interpretation may have become less stable. Still, there is as yet no strict secularity in the sense that religion is not supposed to play any part at all inside state controlled or organised institutions.[7] The required neutrality of the state has for example to be interpreted as demanding equality when supporting religious groups.[8] For the rest, it is hard to make general observations about Germany because the relationship between state and religion differs widely in the various German states.

In the Netherlands, the Calvinistic Dutch Reformed Church was a kind of established church up till the 19th century. From that time on, there has been an emancipation process of other Protestant groups and of Catholics. This process led to the so-called 'pillarisation' of Dutch society.[9] Pillarisation is the compart-

[6] While interpreting the term *Sittengesetz* (moral law) in Art. 2 of the *Grundgesetz,* the Federal Constitutional Court took into consideration the notions of the great German churches, the Lutherans and the Roman-Catholics, decision of 10 May 1957, BverGE 6, 389.

[7] Von Münch, *Grundgesetz-Kommentar* (München 2000), p. 304.

[8] Karl-Hermann Kästner, 'Anmerkung', *JuristenZeitung* (2003) p. 1178-1180.

[9] A. Lijphart, *The policy of accommodation: pluralism and democracy in the Netherlands* (Berkeley 1968).

mentalisation of society along religious and ideological lines. The socialists for example had their own pillar as well. Schools, newspapers, hospitals, sports clubs and so on were for the most part organised along these lines. Citizens mainly lived inside their own pillar. Even the public broadcasting system was 'pillarised'. Broadcasting time was largely divided between pillarised broadcasting organisations inside the public broadcasting system.

In this 'pillarised' society state and religion actually have common grounds (education, hospitals, broadcasting). In this part of the public domain therefore, not secularity, but 'pluriformity' has always been the benchmark. This part of the public domain had to be open to all kind of religious groups that were to be treated equally. Although the Dutch Constitution does not mention God and the secularisation of the people in the Netherlands has been relatively drastic in the last decades, the public domain is much more indulgent to religious influences than under a system of secularity. The inscription 'God be with us' on the edge of the Dutch 2-Europieces is in this respect a fine example.

In the former Ottoman Empire, close ties existed between religion and the state. The Caliph, for example, had both governmental and religious functions. At the same time, there was a reasonable degree of freedom of religion for other groups inside the governmentally prescribed order. After World War I, the Ottoman Empire collapsed by its own weakness. The present Turkish nation arose in 1923 out of the struggle for freedom led by Kemal Ataturk. One of the more important parts of his revolutionary modernisation of the Turkish State and society was the creation of areas free of religion. In 1928, the provision that made Islam the established religion was struck out of the Constitution. Since 1937, the Turkish Constitution states explicitly that Turkey is a secular state. In the present Constitution, this provision is one of the 'unchangeable' ones. Article 24 of the Constitution is even better proof of Turkish active and 'militant' secularism. It prohibits abuse of religion to get political influence or to found the state on a religious base.

At the same time, the Kemalistic ideology brings along a need for state-control of religion. The reason for this is the supposed tendency of religion to influence public life and the law, which must be kept within bounds. Therefore Article 136 of the Constitution stipulates that there is a Directorate General for religious matters. This agency is, among other things, involved in the appointment of imams in Turkey as well as in Turkish Islamic communities in other countries.[10]

So in Turkey we encounter the remarkable phenomenon of a secular state strongly involved in religious matters. This has to be explained by the special character of Turkish secularism: it is militant against the pressure put on the secularity of the state by the Islam, the religion of the vast majority of the people.

[10] G.A.M. Strijards, *Turkey, the Union and the Accession* (Brussels: EULEC 2004) p. 57.

The European Court on state and religion

We have seen that a wide variety of relationships between church and state in members of the Council of Europe exist.[11] Moreover, even the concept of separation of state and church is in itself ambiguous.[12] The European Court of Human Rights witnesses this in its case-law: 'It is not possible to discern throughout Europe a uniform conception of the significance of religion in society'.[13] Even the existence of a state church is, as such, not contrary to the Convention.[14] Therefore, one would expect the European Court to use a wide margin of appreciation in judging cases wherein the relationship between state and church plays a part. This dimension is not missing in *Leyla Sahin* as a reason for giving a wide margin of appreciation to Turkey: on the 'relationship between State and religions (…) opinion in a democratic society may reasonably differ widely'.[15]

That is not to say that there is no European supervision by the European Court at all. In several cases, government interference in church matters did amount to a violation of Article 9 ECHR. That is especially the case when the government hinders religious groups that are at variance with the established church.[16] For example, the official recognition of a religious group, which was necessary for the 'full' practising of its freedom of religion, can not be made dependent on the decision of church authorities.[17] Besides, a state is not allowed to punish a person for merely acting without official appointment as the religious leader of a group that willingly follows him.[18] Also an obligation for members of parliament to take an oath on the New Testament was judged contrary to Article 9 ECHR.[19]

This case-law implies that the various religions (and other convictions) in many respects have to be treated equally, even when there is an established church. Nevertheless it still holds true that the established church may have a special status and government interference in established church matters may be more far-reaching than in other churches.[20] The question of how the European Court would

[11] Evans, *supra* n. 5, at p. 21-24. One may point as well to the controversy about a reference to Christianity in the Constitution of the European Union, Jean-Louis Clergerie, 'La place de la religion dans la future Constitution européenne', *Revue du droit public* (2004) p. 739-754.

[12] T. Koopmans, *Courts and political Institutions* (Cambridge 2003), p. 210.

[13] ECtHR 20 Sept. 1994, Appln No. 13470/87, *Otto-Preminger-Institut* v. *Austria.*

[14] ECommissionHR, Appln No. 11581/85, *Darby* v. *Sweden.* The applicant lodged a complaint against obligatory church taxes.

[15] ECtHR 29 June 2004, Appln No. 44774/98, *Leyla Sahin* v. *Turkey*, at par. 101.

[16] ECtHR 26 Oct. 2000, Appln No. 30985/96, *Hasan and Chaush* v. *Bulgaria.*

[17] ECtHR 13 Dec. 2001, Appln No. 45701/99, *Metropolitan Church of Bessarabia and others* v. Moldovia.

[18] ECtHR 14 Dec. 1999, Appln No. 38178/97, *Serif* v. *Greece*; cf. ECtHR 17 Oct. 2002, Appln No. 50776/99, *Agga* v. *Greece (no. 2).*

[19] ECtHR 18 Feb. 1999, Appln No. 24645/94, *Buscarini and others* v. *San Marino*.

[20] F.e. EcommissionHR, Appln No. 11045/84, *Knudsen* v. *Norway*, D&R 172 (1988); EcommissionHR, Appln No. 7374/76, *X.* v. *Denmark*, D&R 157 (1976).

decide about the Turkish government's involvement in the appointment of imams, without the Islam being the established religion, is hard to answer.

The European Court has made interesting considerations about another aspect of the relationship between state and religion as well. Freedom of religion is an integral part of the European pluralistic democracy.[21] There is not only a right to hold, but also to confess and manifest one's conviction. Furthermore, participation in the social and political debate may be religiously inspired.[22] However, striving for a state wherein the authorities are not responsible to the people because religious truth is all decisive, or striving for a state wherein religiously inspired laws imply discrimination against women, is contrary to the European conception of democracy. Therefore, under certain circumstances a party striving for those aims may be prohibited.[23]

State schools and religious symbols

Schools do more than merely impart knowledge; they transfer values that have an important socialising function as well. Therefore, in the process of secularization, the school system has been one of the more important battlefields between religion and state. Nowadays state and religion still clash in the educational field. One of the big issues is what room state schools must provide for the manifestation of pupils' (or their parents') beliefs. As may be expected, the answer to that question is linked to the more general relationship between religion and state sketched above.

In France the preamble of the Constitution of 1958 refers to the preamble of the Constitution of 1946, which stipulates that the government takes care of education with a secular character. Furthermore, a strict secular starting point forbids the funding of schools with a religious character, something that, as a matter of fact, had already stopped before the introduction of the above-mentioned Act of 1905.[24] This strict regime was somewhat mitigated by the *Loi Debré* in 1959: schools with a religious character now can get government funds when meeting certain conditions.

Teachers in state schools have to keep from wearing all distinguishing marks of a philosophical, religious or political nature. Such a ban actually holds for all civil servants, but is maintained more strictly for state schoolteachers, because they are more or less considered to be representatives of the secular state.[25] Moreover, a

[21] ECtHR 25 May 1993, Appln No. 14307/88, *Kokkinakis* v. *Greece*; cf. ECtHR 13 Feb. 2003, Appln No. 41340/98, *Refah Partisi* v. *Turkey.*

[22] ECtHR 4 Dec. 2003, Appln No. 35071/97, *Gündüz* v. *Turkey.*

[23] ECtHR 13 Feb. 2003, Appln No. 41340/98, *Refah Partisi* v. *Turkey.*

[24] In 1886, cf. J. Rivéro, *Les libertés publiques*, Vol. 2 (Paris: PUF 1977) p. 297.

[25] *See* J. Robert & J. Duffar, *Droits de l'homme et libertés publiques* (Paris, Montchrestien 1999) p. 626.

state school should be the Republic in miniature and religious influences or religious pressure non-existent. Nevertheless, in 1989 the *Conseil d'Etat* considered wearing religious symbols by pupils in state schools not as such contrary to the constitutionally guaranteed secular character of the state.[26] However, the wearing of religious symbols could, in certain cases or under certain circumstances, conflict with this principle if it amounts to an act of pressure, provocation, proselytism or propaganda.[27] We will see in the next paragraph that the *Stasi*-committee did argue for a ban on headscarves not only because of the religious character as such, but for other reasons as well.

As in France, in Germany most schools are state schools. State education however does not have the same principled secular character as in France. The least we can say is that Christian-inspired values are important in the educational field. Once more, to what amount these values are important differs widely in the different states of Germany. To give just an example, the constitution of Bavaria, one of the more Christian regions, states that reverence for God is one of the paramount educational goals. Yet, there are limits to what is allowed by the federal constitution in this respect. The Federal Constitutional Court, the *Bundesverfassungsgericht*, decided in the so-called 'crucifix case' that a Bavarian law requiring a crucifix to be hanged in every classroom of states schools was contrary to the right of freedom of religion of parents and their children.[28] The pressure 'to learn under the cross' was considered to conflict with the neutrality of the state in religious matters.

This case however has to be distinguished from the 'teacher with a headscarf case'. In the latter case, not only parents and their children may invoke fundamental rights, but the teacher as well. He or she may invoke the right to freedom of religion and the right to equal access to the civil service. The *Bundesverfassungsgericht* indicated that this case of conflicting fundamental rights does not have just one simple solution.[29] It is up to the legislatures in the German states to decide whether they see the wearing of headscarves by teachers as a real problem. They accordingly have the power to decide if they want stricter neutrality or allow for more multiformity in their state school system. The assessment of the meaning of the headscarf will play an important role in this respect, as we will see in the next paragraph.

The school system in the Netherlands has for decades been a part of the pillarised society. Most primary and secondary schools are run by private organisations, mostly along religious lines. The Dutch Constitution stipulates that these 'special'

[26] Avis du 27 novembre 1989, <www.conseil-etat.fr/ce>.
[27] *See* Robert & Duffar, *supra* n. 25, at p. 602.
[28] Decision of 16 May 1995, BverGE 93, 1.
[29] Decision of 24 Sept. 2003, BverGE 108, 282.

primary schools get government funding on the same footing as state primary schools when they meet certain quality standards. Legislation extends this principle of equal funding to secondary schools and other educational institutions. This approach shows the importance of 'pluriformity' in the educational field. Nowadays this situation still holds even if the role of religion in a lot of 'special' schools is not that noticeable anymore.

State schools have an open and 'pluriform' character as far as religion is concerned. Religious and philosophical matters may be treated, but only with respect for the convictions of parents and children. Teachers must have an open attitude in this respect. The refusal to appoint a teacher just because she wears a headscarf is judged to be contrary to equal access law. The Equal Treatment Committee, an official semi-judicial body, decided that wearing a headscarf as such does not imply that a teacher misses the required open attitude.[30] The refusal to appoint would only stand when the teacher has shown intolerant ideas.

Turkey has seen the introduction of state school education shortly after the coming to power of Ataturk. Education on a secular basis pre-eminently fits in the Kemalistic ideology with its attachment to non-religious areas. Moreover, in the former Ottoman Empire, religion and clothing used to be linked closely together: both the central government and religious groups required people to dress in accordance with their religious affiliation. Against this background, it may be understood that the wearing of headscarves in state schools and even universities touches on a soft spot in Turkey. In the light of Kemalistic ideology, the wearing of headscarves is seen as contrary to modernism and secularity. Moreover, there is a fear that the wearing of headscarves by a lot of pupils or students lays pressure on others to do the same.

The European Court on school and religion

The European Court of Human Rights recognises the wide variety of school systems sketched above. On the one hand, a public school may not indoctrinate pupils and teaching may not be disrespectful to the philosophical or religious convictions of the pupil's parents. On the other hand, Article 2 of the First Protocol to the ECHR does not prevent states from imparting, through teaching or education, information which is, directly or indirectly, of a religious or philosophical kind. In principle, presenting such material should be done in an objective, critical and pluralistic way.[31] Nevertheless, exclusively passing on knowledge of Christianity in state schools as such does probably not violate the Conven-

[30] CGB (*Commissie Gelijke Behandeling*) 9 Feb. 1999, <www.cgb.nl>.

[31] ECtHR 5 Nov. 1976, Appln No. 5095/71, *Kjeldsen, Busk Madsen and Pedersen* v. *Denmark*, at par. 53.

tion.[32] Parents who are not content with public education have the right to organise private schools with a religious character. There is no state obligation however to subsidise that kind of schools.[33] All in all, the Court leaves the national authorities room for all kinds of school systems. In accordance therewith, the Court applies a rather wide margin of appreciation when reviewing rules in the educational field.

Therefore, the wide margin of appreciation that the Court allows states, when it reviews rules on the relationship between state and religion, may even be enlarged when rules in the educational field are reviewed. This two-fold margin of appreciation becomes even wider when very small children are involved. In the *Dahlab* admissibility decision, the Court stressed the fact that Dahlab was teaching very young children, and that there is not much known about the impact of religious symbols on their development. In *Leyla Sahin,* this aspect is missing, because the ban was applied to university students. Other reasons for a rather wide margin in the educational field did remain however: regulation of the educational field is usually based on national traditions and education, and schools by definition need regulation.[34]

Given the two-fold margin, the Court in *Leyla Sahin* accepts the Turkish arguments that the contested circular is necessary in a democratic society. Wearing a headscarf at the university is an infringement of the important Turkish principle of secularity. Moreover it may lay pressure on other students.

The ambiguous meaning of the headscarf

Up till now we have treated the headscarf as a religious symbol whatsoever. Political debate and legal reasoning in many countries however do often attribute a more particular meaning to the headscarf. The scarf is sometimes conceived as a symbol expressing the pursuit of theocracy, or as a symbol of discrimination against women. In both cases, the wearing of a headscarf may be considered to conflict with western democratic values. This may be an additional reason for a ban.

The *Stasi* committee in France stresses the importance of equality between men and women: equality is a constitutional value of the Republic. According to the committee, the wearing of headscarves may be an expression of the discrimination against women. The committee did hear a lot of experts and persons concerned and drew the conclusion that pupils are often pressed by their parents or surroundings to wear a headscarf. Especially in immigrant neighbourhoods, women may have no real choice. Besides, the Committee sees some relationship between

[32] EcommissionHR, Appln No. 10491/83, *Angelini* v. *Sweden*, D&R 41(1986).

[33] *See* more generally ECtHR 23 July 1968, Appln No. 1474/62, *Belgian Languages Cases*, at 31; cf. Evans 2001, *supra* n. 5, at p. 88.

[34] ECtHR 29 June 2004, Appln No. 44774/98, *Leyla Sahin* v. *Turkey*, par. 102.

the rise in the wearing of the scarf and increasing Islamic political radicalism. At least that was considered to be one of the reasons for problems at schools. The Committee points out that the *Conseil d'État* in 1989 did not yet take into account the discriminatory character of the headscarf when it decided that wearing a headscarf was not as such contrary to the secular character of the state and of state schools. The Committee however takes the line that nowadays the secular and democratic values of the Republic are at least under pressure by these particular religious symbols.[35] Secularity being the key value, the outcome is that in primary and secondary state schools the wearing of all clearly visible religious symbols, Christian and Islamic alike, is prohibited. Against this background, it is obvious that the ban is especially directed at the Islamic headscarf. When it will be strictly maintained, however, there will be no (direct) discrimination between symbols of different religious groups.

In Germany, the Federal Constitutional Court explicitly pointed out the ambiguous character of the headscarf. On the one hand it may be a symbol of discrimination against women, on the other it may have emancipatory aspects as well, allowing devout Islamic women to enter the labour market. As mentioned before, the *Bundesverfassungsgericht* entrusts the legislatures of the German states to deal with the headscarves of state schoolteachers. In this respect these legislatures, and thus politics, may assess the meaning of the scarf.

Shortly after the decision of the *Bundesverfassungsgericht,* some German states have introduced new legislation. Baden-Württemberg may serve as an example. The new rules do not allow teachers to wear political, religious or philosophical signs which are fit to breach the peace at school. The ban applies more particularly to behaviour contrary to human dignity, contrary to equality, or contrary to the free and democratic basic structure of the state (*freiheitliche demokratische Grundordnung*). A second provision stresses the point that the fulfilment of the 'educational duty' (*Erziehungsauftrag*) stated by the constitution of Baden-Württemberg and the resulting setting forth of Christian and western educational and cultural values or traditions (*Darstellung christlicher und abendländischer Bildungs- und Kulturwerte or Traditionen*) does not conflict with the aforementioned ban.[36] Legislatures in some other German states have also interpreted the

[35] Cf. A. Finkelkraut, 'Le laïcité à l'épreuve du siècle', *Pouvoirs* (1995) p. 53-61.

[36] *See* of the *Verfassung des Landes Baden-Württemberg* the Arts. 12(1) ('Die Jugend ist in Ehrfurcht vor Gott, im Geiste der christlichen Nächstenliebe (…) zu erziehen'), 15(1) ('Die öffentlichen Volksschulen (Grund- und Hauptschulen) haben die Schulform der christlichen Gemeinschaftsschule nach den Grundsätzen und Bestimmungen, die am 9. Dezember 1951 in Baden für die Simultanschule mit christlichem Charakter gegolten haben'), und 16 (1) ('In christlichen Gemeinschaftsschulen werden die Kinder auf der Grundlage christlicher und abendländischer Bildungs- und Kulturwerte erzogen. Der Unterricht wird mit Ausnahme des Religionsunterrichts gemeinsam erteilt').

headscarf as a political symbol that contravenes fundamental constitutional values. So the question is seen as a case of maintaining western freedom and equality. Because of the special position of Christianity, or at least of Christian values, it is at least suggested that the ban does not hold likewise for Christian symbols.[37] The Federal Administrative Court has judged the new Baden-Württemberg law not contrary to the Constitution. The government may take into account all possible meanings of the headscarf. Moreover, the government does not have to make sure that the wearing of headscarves will actually lead to breaches of the school peace. It is permissible for the government to think in terms of 'abstract endangerment'.[38]

In Dutch law, the starting point is the equal access of members of all religious or philosophical groups to the civil service. Members of all kind of religious groups therefore may work as teachers in a public school, as long as they have the 'open attitude' required. Whereas a school board had reasoned that wearing the headscarf as such was a sign that this attitude was missing, the Equal Treatment Committee assessed the scarf merely as a religious symbol not venturing any opinion about the political role of religion or the position of women. A teacher with a scarf who is willing to respect the principles of the state school system is therefore qualified for appointment just as well as everybody else. This is different only when there are substantial reasons to doubt that the required attitude is missing in a concrete case.

As far as pupils are concerned, there is even less reason to prohibit the headscarf. A circular of the Department of Education directed to all state schools stated that only (religious) garments that cover the face may be banned. This is not because of their religious or fundamentalist character, but because they substantially hamper the educational and communicative process between pupil and teacher. This interpretation of the present law does not mean that there is no on-going discussion in the Netherlands. The amount of people favouring a more French-oriented secularism seems to be on the rise. In their considerations, preferences for non-religious areas and aversion against Islamic symbols are mixed.[39] A special issue is the constitutional principle of equal government funding for state and 'special' schools. There is fear that integration will be slackened when more and more immigrant children go to government funded Islamic schools. There is increasing concern that pupils in Islamic schools may pick up outmoded and antidemocratic ideas.

Turkey may be an example of a country where the assessment of the headscarf as a religious symbol coincides with its assessment as an anti-constitutional sym-

[37] Cf. Langenfeld & S. Mohsen, 'The teacher head scarf case', *ICLR* (2004), p. 90.

[38] Bundesverwaltungsgericht 24 June 2004, *Neue Juristische Wochenschrift* (2004), p. 3581.

[39] A lot of people have considerably more aversion against Islamic symbols than against other religious symbols, *Binnenlands Bestuur* (2003), p. 43.

bol, at least if they are worn in state schools. The historically understandable reason is that wearing a headscarf in the public domain raises a problem both because of the religious character of the scarf as such and because the scarf is simultaneously seen as an attack on the secularity of the state, one of the fundamental values of the constitution. This is shown by the *Refah* case. Among the evidence of the anti-constitutional character of this party accepted by the Turkish courts was the fact that leaders of this party had advocated the wearing of headscarves in the public domain.[40]

More generally, the advance of the scarf since 1980 is linked to the advance of the political Islam. Therefore, it is not surprising that the Turkish Supreme Administrative Court in the *Sahin* case called the scarf a symbol of a vision contrary to the freedom of women and to fundamental principles of the Republic.[41]

The European Court on the meaning of the scarf

In the *Dahlab* decision, the European Court itself seems to take the view that the headscarf is not only a religious symbol, but also a symbol contrary to western fundamental values: 'wearing the Islamic headscarf seems as well hard to reconcile with the message of tolerance, of respect for others, and above all of equality and non-discrimination which in a democracy every teacher has to transmit to his pupils'.[42] In the *Refah* case, however, the advocacy of wearing the headscarf by leaders of the Refah party was not that important in the considerations of the Court that led to the conclusion that banning the party did not amount to a violation of the Convention.

In the *Sahin* case, the Court accepts the assessment of the Turkish authorities and the Turkish courts that the interference was not only based on the principle of secularity, but also on the principle of equality between men and women. In accepting this judgement, the margin of appreciation and the Turkish context play important roles. So the different assessments of the meaning of the scarf amount to a third factor explaining the rather wide margin of appreciation in this case.

Some concluding remarks

There is no single European standard as far as the relationship between state and religion is concerned. Moreover, there is no single European standard as far as the

[40] ECtHR 13 Feb. 2003, Appln No. 41340/98, *Refah Partisi* v. *Turkey*.
[41] ECtHR 29 June 2004, Appln No. 44774/98, *Leyla Sahin* v. *Turkey*.
[42] 'Aussi, semble-t-il difficile de concilier le port de foulard islamique avec le message de tolérance, de respect d'autrui et surtout d'égalité et de non discrimination que dans une démocratie tout enseignant doit transmettre à ses élèves', ECtHR 15 Feb. 2001, Appln No. 42393/98, *Dahlab* v. *Switzerland*.

organisation of the educational system is concerned. Therefore it is to be expected that the ECHR applies a rather wide margin of appreciation in those fields. That especially holds true for an interference with the freedom of religion in the public educational field.

In Germany, the Federal Constitutional Court even takes as a starting-point that there is no German standard; the various state legislatures have to decide for themselves. In France and Turkey, the principle of secularity is decisive, whereas in the Netherlands the right to freedom of religion of teachers and pupils is paramount.

This is to say that in France and Turkey the phenomenon of the headscarf is mainly judged on the macro-level of the relationship between state and religion; the restriction of the individual's right to freedom of religion is a consequence that has to be taken for granted. In the Netherlands, the phenomenon of the headscarf is mainly judged on the micro-level of the religious individual. The potential restriction of the neutrality of the state school is a consequence that has to be taken for granted.

This difference in approach is found even more clearly as far as the meaning of the scarf is concerned. In France and Turkey, the meaning is assessed on a macro-level. In Germany, the state legislatures may decide which meaning is decisive.[43] In the Netherlands, the opinion of the teacher that wears the scarf seems to be paramount.

The ECHR accepts an assessment of the scarf's meaning without the wearer's motivation been taken into consideration. That is an extra reason why the individual's right to manifest its religion has not much weight inside the public educational field.

[43] Langenfeld & Mohsen, *supra* n. 37, at p. 91.