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LEYLA V. EUROPE?

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TURKISH SECULARISM AND
FREEDOM OF RELIGIOUS EXPRESSION
IN THE ECtHR

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Summary

A number of ‘freedom of religion v. secular policies’ cases in the European Court of Human Rights (and, before 1998, the European Commission of Human Rights) emanating from Turkey suggest that the Court endorses Turkish secular policies at the expense of Turkish Muslims’ human rights. These cases include the high-profile case of *Leyla Şahin v. Turkey* that was decided in favour of the Turkish government by the Grand Chamber of the ECtHR on November 10, 2005.

This thesis discusses *Şahin* and four other related cases against the backdrop of, on the one hand, ECHR case law on religious freedom and secularism and, on the other hand, the nature and history of Turkey’s peculiar breed of secularism.

The right to freedom of religion is protected by the ECHR. It includes, *inter alia*, a right to manifest one’s religion openly in worship, teaching, practice and observance. In turn, the right to manifest a religion includes a right to public religious expression. Manifestations of religion in the public sphere are a highly contested issue in Turkey. The reason for this is an ongoing social-cultural conflict in that country, which involves secularists – mainly made up of an urbanised elite – and pious traditionalists of rural origin in a battle over ‘the soul’ of Turkey. Secularists, strongly represented in the educational sector, the bureaucracy, the military and the courts, seek to preserve a polity separating Islam from state affairs while retaining state control over religious matters. Over the decades, the military has on several occasions intervened in Turkish politics to this end; religious life and practices have been constrained; and Turkish courts have banned Islamist parties.

In all five ECHR cases examined, the Turkish government motivated the measures complained of as protecting the principle of secularism. This argument was accepted in all instances by the Convention organs. Secularism in Turkey is according to the ECtHR a principle in harmony with the rule of law and respect for human rights and democracy. The other side of the coin is the Court’s – less than generous – approach to Muslims’ right to manifest and express their religion. Islamic manifestations and expressions were valued low and interpreted as potential threats to secular and democratic values. In the view of the Court, these threats went a long way to justify limitations on religious rights. When it came to assessing such threats, more often than not, the Court and Commission accepted the Turkish government’s assertion of facts uncritically without conducting sufficient European supervision. There is thus a tendency on the part of the ECtHR to ascribe to, or at least implicitly accept, the secularist description of reality and, in the process, grant the Turkish government an excessively wide margin of appreciation.

Based on this, the thesis argues that the Court has taken Turkish secular policies for something it is not, i.e. democratic and in line with human rights requirements. Furthermore, the Court has a tendency to mistake Islam for Islamic fundamentalism. This tendency might be due to a Judeo-Christian bias in the Court and a resultant lack of awareness as to how Islam is manifested.

Preface

I would like to thank my tutor Karol Nowak for his valuable input and optimistic support. I would also like to extend my gratitude to my parents.

Abbreviations

ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11. (Originally signed in Rome, November 4, 1950.)
ECmHR	European Commission of Human Rights. (In operation from 1954 to 1998.)
ECtHR	European Court of Human Rights. (Established in 1959.)
NSC	National Security Council of Turkey (Established by the General Staff after the 1980 Coup.)
TCC	Turkish Constitutional Court

1 Introduction

On November 10, 2005, the Grand Chamber of the European Court of Human Rights in Strasbourg ('the Court' or 'ECtHR') finally handed down a judgment on the merits in a religious dress case. In *Leyla Şahin v. Turkey* the Grand Chamber confirmed the decision of the lower Chamber, saying that the prohibition to wear the Islamic headscarf in Turkish universities did not constitute a violation of religious freedom in Article 9 or any other provision of the European Convention on Human Rights and Fundamental Freedoms ('the Convention' or 'ECHR').

Şahin was not the first Strasbourg decision involving Turkey, Islam and the right to religious expression to disappoint Muslim applicants. In *Karaduman v. Turkey* from 1993 a student was not allowed to graduate from the Ankara University because she refused to submit a photograph of herself bareheaded. The European Commission of Human Rights (hereinafter 'the Commission' or 'ECmHR') rejected her claim on the ground that her Article 9 rights had not been interfered with. Ten years later, in *Refah Partisi v. Turkey*, in which the Grand Chamber accepted the dissolution of an Islamic political party, it also stated that in a democratic society limitations on the manifestation of religion, such as wearing an Islamic headscarf, may be legitimate if the exercise of that freedom clashes with the aim of protecting the rights and freedom of others, public order and public safety.¹

In Turkey the issue of religion and thereby religious freedom is highly sensitive. *Şahin* and the other cases expose a fundamental ideological rift in Turkish society; that between an urban ultra-secular elite – at times called 'white Turks' – and a class of pious traditionalist Muslims of mostly rural origin. The secularists – strongly represented in the political and military leadership, the administration, the courts and the educational institutions (but not the Government, *nota bene*²) – fear an Islamisation of Turkish society and the introduction of *sharia*. Some call it secularist paranoia, but clearly there are Islamists in Turkey aspiring to, in the words of the Court, 'impose on society as a whole their religious symbols and conception of a society founded on religious precepts'.³ However, even though Turkey since 2004 is headed by a mildly Islamist AK-Party government, little has been done to tamper with the secular orientation of the Turkish state.⁴

It seems the ECtHR has now inherited the problem, and in that process – it is not unfair to say – endorsed the secularist outlook on reality. The *Şahin* decision, echoing the *Refah* one, portrayed the principle of secularism as 'one of the fundamental principles of the Turkish state', 'consistent with

¹ *Refah Partisi and others v. Turkey*, 13 February 2003, § 92, reiterating the admissibility decision in *Dahlab v. Switzerland*, 15 February 2001.

² Even though, ironically, during the proceedings of the *Leyla Şahin* case, the new 'Islamist' AK Party government took office. Arguably for the first time in the Court's history, leading figures of the Government, including the Prime Minister, criticised the Court for deciding in favour of the Government. See Altıparmak and Karahanogullari, 2006, at 269.

³ *Ibid.* n. 1, §§ 107-8.

⁴ *Erdogan's dilemma; Turkish politics*. The Economist London: Mar 31, 2007.

the values underpinning the Convention’ and ‘in harmony with the rule of law and respect for human rights...[and] necessary to protect the democratic system in Turkey’.⁵ Manifestations of the Islam, such as wearing an Islamic headscarf, on the other hand, were depicted as a threat to that principle.

The Court’s tendency to reject claims made by Muslim applicants under Article 9 or related provisions and its apparent soft spot for Turkish secularism merit scrutiny. The mere suspicion that Turkey’s Majority Muslim population is not given a fair break in Strasbourg and that the country’s particular breed of secularism, which could be labelled militant and has contributed to Turkey’s dubious track record on democracy, is granted unwarranted respect at the expense of human right and fundamental freedoms is alone a good reason for that.

Needless to say, a failure of the Court to see Turkey for what it is could not only have a negative affect on ordinary Muslims’ right to freedom of religion, but also play in the hands of those fundamentalist elements in Turkey who benefit from being able to portray Islam as oppressed and Muslims as the unwanted stepchildren of Europe.

Is the Court’s take on Islam and Turkish secularism compatible with its case law under Article 9? Or has the Court mistaken Islam for Islamic fundamentalism and Turkish secularism for secular democracy?

1.1 Purpose and Delimitations

The overall purpose of this thesis is to study recent case law of the European Court of Human Rights on freedom of religion emanating from Turkey, especially *Leyla Şahin v. Turkey*. I argue that two factors stand out in determining and explaining the outcomes of these cases. These two factors are, one, the Court’s inadequate examination of the nature of Turkish Secularism and, two, its lacking understanding and knowledge of the ways in which Islam is manifested. Concerning the second factor, it should be noted that already the fact that the Court expresses opinions on how a religion is ‘normally’ manifested is dubious. However, since it does, it is even more important that the Court acquires proper knowledge on the matter.

The area of study of this thesis is naturally delimited by the subject matter of the cases brought to the European Court of Human Rights emanating from Turkey. In broad terms, therefore, most examples concern the right to religious manifestation found under Article 9 on freedom of thought, conscience and religion, and touches on other provisions only when necessary to shed light on issues relating to freedom of religion.

1.2 Material and Method

This thesis, in all aspects, sets out from five cases decided in the European Commission and Court of Human Rights. These are *Yanasik v. Turkey*⁶ and

⁵ Here in the words of *Leyla Şahin v. Turkey*, 10 November 2005, § 114.

⁶ *Yanasik contre la Turkie*, 6 January 1993. (Only available in French in Hudoc.)

*Karaduman v. Turkey*⁷, both from the European Commission of Human Rights, and *Kalaç v. Turkey*⁸, *Refah Partisi and others v. Turkey*⁹ and *Leyla Şahin v. Turkey*¹⁰ from the European Court of Human Rights. These cases all have in common that they – although from varying perspectives – deal with the relationship between secular policies and religious rights. *Şahin* and *Refah Partisi* were chosen for rather obvious reasons; they are both recent, much discussed and decided by the Court sitting *in plenum*, i.e. by the Grand Chamber. *Karaduman v. Turkey*, treating a similar subject matter as *Şahin*, provides a useful historical perspective on the headscarf issue since it was decided some 12 years earlier than *Şahin*. *Yanasik v. Turkey* and *Kalaç v. Turkey*, decided by the Commission and Court respectively, serve as representatives of the great number of cases pertaining to religious freedom of military service personnel in Turkey. The reasons for which these five cases have been chosen will be further accounted for below in the introduction to chapter four.

The five selected cases will be analysed contextually against the backdrop of the history and nature of Turkish secularism, and according to traditional legal method as reflected in the ECHR system. The latter analytical method is executed through interpretation of the Convention provisions according to recognised principles described in chapter 2.4, and recourse to the Convention organs' established case law on religious freedom.

When referring to Turkish case law, I have, due to lacking skills of Turkish, relied solely on citations and quotations in the Strasbourg case law.

1.3 Outline

Chapter two introduces the concepts of religious freedom and 'secularism' in the context of the Convention and its Article 9. It also includes an overview of the, for this thesis relevant, principles governing interpretation of the Convention.

Chapter three gives an historical outline of the nature of Turkish secularism and the Turkish state's general approach to religion and religious liberty.

Chapter four gives an account of how 'religious rights versus secular policies'-cases emanating from Turkey have been dealt with by the Court (and Commission in some instances). Some emphasis will be given to the recent Grand Chamber cases of *Refah Partisi and others v. Turkey* and, especially, *Leyla Şahin v. Turkey*.

Chapter five compares the Court and Commission's construction of Turkish secular policies with their own case law on religious freedom and 'reality', and argues that the Convention organs have misinterpreted the Turkish secular system and, in that process, undervalued Islamic religious manifestations with detrimental effects for Turkish Muslim applicants.

Chapter six contains some concluding remarks.

⁷ *Karaduman v Turkey*, 3 May 1993.

⁸ *Kalaç v. Turkey*, 1 July 1997.

⁹ *Refah Partisi and others v. Turkey*, 13 February 2003.

¹⁰ *Leyla Şahin v. Turkey*, 10 November 2005.

2 Article 9 of the ECHR

The European Convention on Human Rights and Fundamental Freedoms contains three provisions on 'religion'. Article 9 provides the general right to religious freedom paired with the freedom of thought and conscience. Article 14 prohibits discrimination based on, among other grounds, religion. Article 2 of the First Protocol gives parents the right to choose the religious or ideological orientation of their children's education. On top of this, it is not unusual that cases involving religion are decided under Article 8 on the right to privacy, Article 10 on the freedom of expression or Article 11 on the freedom of peaceful assembly and association. For the understanding of the concept of religious freedom under the Convention, however, Article 9 is the key provision. It is, so to say, the *lex specialis* to Articles 8, 10 and 11 on matters confined to the area of religious freedom.¹¹ It is therefore useful to study closer the basic principles of its application before proceeding.

2.1 The Text and Structure of the Article

Article 9 of the European Convention on Human Rights reads:

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.

The Article makes a distinction between the general freedom of thought, conscience and religion on the one hand and the right to freedom of manifestation of religion or belief on the other hand. This structure is a result of the idea that beliefs and actions are two separate and distinguishable notions. The latter is qualified by Article 9(2) and may therefore be limited if it is necessary in the public interest. The general freedom of thought, conscience and religion is accordingly absolute in the sense that it may not be limited according to Article 9(2). The prime aim of Article 9 is thus to protect the *forum internum*, or the inner life, of the individual.

A second important point is the fact that the second sentence of Article 9(1) on the right to manifestation only relates to 'manifestations of religion or belief', not to manifestation of other patterns of thought or conscience. The latter is instead covered by the general right to freedom of expression found in Article 10 of the Convention. Expressions of a religious character that do not qualify as manifestations for the purpose of Article 9 also fall

¹¹ The *lex specialis* aspect of Article 9 and its relation to Article 10 on freedom of expression will be further discussed below in chapter 2.1.

under Article 10. ‘Manifestation’ is thus, in the language of the Convention, reserved for religion or belief. This means that religion or belief can be manifested *and* expressed, whereas ‘thought’ or ‘conscience’ can only be expressed. Danelius points out that in freedom of expression cases Article 9 should be seen as *lex specialis* to Article 10 in cases concerning manifestation of religion or belief.¹² Article 9 cases therefore often presuppose some definition of ‘manifestation’.¹³

2.2 The Freedom of Thought, Conscience and Religion

When it comes to defining the freedom afforded by Article 9, the wording of the Convention is not very helpful. According to the text, the right to freedom of thought, conscience and religion includes ‘freedom to change one’s religion or belief, and freedom, either alone or in community with others and in public or private, to manifest one’s religion or belief, in worship, teaching, practice and observance’. The use of the word ‘includes’ in the text of the Convention and the case law of the Court and Commission indicate that the list is not exhaustive, and that the enumerated elements are but part of a wider scheme of protection.

Two fundamental questions must be asked to understand the reach of the rights provided in Article 9. Firstly, which rights are absolute, in other words protected independently from the right to manifestation, and secondly, what does a right to manifest a religion or belief consist in? This is essentially a question of drawing a line between the beliefs *per se*, and their expression; a distinction not always easy to make. A further complication is, as has been pointed out above, that not all actions of an individual that is motivated by religion or belief qualify as a ‘manifestation’ for the purpose of Article 9.

2.2.1 The Distinction between the ‘Inner’ and ‘Outer Sphere’

The Court and Commission has stated, and then echoed many times, that ‘Article 9 primarily protects the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*’ (emphasis added).¹⁴ This would in plain English include a right to hold, maintain and change personal preferences in all fields of inner life: thought, conscience and religion. This right is, under most circumstances and for good reasons, taken for self-evident. Still, it might be difficult to envisage what such a right would mean in practice. How far must a state go to be considered to tamper with the inner sphere of an individual in a way that is in violation of the Convention? Some ground rules are in place. To start with, it is forbidden for a state to pursue an aim of indoctrination or so-

¹² Danelius, 2002, at 306.

¹³ The question of what constitutes a ‘manifestation’ will be dealt with under chapter 2.2.2.

¹⁴ This specific quotation is taken from the admissibility decision in *C v. the United Kingdom*, 15 December 1983.

called brainwash. The state also has a positive obligation to protect from indoctrination by third parties. A person is protected from being subjected to actions aimed at changing his mind against his will, even in cases where these actions are non-violent.¹⁵ The threshold is however not so low as to include advertisement or normal political campaigning.

A related issue that has attracted some attention in the Strasbourg institutions is the right to be free from criticism against one's beliefs and the corresponding positive obligation on the state to prevent such criticism. Such a general right/obligation does not exist.¹⁶ However, a positive obligation for the state to protect the religious sensibilities has been developing in the Court, at times at the expense of other freedoms, such as freedom of expression or indeed the right to manifest religion or belief. The idea is that, should the criticism amount to a threat to the freedom of thought, conscience or belief of the exposed person, then there will be an obligation for the state to prevent it.¹⁷ A state may also protect its subjects from 'improper proselytism' according to the *Kokkinakis case*.¹⁸

Another question is whether the freedom of thought, conscience and religion protects a person from being forced by the state to act in a manner contrary to his beliefs. Malcolm Evans points out that the right to deny fulfilling a civic duty for religious reasons is considered a manifestation, and thus pertaining to the *forum externum*.¹⁹ That would, of course, mean that that right might be limited under certain circumstances. Carolyn Evans notes, however, that the point at which forcing a person to act against his conscience or belief amounts to indoctrination, and thus interfering with the *forum internum*, is far from self-evident.²⁰ Danelius says that it is in most cases impossible to base a right to exemption from a normal civil duty (such as military service, partaking in pension systems or taxpaying) on Article 9.²¹ The fact that Article 9(2) might be invoked in these cases makes it even less likely that the imposed duty will be in violation of the Convention. When it comes to duties that are results of a person holding a position or an employment in the state bureaucracy, e.g. dress codes or requirements to accept working on religious holidays, these are arguably not in violation of the Convention.

The Convention organs have in principle accepted state churches as compatible with the Convention. The question is rather to what degree a state can actively promote one religion by assisting a church in a way that puts inappropriate pressure on non-adherents.²² It should however be noted that states do not always maintain an influence over churches in order to promote the religion the church represents over other religions, it may also seek to control and restrain social forces that the church and its members constitute. Therefore it is also meaningful to address the question of how

¹⁵ *Kjeldsen, Busk Madsen and Pedersen v Denmark*, 7 December 1976, § 53.

¹⁶ *Church of Scientology and 128 of its members v. Sweden*, 14 July 1980. See M. Evans, 1997, at 295 and 301, and C. Evans, 2001, at 70.

¹⁷ Cf. *Wingrove v. the United Kingdom*, 22 October 1996.

¹⁸ *Kokkinakis v Greece*, 25 May 1993, § 48.

¹⁹ M. Evans, 1997, at 284.

²⁰ C. Evans, 2001, at 73.

²¹ Danelius, 2002, at 299.

²² *Ibid.* n. 20, at 80.

involved a state may be in the internal affairs of a state church before it threatens the freedoms of the church's own members.

To sum up, it seems that the general right to freedom of thought, conscience and religion is limited in reach. It is exercised exclusively in the *forum internum*. The Court has taken the position that most inconveniences, disabilities and criticisms resulting from a personal belief do not intervene with the inner sphere, and are thus not an interference with the general freedom in Article 9(1).²³

2.2.2 The Right to Manifestation

Considering the narrow scope of the general freedom of thought, science and religion granted by the Court, the right to manifest religion or belief constitutes an important element of Article 9, even though it is subject to restrictions in the second subparagraph. Not all patterns of thought or ideas may be manifested in the words of the Convention, and not all expressions or actions that are motivated by a religion or belief are considered 'manifestations'. So which actions actually qualify? To find out let us first look at which convictions may be manifested, and then what constitutes a 'manifestation'.

The reference not only to 'religion' but 'religion or belief' in the second sentence of Article 9(1) makes it clear that the drafters of the Convention meant not only to protect manifestations of religion but also of other forms of convictions and philosophies. This has been confirmed in ECmHR case law.²⁴ There is therefore no reason to discuss the boundaries of 'religion' independently; the only relevant distinction is that between beliefs, on the one hand, and other patterns of thought or conscience, on the other.

The text of the Convention gives little guidance as to what qualities a conviction must possess to fall within the scope of 'religion or belief'. The Commission and the Court were obviously left with the task of finding a workable definition.²⁵ Both have dodged the highly controversial²⁶ issue on several occasions.²⁷ Neither of them have developed a generally applicable 'test' to decide what constitutes 'religion or belief' in the meaning of the Convention and accordingly there exists no general definition.²⁸ Nevertheless, the Court has not accepted any set of ideas or opinions to fall within the scope of protection. It must 'attain a certain level of cogency, seriousness, cohesion and importance'.²⁹ Vague notions are not enough.

Determining what constitutes a 'religion or belief' is thus not an easy call and is bound to produce difficult borderline cases. It is true, both when it comes to religious beliefs and beliefs of non-religious character, that it

²³ Ibid. n. 19 at 304.

²⁴ Cf. the Commission in *Arrowsmith v the United Kingdom*, 16 May 1977, which was later followed up by the Court in the case of *Campbell and Cosans v. UK*, 25 February 1982, which at § 36 equated 'convictions' to 'beliefs'.

²⁵ C. Evans, 2001, at 51.

²⁶ Tahzib, 1996, at 165-90 and *ibid.* n. 25, at 51.

²⁷ *Ibid.* n. 25, at 55f. On many occasions this has been dealt with by moving swiftly to questions raised under Article 9(2).

²⁸ Ovey, 2006, at 303.

²⁹ *Campbell and Cosans v. UK*, 25 February 1982, § 36.

helps if the applicant can persuade the Court that the conviction, which he or she defends the right to manifest, falls within one of the accepted and well-established belief-systems. Islam³⁰, together with its traditional world religion peers³¹, has cleared the bar effortlessly, whereas less mainstream creeds such as Druidism³², Jehovah's Witnesses³³, and Scientology³⁴ have only just made it. Among non-religious belief-systems, atheism³⁵ and pacifism³⁶ have been deemed worthy of protection. Scholars are disagreeing whether the Commission meant to accept Nazism as a 'belief' in a case from the 1960s.³⁷ The fact that it continued to Article 9(2) without considering the threshold of 9(1) at least implies this result, although it might just have been a way to duck a contentious issue.

Claims based on assertions of private beliefs which are not backed by a membership of or affiliation to any well-established or even known belief-system or association of any kind are likely to fall outside of Article 9.³⁸

The second question is thus what constitutes a 'manifestation'. This is particularly difficult when it comes to philosophical beliefs such as atheism or pacifism, since manifestations of such beliefs have a tendency to look very much like an expression of an individual's conscience not protected by Article 9.³⁹ The Convention states that everyone is granted a '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'. 'Alone or in community with others' and in 'public or private' is not meant to leave a choice to the state but to the believer. He has a right to choose how he manifests his beliefs. The second limb of Article 9(1) implies both a positive and a negative right to manifest a religion. There is thus a right not to be coerced to exercise any element of religious practice. An ongoing debate concerns whether such coercion would violate already the first limb of Art 9(1). In any case, it is hard to imagine a scenario where it would be justified with reference to the public interest to force people to participate in any religious activity.⁴⁰

There are four types of manifestation enumerated in the text: 'worship, teaching, practice and observance'. The case law suggests that this list is

³⁰ *Karaduman v Turkey*, 3 May 1993.

³¹ *Knudsen v. Norway*, 8 March 1985; *D v. France*, 12 December 1983; *ISKCON and others v. the United Kingdom*, 8 March 1994; and *X v. the United Kingdom*, 12 March 1981. See further Ovey, 2006, at 303.

³² *Chappell v UK*, 30 March 1989.

³³ *Kokkinakis v. Greece*, 25 May 1993.

³⁴ *Pastor X and the Church of Scientology v. Sweden*, 5 May 1979.

³⁵ *Angelini v. Sweden*, (dec.), no 1041/83, 51 DR (1983) (not found in Hudoc), and *Le Cour Grandmaison et Fritz v. France*, 6 July 1987.

³⁶ *Arrowsmith v. UK*, 16 May 1977.

³⁷ *X v. Austria*, 15 October 1981. See further C. Evans, 2001, at 56.

³⁸ M. Evans, 1997, at 292.

³⁹ *Ibid.* n. 38 at 286.

⁴⁰ See for example *Buscarini, Della Balda and Manzaroli v. San Marino*, 18 February 1999, in which it was held that requiring two members of the San Marinese parliament to take a religious oath on the Gospels was tantamount to forcing them to swear allegiance to a particular religion, a practice that could not be considered compatible with the general and absolute freedom of religion in Article 9(1), no matter the nature of the aim pursued by the Government.

exclusive. A reason for this is arguably the open-ended character of ‘practice’, which tends to focus the debate on how widely this term should be interpreted rather than on trying to add new categories of manifestations.⁴¹ Not surprisingly, thus, whereas observance, worship and teaching have quite obvious meanings, the scope of ‘practice’ has been more disputed. ‘Worship’ and ‘observance’ are taken to mean those manifestations that are immediately related to a religion or belief, such as holding mass and praying etc. ‘Teaching’ is not restricted to teaching among the already salvaged; there is also a right to spread the message of one’s religion to non-believers.⁴² It does not, however, include what the Court chose to call ‘improper proselytism’ in the *Kokkinakis* case.⁴³ According to that case, proselytism would be improper if it included manipulating people in distress or using violence or brainwash.⁴⁴

The difficulty of defining the term ‘practice’ centres on the question whether the right to manifestation of a religion or belief covers only actions that are dictated by religion or belief, or if it covers all behaviour that is motivated by it. According to a review by C. Evans⁴⁵, the general trend in the Court and Commission is, though there have been exceptions, to interpret ‘practice’ to include only behaviour that is ‘necessary’ for the exercise of a religion or belief. This approach has been called the *necessity* or *Arrowsmith* test after the leading Commission case in which it was first developed.⁴⁶ The test presupposes that someone has to determine what is necessary for the fulfilment of religious or convictional duties. The Court does not accept, as facts, an applicant’s claim of necessity. Instead it applies an objective approach. In the *Valsamis* and *Efstratiou*⁴⁷ cases, for example, a group of students and their parents claimed that it was against their religion as Jehovah’s Witnesses for the students to participate in a Greek National Day parade. The Court dismissed their claim without presenting any evidence to support its position, stating that it could see nothing in the march that was against their religion. Evidence of necessity seems to be a general problem area in the Court.

The *Arrowsmith* test is normally not used in cases where the applicants’ claim to have had their right to manifestation as worship, observance or teaching infringed. In these cases the applicant only have to show that there has in fact been an interference.

2.2.3 Restrictions on the Right to Manifestation of Religion or Belief

A state does not have to accept all behaviour that qualifies as ‘manifestation’ for the purpose of Article 9(1). Article 9(2) opens up for

⁴¹ C. Evans, 2001, at 106.

⁴² *Kokkinakis v. Greece*, 25 May 1993, § 13.

⁴³ *Ibid.* n. 42 at § 48.

⁴⁴ For the corresponding right to be free from indoctrination and ‘improper proselytism, also from third parties, see above 2.2.1.

⁴⁵ *Ibid.* n. 41 at 119.

⁴⁶ *Arrowsmith v. the UK*, 16 May 1977.

⁴⁷ *Valsamis v. Greece*, 27 November 1996, and *Efstratiou v. Greece*, 27 November 1996.

limitations on the right to manifestation of religion or belief in cases where ‘such limitations [...] 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.’ This is an acknowledgement of the fact that the external expressions of religions or beliefs is not the only value worth protecting for a pluralistic and democratic society, and must sometimes be weighed against other human rights and freedoms.

When a state claims that an interference with the right to manifest a religion under Article 9(1) can be justified under Article 9(2), the Court will normally examine the claim in three stages. First, it examines whether the interference is ‘prescribed by law’. For this purpose the restriction must have some basis in national law, be accessible and adequately specified so its application can be foreseen. Second, it considers whether the limitations serve any of the aims – which are exclusive – provided in the Article. In this context it should be mentioned that Article 18 of the Convention states that the restrictions must only be applied for the purpose or purposes for which they have been prescribed. Third and last, the Court sets out to determine whether, considering all relevant circumstances, the limitation is ‘necessary in a democratic society’. This last step consists in the Court examining whether the interference, on the particular facts of the case, is ‘proportionate to the aim pursued’ and responding to a ‘pressing social need’. In this process the Court does not substitute its judgment for the state’s, but considers if the assessment of facts conducted by the state is acceptable, in other words, if the reasons given are ‘relevant and sufficient’. In connection with the assessment of necessity the Court and Commission have developed the doctrine of ‘margin of appreciation’ described below in chapter 2.4.2.

The aims for which limitations are legitimate are fewer in Article 9 than in any of the other Articles sharing its two subparagraph-structure, i.e. Article 8 (the right to privacy), Article 10 (right to freedom of expression), and Article 11 (right to peaceful assembly and association). Article 9(2) does, for example, not provide for limitations in the interests of ‘national security’ or ‘territorial integrity’, as does Article 10(2). This should suggest that the possibilities for restrictions are fewer for freedom of religion than for freedom of expression. The Court and Commission have, however, interpreted the wording of Article 9(2) broadly, so there is not a big difference between the application of that subparagraph and 10(2).⁴⁸

2.3 Secularism and Democracy under the Convention

2.3.1 What is secularism?

To ask how the European Convention on Human Rights values ‘secularism’, or what approach the Court has to the principle is of no use until we agree on what ‘secularism’ is. To start with the term ‘secularism’ is not one

⁴⁸ See the discussion in C. Evans, 2001, at 137.

uniform concept. It suggests different things depending on the context in which it is used. Normally, ‘secularism’ implies the end-result of the historic process of secularisation, which can in turn be described as a decrease in significance of religious ideas, symbols and institutions in society and culture. Such a process consists of both a separation of state and church, and a decline in the role of religion as source of self-identification of the individual, the group and the society as a whole. In this sense secularisation has two dimensions. Keyman⁴⁹ describes the first of these as an objective social-structural process in which ‘religion is removed from the authority and legitimacy of the state.’ France, by this standard, is an example of a strictly secular republic where the state ‘does not recognise, salary or subsidize any religion’. On the other hand Ireland’s constitution establishes a strong bond between the Irish state and the Catholic creed.⁵⁰ In its other dimension secularisation is a subjective-cultural process by which a growing number of members of society learn to view the world ‘through secular reason rather than traditional religious codes’.

Secularism is, thus, among other things, a feature of a political system indicating a specific approach to religion. It is secularism in this sense that the Court has had to deal with in its case law, and we will return to that aspect of secularism shortly. However, it might be useful to consider for a moment the historic importance of secularism for the development of the modern human rights regime in Western Europe. This may provide some deeper insights into the approach to secularism in the ECHR case law.

It may be argued with some success that Christianity gave birth to the notions of human individualism, moral equality, belief in free will and ‘human dignity’ (‘every human being is sacred’), and thus laid the philosophical foundation of human rights thinking. Many have done so.⁵¹ But, many more would rather argue that the concept of human rights and freedoms developed in tandem with the secularisation of Western Europe; an argument that does not, however, rule out that Christian precepts contributed. In 16th century Europe, writers started to question with some success the intimate relationship between state and society, and argue for the existence of a private domain where the individual had a legitimate claim to certain fundamental freedoms – one of the most important being religious liberty.⁵² This development coincided with a development in which many European states – as a pragmatic response to the religious minorities that had occurred all over Europe as a result of the Reformation – took the first steps in the direction of a separation of state and religion. The Enlightenment in the 18th century further moved European societies towards a shift from religious to secular state culture, from communitarianism to individualism, and from status to contract.⁵³ The independent authority of the state freed from religious authority, the autonomy of the individual that followed suit, and the prevalence of secular reason and rationalism that came as a result opened up for, and became the basis of, a modern

⁴⁹ Keyman, 2007, at 218.

⁵⁰ Nieuwenhuis, 2005, at 499f.

⁵¹ See e.g. Stark, 2005, and Perry, 1998.

⁵² Ibid. n. 50, at 499.

⁵³ Raday, 2003, at 663.

understanding of human rights. Israeli historian Arieli, quoted by Raday⁵⁴, comments on the importance of secularism:

[t]he Secular character of the normative system embodied in human rights doctrine is essential to its comprehension. All its premises, values concepts and purposes relate to the homocentric world and to ways of thought freed from transcendentalist premises and from the jurisdiction of religious authority. And so, the development of the doctrine of human rights is inseverably connected to the process of secularisation of Western society [...]

Secularism was thus a central, highly esteemed value in human rights thinking already at the outset of the modern era, beginning after World War II. The history of the modern human rights protection (i.e. international human rights law) for religious freedom reinforces that impression. In that process the dominant Catholic and Protestant churches of Europe did not engage. By Christian default, as Tore Lindholm writes, international protection became a ‘pioneering achievement of secular international *realpolitik*.’⁵⁵ While mainstream Christian institutions did not support the process, the great importance that many Western politicians involved in the drafting of the ECHR attached to their personal Christian beliefs made them realise the value of a formalised international protection. However, their perspective was human rights oriented and thus secular-rational, and prompted them to see religious liberty as a protection of individual belief against the interference of state and church, which through history had done their fair share of incitement to religious violence and persecution of religious dissidents. The dominance of secular thinking is, as a result, reflected by the fact that non-theistic/philosophical convictions are formally ensured the same protection within the Council of Europe system as are theistic convictions. This is so for Article 9 of the Convention, but also Article 2 of the First Protocol includes the right of parents to ensure that their children’s education is in conformity with their conviction, whether it is of a religious *or* philosophical nature. It can thus be concluded that secularism is at the heart of the Convention system and has formed the culture surrounding it.

In the Court’s day-to-day operation ‘secularism’ is of course *not* first and foremost an abstract philosophical idea, but a state policy to which the judges have to relate. Secularism as a feature of a political system naturally comes in several varieties. But they all have in common that they indicate a separation of the competence of religion from that of the state. They also entail a distinction between the public and private sphere. Religion in any secular system is regarded as a private matter. The difference between a strict and a less strict secular system can therefore be said to lie in where the line between public and private is drawn. A fundamentalist secularism restricts the private sphere narrowly, possibly to private homes and places of worship, whereas a liberal secularism gives more space to exercise one’s religion.⁵⁶ Similarly, secular systems may differ in the respect it shows for people’s choice of religion as a part of a well-lived life.

⁵⁴ Ibid. n. 53, at 663.

⁵⁵ Lindholm in Lindholm *et al*, 2004, at 30.

⁵⁶ Plesner, 2005, at 1f.

2.3.2 'Secularism' in Strasbourg

A complicating factor when examining the Convention organs' approach to secularism is that the Court and Commission have used the term 'secularism' or 'secularity' scarcely in their own argumentation. Concerning the formal relationship between state and religion, it is clear that even a system providing for a state church is not, as such, against the Convention.⁵⁷ However, the Court and Commission have on several occasions mentioned the state's duty as a neutral and impartial organiser of religion, and pointed at that duty's importance for public order, religious harmony and tolerance in a democracy.⁵⁸ According to *United Communist Party of Turkey v. Turkey*⁵⁹ it is the state's duty to ensure mutual tolerance between opposing groups. This would, of course, also encompass religious groups. Citing *Serif v. Greece*⁶⁰ in *Leyla Şahin*, the Court stated that it was not the role of states to remove the cause of tension between competing groups in society by eliminating pluralism, but to ensure that they tolerate each other. The Court continued describing a 'democratic society' as characterised by pluralism, tolerance and broadmindedness. Accordingly a democracy does not simply mean that the majority view prevails. A balance must be found between interests of individuals and minorities, and those of the majority or other influential groups. Balancing various interests against one another might also involve limiting rights and freedoms guaranteed by the Convention.⁶¹

This said, when balancing the rights enshrined in the Convention against societal interests or other Convention rights, a state has a so-called margin of appreciation. In the case of religious rights, this margin varies with, among other factors, the nature of the manifestation restricted. Restrictions on 'observance and worship' are likely to be closely scrutinised⁶², but when it comes to restrictions on public expressions of a religious belief it is not obviously so. Instead, in the cases of *Karaduman v. Turkey*⁶³, *Leyla Şahin v. Turkey* and *Dahlab v. Switzerland*⁶⁴, it construed the margin quite widely. The Court motivates this by pointing out that 'it is not possible to discern [...] a uniform conception of the significance of

⁵⁷ Cf. *Darby v. Sweden*, 23 October 1990. However, the state must not promote its state church as has been shown in a number of Greek cases, i.e. *Kokkinakis v. Greece*, 25 May 1993, and *Manoussakis and others v. Greece*, 26 September 1996.

⁵⁸ *Leyla Şahin v. Turkey*, 10 November 2005, §107, and cases referred to there: *Manoussakis and others v. Greece*, 26 September 1996, § 47; *Hassan and Tchaouch v. Bulgaria*, 20 October 2000 [GC], § 78; and *Refah Partisi and Others v. Turkey*, 13 February 2003, § 91.

⁵⁹ *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 57.

⁶⁰ *Serif v. Greece*, 14 March 2000, § 53.

⁶¹ *Leyla Şahin v. Turkey*, 10 November 2005, § 108.

⁶² Cf. *Manoussakis and others v. Greece*, 26 September 1996, § 44.

⁶³ *Karaduman v. Turkey*, 3 May 1993.

⁶⁴ In *Dahlab v. Switzerland*, 15 February 2000, an admissibility decision preceding *Leyla Şahin*, the Court found a prohibition for teachers to wear the Islamic headscarf at work to be within the margin of appreciation, mainly because of the 'need to protect pupils by preserving religious harmony' specially with regard to the 'tender age of the children for whom the applicant was responsible as a representative of the State'.

religion in society' between, and within, European states⁶⁵, and that public expressions of religious belief will have different meaning and cause different reactions depending on time and context. Consequently, regulations on public expressions of religion will vary according to national traditions and the perceived need to protect public order and the rights of others. Therefore it must be left to national authorities to decide.

In *Leyla Şahin v. Turkey* the Court supports the opinion that the margin of appreciation in relation to public expressions of religious beliefs – an issue pertaining to Article 9 – should be held wide by citing two Article 10 cases: *Otto-Preminger-Institut v. Austria* and *Wingrove v. the UK*.⁶⁶ This is, in my opinion, a questionable reasoning. In *Wingrove v. the UK* the Court accepted restrictions on the propagation of material on the basis that it was blasphemous and constituted 'seriously offensive attacks on matters regarded as sacred by Christians'.⁶⁷ In *Otto-Preminger-Institut v. Austria* it found a seizure and forfeiture of a film, depicted by Austrian authorities as 'an abusive attack on the Roman Catholic religion', to be within the state's margin of appreciation.⁶⁸ Both cases, thus, dealt with restrictions on the freedom of expression meant to protect the religious feelings of others⁶⁹ (Article 10(2)) and not restrictions on religious freedom. However, the Court was of the opinion that the measures taken by the national authorities in the Austrian and UK cases were in the same 'sphere' as the headscarf ban in *Leyla Şahin v. Turkey*, thus justifying an analogy argument. To use these two cases to draw the conclusion that 'the margin of appreciation is relatively wide in relation to most Article 9 cases', as C. Evans does⁷⁰, seems to be a misconstrued conclusion.

The generally relaxed attitude shown by the Court towards states restricting religious freedom could also be questioned with starting-point in the Court's own appraisal of the value of religion and religious liberty. Notably, in *Kokkinakis v. Greece*⁷¹, the Court stated in the oft-cited paragraph 31 that the right to freedom of thought, conscience and religion in Article 9 was one of the foundations of a 'democratic society' within the meaning of the Convention. The Court continued, '[i]t 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.' If pluralism, which is 'indissociable' from democracy, really depends on religious freedom, then it should be harder to fit a restriction within the 'necessary in a democratic society'-criteria than merely to refer to national traditions, as the Court did in *Şahin*. Danelius also advocates a narrow margin of appreciation in issues relating to the right

⁶⁵ *Otto-Preminger-Institut v. Austria*, 20 September 1994, § 50.

⁶⁶ *Leyla Şahin v. Turkey*, 10 November 2005, § 109.

⁶⁷ *Wingrove v. the United Kingdom*, 22 October 1996, § 57.

⁶⁸ *Ibid.* n. 65, § 56.

⁶⁹ A questionable concept in itself, but outside the scope for this paper.

⁷⁰ C. Evans, 2001, at 145.

⁷¹ *Kokkinakis v. Greece*, 25 May 1993, § 31.

to religious manifestation, observing the how important a religious or ideological conviction may be for the individual.⁷²

Judging from the above, it cannot be said that ‘secularism’ *per se* is required by the Convention. But many of the features that we normally associate with it are, namely state neutrality, impartiality, and non-discrimination between different religious practises and religious communities. The state is obligated to promote tolerance as a superior goal of its policies in religious issues. In order to comply with the Court’s view on democracy, a secular polity must consequently *not* be detrimental to pluralism and religious tolerance, and must not take sides between competing religious groups. This seems to suggest that the Court endorses a policy towards religion that could be portrayed as a liberal version of secularism.

When the Court finally included ‘secularism’ in its own deliberations it seemed to continue on the path of endorsing a liberal adaptation of the concept. The case was *Refah Partisi and others v. Turkey*.⁷³

2.4 Some Interpretational principles

The most helpful – and most frequently used – ‘tools of interpretation’ are made up of the case law developed under each article of the Convention. However, in order to be able to assess the Court’s past decisions and judgments (i.e. case law) critically and – to a reasonable degree of probability – foresee its future positions in fields yet not covered in case law, it may be useful to have a basic notion of the general interpretational principles that should guide the application of the Convention. Especially since the Convention, including Article 9, is formulated in a broad manner.

Although the European Convention on Human Rights is an international treaty and should as such fall under general rules of interpretation found in international law, it is often said⁷⁴ that the Convention has certain special features and therefore merits a slightly different handling than just any multilateral agreement. These special features include obligating states to act in a certain manner towards all subjects under their jurisdiction. Another special feature is that the states’ conduct is subjected to an international system of protection, supervision and adjudication. The final interpretation of the rights is therefore decided not by the Parties themselves, but by an independent treaty body – the Court. Obviously the special features of the ECHR are consequences of the fact that it is a human rights instrument.

So, in what way should these special features affect the interpretation of the ECHR? Simultaneously with the development of case law on particular provisions of the Convention, the Commission and Court have also developed a framework of general rules of interpretation. To start with, it is of particular importance that the European Convention of Human Rights and Fundamental Freedoms is regarded as a whole. It must be interpreted so that no conflicts between rights occur. Every right should, as Danelius⁷⁵

⁷² Danelius, 2002, at 302.

⁷³ *Refah Partisi and others v. Turkey*, 13 February 2003.

⁷⁴ Ovey & White, 2006, at 40.

⁷⁵ Danelius, 2002, at 55.

puts it, be interpreted in a way that gives the Convention as a whole a reasonable meaning. Within the scope of this fundamental requirement the wording of the Convention will be interpreted according to a number of judge made principles.

2.4.1 ‘Object and Purpose’, Dynamic Interpretation and the Principle of Effectiveness

Interpretation according to the ‘object and purpose of the provision in the context of the Convention as a whole’ has, as Ovey and White point out, been the most influential principle applied by the Court.⁷⁶ Thus, in the *Wemhoff* case the Court stated that it was necessary to ‘seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties’.⁷⁷ This is a reflection of the special character of the European Convention on Human rights, mentioned above. The aim of a human rights instrument is to protect rights of individuals, as opposed to a ‘normal’ multilateral agreement for which the purpose is to establish rights and obligations for states. In a ‘normal’ treaty it might be justifiable, and uncontroversial, to adopt a restrictive interpretation, since that interpretation will apply reciprocally. In human rights treaties there are no such self-regulation driven by reciprocity since, ultimately, the rights-holders are not the contracting states but individuals living under the jurisdiction of these states.⁷⁸ This might seem simple enough, but it transforms the inevitable consequences of the interpretational principle ‘in light of its object and purpose’ into something much less flexible, since states can no longer claim the same ownership of the rights flowing from the treaty.

Another principle developed in case law is that of ‘dynamic interpretation’. This principle is essentially an acknowledgment that the Convention should be a living document and adjust with present-day conditions and developments in social and political attitudes in the Council of Europe area. The Convention was drafted and negotiated in the 1940s, a time whose predominant values, customs and taboos were most likely not in all aspects identical to those of the 1970s or of our time. Without deviating from the core values of the Convention, it is thus possible to reflect the developments of European society in decisions and judgments. The dynamic character of the rights shall, however, not be taken as to imply that the Court is free to invent new rights, only that it has a duty to develop the interpretation of those already present in the Convention and protocols. This dynamic approach to interpretation is also in line with the object and purpose oriented interpretation, discussed above. In conjunction the two

⁷⁶ Ovey & White, 2006, at 40.

⁷⁷ *Wemhoff v. Germany*, 27 June 1968.

⁷⁸ It might be argued that individuals are not immediate rights holders under international agreements, but only under national legislation that must in turn be in line with obligations undertaken by the States. Nevertheless, this does not change the object and purpose of the agreement, to establish respect and protection for human rights standards.

principles seem to suggest that the Court has some manoeuvre space to rule moderately progressively if it should find that appropriate.

Arguably a direct consequence of the application of the principle of dynamic interpretation is that references to *travaux préparatoires* are, as Danelius rightly points out⁷⁹, rare in the case law of the Commission and Court. This practice fits nicely into the text of the Vienna Convention on the Laws of Treaties, which in Article 32 classifies them as supplementary means of interpretation only.

The ‘principle of effectiveness’ instructs the Court to interpret provisions under the Convention and its protocols so that the rights are given the fullest weight and effect possible under applicable rules of interpretation. The Court’s way of expressing this is often to distinguish rights that are ‘practical and effective’ from those that are ‘theoretical and illusory’. This practice has been confirmed by the Court on several occasions and may, according to Ovey & White, be considered a principle of general application.⁸⁰

2.4.2 ‘Margin of Appreciation’

All Articles of the Convention sharing Article 9’s particular two-paragraph structure provides for interests of the greater societal good to be weighed against the rights of the individual. In assessing the proportionality of a state’s interference with a right, the Court has chosen to show a great measure of judicial deference and left the state some margin to decide how to best protect the rights set forth in the Convention. This is an outflow of the supervisory and subsidiary nature of the Court’s mandate and a reminder of the fact that the Court is not an ordinary court of appeal. This practice has no basis in the text of the Convention and has become known as the ‘margin of appreciation’.

Danelius identifies two main scenarios where the benefit of the margin has been given to governments. The first is where the application is based on allegations that a national court has assessed evidence erroneously, or has reached a materially incorrect decision. The other is cases where knowledge of local custom or national interests are vital for the assessment of the matter, and where, accordingly, national courts are better equipped to make a decision. In such cases the Court has often given the state party the benefit of the doubt, and has only intervened when the result has been clearly erroneous or inadequate⁸¹ – in other words outside the margin of appreciation. So the behaviour of states must fit within the margin of appreciation, which can therefore be said to be the outer bounds of the an adequate protection under the Convention.

The width of the margin varies from right to right and according to which aim is pursued with the interference. References to national security and the protection of moral, for instance, are likely to be very persuasive on the Court, since national organs should be best suited to assess these interests, and, one might add, would be controversial for the Court to

⁷⁹ Danelius, 2002, at 55.

⁸⁰ Ovey & White, 2006, at 32 n. 45.

⁸¹ *Ibid.* n. 79, at 57.

question. On issues where the Court feels it cannot find a uniform European approach, it has been keener on granting the states a wider margin of appreciation, than in cases where such a uniform approach does exist.

The margin of appreciation is in a way an exception from the ‘object and purpose’ and ‘effectiveness’ oriented approach of interpretation, since it does consider the states’ interests and does not allow for the most effectual interpretation in every instance. But it also lets the Court, as Ovey & White have it, adapt to ‘legal reality where there is scope for differential application of Convention provisions while retaining some control over State conduct’.⁸² Therefore the margin of appreciation might, after all, help the Court to be as effective as it can be; not in every particular judgment or decision, but in the sum of its influence on state behaviour.

⁸² Ibid. n. 79, at 54.

3 The Case of Turkey

Having dealt with the general rights and freedoms provided by the Convention in the field of religion and the corresponding obligations of states, it is now time to take a step back and study the factual background of the relationship between religion and state in the modern Republic of Turkey. Turkey is unique in that it is a large Muslim nation within the Council of Europe. True, nowadays there are other member states with a majority Muslim population, but none is so big – more than 70 million inhabitants – and none has been along since the signing of the Convention in the early 1950s. Another unique feature of Turkey is that it is at once Muslim *and* a secular democracy. An important factor in the understanding of present-day developments, in and out of courts, is how this rare combination came about.

3.1 An Introduction to Turkish Secularism

The Ottoman Empire had at the outbreak of World War I been regarded as the ‘sick man of Europe’ for about a hundred years. After the war, which the empire entered on the Central power’s side, it collapsed from its own weaknesses. Of the once so great empire, remained only a small area of land in Central Anatolia. However, a certain General Mustafa Kemal (after 1933 Kemal Atatürk) did not accept the conditions of the ensuing peace treaty. He gathered support for the cause and drove out the Greek occupiers, and forced the Western powers to give up their territorial claims in Anatolia and eastern Thrace. A Turkish state was proclaimed on the re-conquered lands in 1923.

The Ottoman government had based its claim to legitimacy in Sunni Islam. This is not to say that religion dominated the state-bureaucracy, rather the other way around; the Ottoman government established effective control of the *ulema*, the class of religious scholars, by turning them into state functionaries. In that way the state gave Sunni Islam a privileged status: It furnished the application of Islamic law and listened to Sunni Islam’s representatives in exchange for political legitimacy. In order to consolidate its power after 1923, the new ruling class needed a new basis of legitimacy distinct from the former.⁸³ In doing so Atatürk constituted the republic on what he called a ‘laicist-nationalist’ basis.

3.1.1 A Kemalist ‘Cultural Revolution’

The Kemalist elite – a westernised splinter fraction of the inhabitants of the republic’s territory – set out on a project to ‘fashion’ modern Turkey in its own image.⁸⁴ The Kemalists looked to the by then consolidated nation-states of Western Europe for inspiration. Atatürk meant that it was only through a nation-state of European model that ‘Turkey could [...] possess

⁸³ Denli in Lindholm *et al*, 2004, at 504.

⁸⁴ Keyman, 2007, at 220.

secularity and rationality, employ reason to initiate progress, and establish a modern industrial economy, thereby fostering the process of industrialization and modernization'.⁸⁵ At the time Turkey had not moved from agriculture to industry like most of Europe had – certainly not in comparison with the ten founding states of the Council of Europe, and the ideas of Enlightenment that had won great influence in Western societies had not done so in Anatolia. Thus, 'Western civilisation' and 'modernity' became the standards to which progress was measured in the young Kemalist republic. Accordingly, the nation-state was to be built on what the Kemalist saw as the foundation of Western success: Western secular reason and scientific rationality, instead of what Kemalists saw as traditional Ottoman Islamic backwardness.⁸⁶

So, from where the Kemalists stood religion was blocking the way of modernisation and progress. An ambitious reformation program was therefore initiated. In doing so they tried to, as Birtek and Toprak (cited by Denli⁸⁷) remark, achieve two things. First, they wanted to limit religion to a question of individual conscience – a sort of Christianised Islam – and, second, they tried to rewrite its language and subsume its institutions under state control. A wide range of measures pursued these aims. The Caliphate was abolished and its political and religious competences transferred to the new National Assembly, mystical orders were banned and traditional institutions for religious education were closed down. All education, including religious, was brought under the secular Ministry of National Education. Dress codes banning some religious garments – such as the fez – from the public sphere were introduced. In 1928 Islam was abolished as state religion.⁸⁸

However, the Kemalist elite understood that it could not, even in case it would have wanted to, eradicate Islam from Turkish society. It would stay there as a potential political and social force. Therefore, the secularist elite set out to reshape and modernise Islam. For this purpose the state had to retain control over religion. In this way Kemalist secularism perpetuated the Ottoman practice of state domination over religious matters. A 'Directorate of Religious Affairs' under the Prime Minister's office was put in charge of religious matters and the administration of religious foundations. The Directorate was then used as a tool to supervise and control religious activity, e.g. to appoint and dismiss imams. At one point the institution even tried to reformulate Islam's theological content.⁸⁹ Religious education was organised, as mentioned, through the secular Ministry of National Education. Turkish secularism, thus, transformed into 'laicism', i.e. a secularism that entails both the formal disestablishment of religion from the state *and* constitutional control of religious affairs. Actually, the measures mentioned in this sub-chapter neatly sums up what the early Kemalist elites

⁸⁵ Keyman, 2007, at 221.

⁸⁶ The Kemalist national narrative tends to describe the developments as if Atatürk and his supporters *brought* modernity to Turkey. However, this is not entirely true. Many of their reforms were a continuation of what had begun already during the Ottoman period. For example, secular courts had been set up during the 19th century.

⁸⁷ Denli in Lindholm *et al.*, 2004, at 504.

⁸⁸ *Ibid.* n. 87, at 505.

⁸⁹ *Ibid.* n. 87, at 505, n. 35.

understood by ‘laicism’, or *laiklik* in Turkish. It was an adaptation of the Western Enlightenment notion of secularism, which aimed at not only separating religion and state, but also retaining constitutional control of religious activity.⁹⁰ The principle of laicism was introduced in the Turkish constitution in 1937.

3.1.2 A Backlash for the Project of Laicism

The idea was that the laicist measures directed at removing religion from state affairs and containing Islam by bringing its institutions under the control of the state bureaucracy would, in turn, start off the process of subjective secularisation among the population and, thus, create a more progressive societal environment.⁹¹ But, rather than declining and fading, religion remained in Turkish society as a dominant ideology.⁹²

The multi-party system that was introduced in 1946 made it inevitable that also pro-Islamic ideas gained some influence. Even Atatürk’s Republican People’s Party had to make some concessions from its strict laicist policies. However, this did not help it to win the first free elections in Turkey that were held in 1950 (the same year that Turkey signed the ECHR⁹³). The Republican People’s Party lost power to the conservative Democratic Party, which repealed some of the laicist reforms, particularly within education. This government was eventually overthrown in 1961 by the Kemalist-dominated armed forces. The first truly Islamist party, the *Milli Nizam Partisi*, led by Erbakan, was founded in 1970, but banned after a military coup the following year, accused of anti-secular activities.

So, the Turkish armed forces had taken upon it to be the prime defender of Kemalist policies and Atatürk’s heritage. However, it had also successively taken on an increasingly right-wing profile. Social disturbances occurred in Turkish society during the 1960s and 70s as industrialisation and urbanisation had created a working class that organised itself, and demanded social and other rights. This eventually led to two new interventions by the Turkish army within a short period; one in 1971 and one in 1980. Particularly worth noticing, the latter coincided with a global and national trend of Islam penetrating into political life.

⁹⁰ Keyman, 2007, at 222.

⁹¹ Ibid. n. 90, at 221.

⁹² Ibid. n. 90, at 223.

⁹³ Notwithstanding the reactionary trend in Turkish politics the Kemalist attitude towards religion was clearly still going strong during the drafting process of the Convention. In a formal reply to the report of the Committee of Experts the Turkish expert commented on his countries policies: ‘Legislative measures relating to [...] the Moslem religious orders are in no way intended to place restrictions on the freedom of religion [...] It must, however, be pointed out that in the course of our history a number of attempts at reform and modernization have been frustrated by stubborn resistance on the part of certain persons or groups of persons who wished to keep the population in ignorance for their own ends [...] Turkey has therefore been obligated to start by abolishing the Moslem orders and their archaic institutions.’ The quote can be found in M. Evans, 1997, at 269.

3.1.3 The 1980 Coup; Setting a Standard for Laicist Policies in Modern Times

Political violence among extremists and economical crisis led up to the events of 1980. In September that year, the military under General Evren removed the democratically elected government from power. All political parties and unions were suspended, martial law imposed and thousands of people arrested. The Grand National Assembly was dissolved and replaced by the National Security Council ('NSC'), which was all-military. General Evren ruled, mostly under martial law, until 1989.⁹⁴

During the years of military rule following the coup, the Kemalist generals worked out and executed a plan to use religion as an ideological bulwark against the perceived growing threat from communism and other radical ideologies. Turkey stood firmly in the Western camp in the Cold War; it had been a member of NATO since 1952. This required a new official attitude towards religion.⁹⁵ Large investments were made in promoting and controlling Islam. In that way the strategy followed the principles of Kemalist laicism, developed in the early days of the Republic. The intention behind this was, as Denli, puts it, 'to elicit support of the Islamic loyalties of the population behind an authoritarian institutionalisation'.⁹⁶ The point was, as Denli correctly states, not to 'provoke extensive Islamisation'; the new Constitution of 1982 – worked out by the military junta and submitted to a popular referendum while the media and hundred of leading politicians were silenced⁹⁷ – provided strong protection for the republic's fundamental secular character, and afforded special protection for a number of laws meant to embody the principles of Kemalist laicism.⁹⁸ Further, the new Cabinet issued a number of regulations obliging state employees and female students to dress in an ordinary, sober and modern way. Notably, the new Constitution also referred to the rule of law, but failed to mention the wide-ranging powers vested in the presidency and the military leadership.

Since education was a central battlefield in the Kemalist secularisation project, it is significant to note that the military took effective control of the educational sector by instituting the Higher Education Council (HEC) in 1982. Since then university administration has been under the direct influence of the Armed Forces through the HEC. This body later issued the 1982 Circular banning the Islamic headscarf in lecture theatres that was mentioned in Şahin.⁹⁹

Even though General Evren and his NSC had not intended to strengthen

⁹⁴ Zürcher, 2004, at 279.

⁹⁵ Denli in Lindholm *et al*, 2004, at 506.

⁹⁶ *Ibid.* n. 95.

⁹⁷ *Ibid.* n. 94.

⁹⁸ One of which was proscribing the hat as a particularly suitable headdress for gentlemen. See *ibid.* n. 95, at 506 n. 38.

⁹⁹ *Leyla Şahin v Turkey*, 10 November 2005, § 37. The Grand Chamber quoted the Supreme Administrative Court noting: 'Beyond being a mere innocent practise, wearing the headscarf is in the process of becoming the symbol of a vision that is contrary to the freedoms of women and the fundamental principles of the Republic'. See further chapter 4.3.

Islam as a political force in its own right, this was what happened in the 1980s. Keyman has argued that Islam from the 1980s onward, not only became politicised by political parties, it also increased its significance in almost all sectors of society: in economical life, in civil organisation, and in people's identity formation.¹⁰⁰ As Denli notes, the military junta's new policies towards Islam came at a time when Islam was already politicising in Turkey and globally.¹⁰¹ In that context, the state resources that were put to the disposal of local political networks all over Turkey came in handy to provide an institutional platform for political Islam. It now gained political momentum and has since been an influential factor in Turkish politics.

During these decades, the Turkish Armed Forces and parts of the civilian bureaucracy have acted watchdog over the secular character of the state. This has resulted in a number of interventions by the army in order to counter-check anti-secular tendencies.¹⁰²

During an earlier round of the headscarf issue in 1989, General Evren, during his last year at the helm, vetoed the parliament's liberalisation of the university dress code regulation. When the parliament overrode the veto, the General asked the Kemalist dominated Constitutional Court, which – obligingly, as Gunn puts it¹⁰³ – held the liberalisation unconstitutional and anti-secular. A lifting of the ban providing that '[c]hoice of dress shall be free in institutions of higher education, provided that it does not contravene the laws in force' was only passed after Evren had stepped down later the same year. In 1991, this lifting was in turn 'interpreted' by the Constitutional Court as not allowing for headscarves, since that would be contrary to the principles of secularism and equality enshrined in the Constitution, which was indeed a 'law in force'.¹⁰⁴

The coalition government formed in 1996 by the Islamist *Refah Partisi*, together with the centre-right *Dogru Yol Partisi*, was forced to step back in what has been called a 'post-modern' coup in 1997. The General Staff presented the government a list of desirable reforms aimed at 'curbing the influence of Islamists in the economy, in education and inside the state apparatus'. Rather than enforcing the list, the government resigned.¹⁰⁵ Not much later *Refah Partisi* was prohibited and its leader Necmettin Erbakan banned from politics.¹⁰⁶ Shortly after that, the Virtue Party, founded by some former *Refah* MPs was also banned.¹⁰⁷

A new government set out to implement the wishes of the military. In this context, the 1998 Circular, central in the *Şahin* case, banning headscarves and beards at universities was issued by the Vice Chancellor of the Istanbul University.¹⁰⁸ The Human Rights Watch has reported in a memo to the Turkish government that several judges were transferred

¹⁰⁰ Keyman, 2007, at 223.

¹⁰¹ Denli in Lindholm *et al*, 2004, at 506.

¹⁰² Gunn, 2005, at 11f. Below is a brief mention of a few examples from Gunn's list.

¹⁰³ *Ibid.* n. 102, at 11.

¹⁰⁴ The TCC cited in *Leyla Şahin v. Turkey*, 10 November 2005, § 41.

¹⁰⁵ Zürcher, 2004, at 300f.

¹⁰⁶ Erbakan had interestingly had his *Milli Nizam Partisi* banned by the Military after the 1971 coup. See above under chapter 3.1.2.

¹⁰⁷ *Ibid.* n. 100, at 225.

¹⁰⁸ *Leyla v. Turkey*, 10 November 2005, § 16.

because they had ruled in favour of plaintiffs wearing the headscarf.¹⁰⁹

As late as in year 2000, the International Helsinki Federation for Human Rights (IHF) reported that the campaign to restrict the use of the Islamic headscarf in state institutions, including health care and education settings, continued unabated, supported by the Office of the Chief of the General Staff. This campaign, waged in the name of secularism, had according to IHF resulted in thousands of devout Muslim women being temporarily or permanently denied access to education or suspended from their workplace in health care and education in the considerable Turkish public sector. Three hundred primary and secondary school teachers had, according to the ministry of education's own figures, been dismissed by the ministry for defying the dress code imposed on them.¹¹⁰

3.2 Summing up; the General Features of Turkish Secularism

The strategy of Kemalist modernisation was, as has been mentioned, that laicist policies directed at removing Islam from state affairs, restricting it to the private sphere of the individual and containing it by bringing its institutions under the control of the state bureaucracy, would start off the process of subjective secularisation among the population and, thus, create a more progressive societal environment.¹¹¹ Atatürk's secularisation was, thus, not a gradual process as it had been in large parts of Europe. This point is fundamental for the understanding of Turkish secularisation; instead of being a social-cultural and historical process as well as a political one, Turkish laicism was to large extent an elitist project of top-down desacralisation of state, society and culture, in that order. During the time enthusiastic western observers hailed the 'cultural revolution' that was taking place in Turkey on the initiative of Atatürk. However it was more of a 'cultural *coup d'état*' meant to, at express pace, bring Turkey to the 'contemporary level of civilisation'. This failed, and rather than declining and fading, religion remained a strong force in Turkish society.¹¹² Still, the project has not been abandoned. The Military and a secular elite have continued to defend the secular character of the state, and in so doing at times used undemocratic and oppressive methods.

Today, particularly the Islamic headscarf has become *the* symbol around which the struggle between the secular and pious elements of Turkish society orbits.

¹⁰⁹ HRW memo, 2004, at 29.

¹¹⁰ IHF report, 2001, at 25f.

¹¹¹ Keyman, 2007, at 221.

¹¹² *Ibid.* n. 111, at 223.

4 Turkey's Secularism on Trial

The purpose of this chapter is to briefly review the case law on Turkey pertaining to questions of the right to religious expression and manifestation and the principle of secularism. There is not space, nor avail, to examine all cases matching these criteria. The recent Grand Chamber cases of *Refah Partisi and others v. Turkey*¹¹³ and *Leyla Şahin v. Turkey*¹¹⁴ have been included for rather obvious reasons: they are decided recently, decided *in plenum* by the 'highest instance' of the Court, and have occurred repeatedly in European debate. Although the case of *Refah Partisi* was not settled under Article 9, but under Article 11 (the right to peaceful assembly and association), the Court made many statements relevant to religious rights and secularism. These two cases have accordingly been given some extra attention in this review.

*Karaduman v. Turkey*¹¹⁵ from the Commission (ECmHR) is interesting because it may serve as an anchor back in history for issues resurfacing in the *Şahin* case. *Yanasik v. Turkey*¹¹⁶, a relatively early Commission case, should be seen as a representative for a vast number of admissibility decisions on applications filed by discharged Turkish military servicemen.¹¹⁷ *Kalaç v. Turkey*¹¹⁸ was another such case that, as oppose to *Yanasik* and a score of other applicants, made it to the Court.

4.1 Earlier Cases in the Commission and Court

One of the first cases on religious rights in Turkey to reach the Convention organs was *Yanasik v. Turkey*¹¹⁹. Mr Yanasik was a high-achieving student at the Ankara Military Academy from 1983 to 1986. Coinciding with his adoption of the Islamic faith his marks dropped dramatically to minus figures in the beginning of 1987. He was accused of fundamentalist activities and of spreading propaganda. In the first military instance he was acquitted on lack of evidence. Accusations against him continued until it was recommended that he be expelled on the grounds that he did not have the qualities either of a student of a military academy or an officer of the Armed Forces.

Mr Yanasik complained to the European Commission after having exhausted all national remedies. He alleged that his rights under Article 7 of the Convention (no punishment without law) had been violated when he was expelled on unsubstantiated grounds of fundamentalist affiliation. Instead, he contended, the expulsion had been motivated purely by his religious faith

¹¹³ *Refah Partisi and others v. Turkey*, 13 February 2003.

¹¹⁴ *Leyla Şahin v. Turkey*, 10 November 2005.

¹¹⁵ *Karaduman v. Turkey*, 3 May 1993.

¹¹⁶ *Yanasik contre la Turquie*. 6 January 1993. (Found only in French in HUDOC.)

¹¹⁷ See, for the most recent example, *Tepeli et autres contre la Turquie*, 11 September 2001. (Found only in French in HUDOC.)

¹¹⁸ *Kalaç v. Turkey*, 1 July 1997.

¹¹⁹ *Ibid.* n. 116.

in violation of Article 9. He did, however, not maintain that his right to manifestation had been breached. The state countered, contending that the reason for expulsion of the applicant was his incapability to submit to military discipline, which included respecting the principle of laicism. Further, he had at no point been impeded to exercise his religion, since this was not a violation of disciplinary regulations; he had not even alleged that this was the case. The Government also submitted that the obligation to respect the principle of laicism within the Army was in accordance with Article 9(2) of the Convention.

The ECmHR moved directly to cite the *Arrowsmith v. the United Kingdom*¹²⁰ decision, explaining that Article 9 does not protect just any behaviour in the public domain solely on the ground that it is motivated by religion or a conviction. Thereafter it examined whether, on the particular facts, there had been an interference with the applicant's right to manifest his religion. Citing the *Engel v. the Netherlands*¹²¹ case, the Commission stated that military discipline, to which the applicant had voluntarily submitted himself, by its nature implied the possibility to place some restrictions on members of the armed forces. Those limitations could involve a duty not to take part in fundamentalist movements. The Commission did not question the Government's documentation that Yanasik had in fact participated in such activities, something he had denied. Therefore, there had been no interference with Article 9(1) and the application was found manifestly ill-founded.

*Karaduman v. Turkey*¹²², on the other hand, was set in a university context, as oppose to a military one. Karaduman, a female student, was ready to graduate from the University of Ankara. To do so, however, she had to have her picture for the degree certificate taken without wearing the headscarf. Contrary to University rules, she refused to appear bareheaded on the photo. This resulted in her being refused to graduate.

Before the ECmHR, the Government argued that the requirement to submit a photo of oneself bareheaded was not in violation of Article 9, since it did not impede the applicant from practicing her religion. Furthermore, the principle of laicism imposed on university students should be considered in accordance with the possible restrictions in Article 9(2), since it was aimed at preserving public order and preventing certain fundamentalist currents. The applicant submitted that her wearing the headscarf was an intricate part of, and thus required by, her religious convictions, and that there had indeed been an interference with her Article 9(1) rights in this regard.

In the ECmHR's view, the rules surrounding photos for graduation certificates were part of the university regulations established to preserve the university's 'republican' and 'laicist' nature, to which the applicant had submitted herself when choosing wilfully to enrol at a laicist university. These regulations may limit the students' right to manifest a religion in order to ensure the harmony among students of different faiths. The Commission also noted that to allow manifestations of religion unlimited in

¹²⁰ *Arrowsmith v. the United Kingdom*, 16 May 1977.

¹²¹ *Engel v. the Netherlands*, 8 June 1976.

¹²² *Karaduman v. Turkey*, 3 May 1993.

place and form in countries where a large majority adheres to one religion would make it possible for certain fundamentalist groups to exert pressure on students who did not practice that religion or adhered to another creed. To support this statement the Commission notably referred to a decision by the Turkish Constitutional Court. In parallel to the *Yanasik* decision, the Commission said that being a student at a laicist university implied, by its very nature, an obligation to submit oneself to certain rules in place to ensure the respect for the rights and freedoms of others.

The Commission also stated that the certificate issued by the university was in no way meant for the public, it was only a proof of one's professional competence, and the identification photo attached could therefore not be used to manifest one's religion. The Commission cited the *Arrowsmith* decision to get the point through that not all expressions motivated by religion qualify as 'manifestation'. It also took note of the fact that the applicant at the end of her studies was entitled to an official document that furnished her with all the advantages of the actual certificate.

In conclusion there had been no interference with Karaduman's right to freedom of religion in Article 9(1). The application was found manifestly ill-founded.

In *Kalaç v. Turkey* the Court upheld the principles applied in the *Yanasik* and *Karaduman* decisions. Mr Kalaç claimed that he had been forced to retire from his position as a military judge because of his religious convictions in violation of Article 9. The Government submitted that Mr Kalaç had been retired on because of his 'lack of loyalty to the foundation of the Turkish nation, namely secularism, which it was the task of the armed forces to guarantee'. According to the documentation provided by the Government he was a member, as a matter of fact if not formally, of the *Süleyman* sect and had breached military discipline 'by taking and carrying out instructions from the leaders of the sect.'¹²³

It might be interesting to note that the documentation referred to by the Government had been rejected by the ECmHR as evidence of Mr Kalaç's membership of the sect. The Court started out noting that 'in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account.'¹²⁴ In choosing to pursue a career in the Army, Kalaç had accepted a system of military discipline, which could impose some limitations on individual rights and freedoms of those affected. Further, it had not been contested that Kalaç had been able to fulfil the 'obligations which constitute the normal forms through which a Muslim practises his religion'.¹²⁵

Moreover, the Court noted, the decision by the Supreme Military Council to forcibly retire Mr Kalaç had not been based on Mr Kalaç's religious opinions or the way in which he manifested them, but on his conduct and attitude, understood as his alleged fundamentalist affiliations, which '[a]ccording to the Turkish authorities [...] breached military discipline and infringed the principle of secularism.'¹²⁶

¹²³ *Kalaç v. Turkey*, 1 July 1997, § 25.

¹²⁴ *Ibid.* n. 123, § 27.

¹²⁵ *Ibid.* n. 123, § 29.

¹²⁶ *Ibid.* n. 123, § 30.

The Article 9 rights of Mr Kalaç had, thus, according to the Court's assessment not been interfered with since the compulsory retirement of him was not based on the way he manifested his religion.

4.2 Refah Partisi v. Turkey

The *Refah Partisi* case was settled under Article 11 of the Convention (freedom of peaceful assembly and freedom of association) and not Article 9, but the Court referred to its case law under the latter article and the decision contains statements on issues relating to secularism and the freedom of religion.

The case concerned a political party that had been dissolved by a final decision in the Turkish Constitutional Court ('the TCC') on January 9, 1998. Further, the decision had stripped five of the party's MPs of their parliamentary offices.

At the time *Refah Partisi* was the largest party in Turkey and the major partner of a democratically elected coalition government under the *Dogru Yol Partisi*'s Mrs Tancu Ciller since 1995. According to the Constitutional Court, *Refah Partisi* had 'become a centre of activities contrary to the principle of secularism', which was a ground for dissolution according to Turkish law.

The TCC emphasised the importance that it saw in secularism observing that:

[it] was one of the indispensable conditions of democracy. In Turkey the principle of secularism was safeguarded by the Constitution, on account of the country's historical experience and the specific features of Islam. The rules of sharia were incompatible with the democratic regime. The principle of secularism prevented the State from manifesting a preference for a particular religion or belief and constituted the foundation of freedom of conscience and equality between citizens before the law. Intervention by the State to preserve the secular nature of the political regime had to be considered necessary in a democratic society.¹²⁷

The evidence to support that conclusion was a number of statements found imputable to the party made by *Refah Partisi* representatives (including the party's three co-applicants: chairman and MP Mr Necmettin Erbakan and two vice-chairmen and MPs) during the years leading up to the legal proceedings. For instance, in 1993 the chairman Mr Erbakan had come out against the hostility he perceived against the wearing of headscarves. The same year he had, in a speech to the Grand National Assembly, proposed a plurality of legal systems 'within a framework of general principles' so that everybody would have the possibility to choose the most appropriate system for himself. The Constitutional Court observed that the origins of such a system lay in the history of Islam as a political regime, that the system would impair judicial unity and therefore jeopardise national unity, force individuals to reveal their beliefs and empower religious movements to decree legal rules. The process in the Constitutional Court also centred on the notion of 'just order'. Erbakan had said in 1994 that 'just order' would

¹²⁷ *Refah Partisi and others v. Turkey*, 13 February 2003, § 25.

be established once *Refah* came to power and that the question was whether the transition would be ‘peaceful or violent’. The *Refah Partisi* contended that the notion had no divine meaning, but the TCC took it to mean a ‘theocratic regime’.¹²⁸

The TCC further quoted two *Refah* MPs to have argued radically for the violent introduction of Islamic law (*sharia*) in Turkey. Another representative of the *Refah* had urged the population to renounce secularism and keep alive the resentment’. Yet another had warned that the situation in Turkey would be ‘worse than Algeria’ if there was an attempt to shut down the *Imam-Hatip* theological colleges. (This MP had been expelled from the party because of his statements.)¹²⁹ The *Refah* Party Minister of Justice, Mr Sevket Kazan, had publicly lent his support to a person detained pending trial for anti-secular activities by paying him a visit. A last example of evidence presented in the domestic proceedings worth mentioning was that the cabinet, at the time dominated by *Refah* ministers, had reorganised working hours in public establishments to make allowance for fasting during Ramadan.

The Turkish Constitutional Court concluded that *Refah Partisi* had perverted its democratic rights into instruments in its struggle to replace democracy with a polity based on *sharia* law. *Sharia*, in the Court’s view, was the ‘antithesis’ democracy.¹³⁰ Therefore, the dissolution was authorised.

In the ECtHR there was common understanding among the parties that there had been an interference with the applicants’ rights, so the question moved on to whether that interference had been legitimate as a response to a ‘pressing social need’. Commenting on the Constitutional Court’s denunciation of *sharia*’s compatibility with democracy, the ECtHR stated that it was ‘[m]indful of the importance for survival of the democratic regime of ensuring respect for the principle of secularism in Turkey, the Court considers that the Constitutional Court was justified in holding that *Refah*’s policy of establishing *sharia* was incompatible with democracy.

Concluding the Strasbourg Court found that the speeches referred to above were imputable to the Party and

revealed *Refah*’s long-term policy of setting up a regime based on *sharia* within the framework of a plurality of legal systems and that *Refah* did not exclude recourse to force in order to implement its policy and keep the system it envisaged in place. In view of the fact that these plans were incompatible with the concept of a “democratic society” and that the real opportunities *Refah* had to put them into practice made the danger to democracy more tangible and more immediate, the penalty imposed on the applicants by the Constitutional Court, even in the context of the restricted margin of appreciation left to Contracting States, may reasonably be considered to have met a “pressing social need”.¹³¹

On proportionality the Court examined the consequences of the TCC’s findings and found them to be within the limits of the reasonable. Accordingly, there had been no violation of Article 11.

¹²⁸ Ibid. n. 127, § 31.

¹²⁹ Ibid. n. 127, § 37.

¹³⁰ Ibid. n. 127, § 40.

¹³¹ Ibid. n. 127, § 132.

In the course of examining the Article 11 claim, the ECtHR had made several statements on democracy, religion and secularism. The Court reiterated its case law under Article 9 listing basic principles relevant for the particular case. On democracy and religion in the Convention system, it referred to freedom of religion as one of the ‘foundations of a democratic society’, and a prerequisite for pluralism, which is ‘indissociable from democratic society’¹³². In democratic societies, the Court continued citing the *Kokkinakis* decision, ‘in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected’. It emphasised the state’s important role as a neutral and impartial organiser of religious life and the conducive affect such a role had on religious harmony and tolerance, and at the same time stated that the state had a right to limit religious manifestations, such as wearing the headscarf, in cases where such practice ‘clashes with the aim of protecting the rights and freedoms of others, public order and public safety’.¹³³ The *Arrowsmith* principle was reiterated: the right to manifest a religion ‘does not protect every act motivated or influenced by a religion or belief.’

The Court expressed its view on Turkish secularism as ‘certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy.’ Further, ‘[a]n attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of Article 9 of the Convention.’¹³⁴

Referring to the *Yanasik* and *Kalaç* decisions the Court stated that, in performing its ‘role as a neutral and impartial organiser of religious beliefs, the State may decide to impose on its serving or future civil servants, who will be required to wield a portion of its sovereign power, the duty to refrain from taking part in the Islamic fundamentalist movement, whose goal and plan of action is to bring about the pre-eminence of religious rules.’¹³⁵

4.3 Leyla Şahin v. Turkey

In this thesis some emphasis has been placed on the case of *Leyla Şahin v. Turkey*¹³⁶. The reason for this is obviously that it is the leading case in the area. In no other case on religious rights versus secular policies in Turkey has the Court gone so much in-depth on issues of Turkish secularism and its justifications, and the right to religious expression in the public sphere – an essential part of the right to religious freedom. It is also the most recent case to discuss those issues. The fact that the Court was sitting *in plenum* as Grand Chamber also adds to the importance of the case.

In addition, the *Şahin* case dealt specifically with the headscarf, an issue that has long been at the heart of the conflict between religious and secular

¹³² Ibid. n. 127, § 90.

¹³³ Ibid. n. 127, § 92.

¹³⁴ Ibid. n. 127, § 93.

¹³⁵ Ibid. n. 127, § 94.

¹³⁶ *Leyla Şahin v. Turkey*, 10 November 2005.

interest in Turkish society. Its symbolic value cannot be underestimated. Being such a powerful and visible symbol, the headscarf also attracts media attention to court proceedings where it is involved – something that was very apparent in the *Şahin* case. But the headscarf quarrel is not merely symbolic; it is also very much a real conflict with real and significant repercussions. The centring of the debate on the headscarf is therefore not entirely unwarranted. Firstly, the headscarf issue is, in fact, not circumscribed only to the headscarf. It encompasses practically all forms of public religious expressions and manifestations. Secondly, the ‘to be, or not to be’ of the headscarf in the public sphere effectively decides the destiny of thousands, if not millions, of women pursuing a professional career or education in Turkey. Thirdly, the opinions on the headscarf issue developed by the Strasbourg institutions will be listened to, not only in Turkey, but also in the rest of Europe.

4.3.1 Background and Legal Question

The legal question put before the Court in *Leyla Şahin* was whether a regulation imposing a prohibition on wearing Islamic headscarves on the premises of the University of Istanbul and subsequent measures to implement the regulation were in line with the requirements of the European Convention, especially Article 9. The Grand Chamber also considered whether the decision to refuse Leyla Şahin access to the University when wearing the Islamic headscarf amounted to a violation of her right to education under Article 2 of Protocol No. 1.

The *Leyla Şahin v. Turkey* case was settled first after being referred to the Grand Chamber. In its judgment on 10 November 2005 the Grand Chamber found no violation of the Convention. Although an interference of Article 9 had occurred, that interference could be regarded as ‘necessary in a democratic society’ and pursuing legitimate aims. Nor had there been any violation of Article 2 of the Protocol.

In the process the Grand Chamber swiftly dismissed allegations put forward by the applicant under Articles 8 and 10 as mere reformulations of those under Article 9 of the Convention and Article 2 of Protocol No. 1. Furthermore, the Court saw no discriminatory elements to the case that could bring Article 14 of the Convention into question.

Leyla Şahin was a medicine student at the Bursa University. Born and raised in a traditional family, she considered it a female Muslim’s duty to cover her hair and neck when in public. In 1997 she moved to Istanbul to continue her studies at the Istanbul University. She had worn the headscarf at campus in Bursa and continued to do so in Istanbul up until February 23, 1998, when the Vice Chancellor of the University issued a circular (‘the regulation’) which, with reference to statutory law and case law, both from the Supreme Administrative Court of Turkey and the ECmHR, prohibited students wearing headscarves, or indeed students with beards, to attend lectures, courses or tutorials. If covered or bearded students refused to leave a lecture, the teacher was instructed to cancel class. The teachers were also instructed to report all such incidents to the university authorities. Leyla

Şahin was, in accordance with the circular, refused access to a number of exams, courses and lectures during the spring of 1998.

Leyla Şahin lodged an application with the Istanbul Administrative Court in March 1999 for an order setting aside the circular. She invoked rights under Article 8, 9 and 14 of the Convention and Article 2 of protocol No 1, saying that the circular had no legal basis, and that the Vice Chancellor had acted *ultra vires*. The application was dismissed. The Istanbul Court referred to settled case law from the TCC and the Supreme Administrative Court in saying that neither the regulation in issue nor the measures taken towards the applicant were illegal. An appeal to the Supreme Administrative Court was dismissed in 2001.

The applicant was also subjected to disciplinary proceedings during the years of 1998 and 1999. First for wearing a headscarf in the first place, which rendered a warning, and then for having, together with other students, rallied against the dress rules. The latter proceeding resulted in the applicant being suspended from university for a semester. The applicant then again lodged an application with the Istanbul Administrative Court to erase the penalties imposed on her. This proceeding, too, ended in favour of the university.

However, an amnesty law that entered into force in June 2000 released the applicant from all penalties and resultant disabilities. An appeal to the Supreme Administrative Court was therefore not dealt with on the merits of the applicant's arguments on points of law. At that time, however, the applicant had moved to Austria to continue her studies at the Vienna University.

An application was submitted to the European Commission already in 1998 and transmitted to the Court later that year. In its judgment of 29 June 2004 the Court (the Chamber) held that no violation of Article 9 had occurred and that no separate questions arose under Article 8, 10, 14 (taken in conjunction with Article 9) of the Convention or Article 2 of Protocol No. 1. The applicant requested the case to be referred to the Grand Chamber. A Grand Chamber panel accepted her request.

4.3.2 Reasoning by the Court

Although the Government had claimed that Article 9 did not include a right applicable in the case whatsoever, the lower Chamber had 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.'¹³⁷ The Grand Chamber accepted this view, and the Government made no submission to the contrary.

4.3.2.1 'Prescribed by law'

The question whether the limitation on the applicant's rights was 'prescribed by law' presented a bigger hurdle for the proceedings. The applicant's arguments as reproduced by the Court are quite hard to follow.

¹³⁷ Ibid. n. 136, § 71.

But it seems that they relied on two main tracks. The first was that the circular of 1998, i.e. the interference, had in fact no legal basis in Turkish law. The Vice Chancellor had thus acted *ultra vires* when issuing rules on students' dress. The second track was not aimed at the circular itself. It argued instead that if such a legal basis did exist, in other words if the Turkish legislator had meant to vest the university authorities with a possibility to regulate students' dress, it had not been foreseeable within the meaning of the ECtHR's settled case law.

The prohibition had no support in 'written law', and was based on an incorrect interpretation of national case law, conducted by the university authorities. Case law could not be construed as legal basis for the regulation, since within the Turkish legal system, courts cannot establish new legal rules, only apply the law. Although the case law from the TCC had interpreted the Constitution to proscribe the headscarf in individual cases, the legislator had not taken this as a reason to introduce legislation banning the headscarf. Thus, the Vice Chancellor had acted *ultra vires* when issuing the regulation refusing students wearing the Islamic headscarf access to the university.¹³⁸

The Court understood the applicant's arguments related to foreseeability to be aimed not at the circular itself, but to the fact that the circular had no basis in the Turkish law, since it was not compatible with section 17 of Law no. 2547 (Higher Education Act). She meant that section 17 did not itself contain a prohibition on Islamic headscarves in universities, nor could it be construed as a legal basis for such a prohibition.

Section 17 actually established the freedom of dress within institutions of higher education, but the freedom was limited to what was not in contravention with the 'laws in force'.¹³⁹ The question therefore boiled down to the meaning of 'laws in force'. The applicant had argued that it meant only statutes, not judge-made law, and that consequently there was no law in force that hindered the wearing of the Islamic headscarf on university premises.

The Court rebutted the applicant's position. Summing up its settled case law on the 'prescribed by law'-formula the court said that it is mainly up to the national courts to interpret and apply domestic law, and that the Court had a liberal approach to what constitutes a 'law'. 'The "law"', the Court concluded, 'is the provision in force as the competent courts have interpreted it'.¹⁴⁰

Along this line, the Court accepted that judgements from the TCC and the Supreme Administrative Court, stating that authorising students to wear the Islamic headscarf was unconstitutional, were 'laws in force'.¹⁴¹

It was finally concluded by the Grand Chamber that transitional section 17 of Law no. 2547 from 1994 read in light of national case law, constituted legal basis for the interference and both the statute and case law had been accessible and their application foreseeable.¹⁴²

¹³⁸ Ibid. n. 136, §§ 79-82.

¹³⁹ Ibid. n. 136, § 40.

¹⁴⁰ Ibid. n. 136, §§ 87-88.

¹⁴¹ Ibid. n. 136, § 92.

¹⁴² Ibid. n. 136, § 98.

4.3.2.2 'Necessary in a Democratic Society'

The question whether the interference pursued legitimate aims was not contested between the parties. The core issue in the *Leyla Şahin* case was, then, whether the regulations and measures, i.e. the interference, were 'necessary in a democratic society'.

The applicant contested the findings of the Chamber. She argued that the dress regulations she had been subjected to were contrary to democratic principles. She had chosen to wear the headscarf out of religious conviction, which was the most fundamental right a pluralistic liberal democracy had granted her. She pointed to the fact that the university and judicial systems were formed by successive *coup d'états* carried out by the military. She also submitted that the margin of appreciation granted to the government should be held to a minimum; no other European state had a similar prohibition and there was no sign of tension in universities that could justify such a radical measure. Further, she argued that students were discerning adults. Consequently, the allegation that her wearing of the Islamic headscarf would have been due to lack of respect for other people's rights and convictions, and an attempt to influence fellow students were completely unfounded. She also contested the idea that the headscarf would contradict equality between the sexes. At the same time she accepted that wearing the headscarf would not be protected as a human right in every situation.¹⁴³

The Grand Chamber first explained that in issues concerning the relationship between state and religion 'on which opinion [...] may reasonably differ widely' the Court must treat the findings of national decision makers with a great degree of deference. In this category, the Grand Chamber placed the issue of regulating religiously motivated dress in educational institutions. The Court pointed to the wide variety of approaches taken by Contracting States:

It is not possible to discern throughout Europe a uniform conception of the significance of religion in society (*Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, Series A no. 295-A, p. 19, § 50) and the meaning or impact of the public expression of a religious belief will differ according to time and context (see, among other authorities, *Dahlab v. Switzerland* (dec.) no. 42393/98, ECHR 2001-V). Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order (see, *mutatis mutandis*, *Wingrove*, judgment cited above, p. 1957, § 57). Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the domestic context concerned.¹⁴⁴

In the Court's opinion the lack of a uniform European approach was not the only good reason for adopting a wide margin of appreciation in the *Şahin* case. Regard had to be taken also to the weight of what it felt was at stake – the need to protect the rights and freedom of others, to preserve public order and to secure civil peace and true religious pluralism. The Grand Chamber

¹⁴³ Ibid. n. 136, §§ 100-2.

¹⁴⁴ Ibid. n. 136, § 109.

noted further that Convention institutions had on previous occasions¹⁴⁵ 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’.¹⁴⁶

Setting out to apply the principles developed in the Court’s case law on the present case the Grand Chamber first established that Turkish courts considered the dress regulation in issue to be based ‘in particular on the two principles of secularism and equality’¹⁴⁷. In a 1989 judgment (referred to above in 3.1.3) the TCC described secularism as the ‘guarantor of democratic values’, and a principle which prevented the State from ‘manifesting a preference for a particular religion or belief’ and ‘served to protect the individual not only against arbitrary interference by the State but from external pressure from extremist movements’. The Constitutional Court added that freedom to manifest one’s religion could be restricted in order to defend those values and principles.¹⁴⁸ Referring to that statement the ECtHR stated that it considered ‘this notion of secularism consistent with the values underpinning the Convention’. It found that:

upholding that principle, which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of Article 9 of the Convention (see *Refah Partisi and Others*, judgment cited above, § 93).¹⁴⁹

Regarding equality, the Grand Chamber noted, as had the Chamber, the central role in the Turkish constitutional system of the protection of the rights of women, and the role of gender equality as a value implicitly underlying the Constitution.

The Grand Chamber did not deviate from the approach taken by the Chamber on whether prohibiting the wearing could be taken to satisfy a pressing social need. Quoted by the Grand Chamber the lower instance had said:

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 (see *Karaduman*, decision cited above; and *Refah Partisi and Others*, cited above, § 95), 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

¹⁴⁵ *Karaduman v. Turkey*, 3 May 1993, and *Dahlab v. Switzerland*, 15 February 2001.

¹⁴⁶ *Leyla Şahin v. Turkey*, 10 November 2005, §§ 110-1.

¹⁴⁷ *Ibid.* n. 146, § 112.

¹⁴⁸ *Ibid.* n. 146, § 113.

¹⁴⁹ *Ibid.* n. 146, § 114.

aims, especially since, as the Turkish courts stated..., this religious symbol has taken on political significance in Turkey in recent years.¹⁵⁰ (Emphasis added.)

Again quoting and agreeing with the Chamber, the Grand Chamber expressed sympathy for Turkey's alleged problem with extremist political movements.

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 (*Refah Partisi and Others*, cited above, § 124). 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.¹⁵¹

Considering the Turkish context, the Grand Chamber was thus prepared to accept the legitimacy in principle of the headscarf prohibition in educational institutions.¹⁵²

The Grand Chamber went on to consider the proportionality between the measures taken and the legitimate objectives pursued by the measures.

The Court started out noting that Muslim students were free to practice and manifest their religion 'in accordance with habitual forms of Muslim observance'¹⁵³, and that the veil was not the only religious apparel banned on campus. The university authorities had thoroughly explained and motivated the regulations, and asked the students to abide by the rules that were consistent with legislation and case law. Furthermore, the process that had led to the regulations

took several years and was accompanied by a wide debate within Turkish society and the teaching profession... The two highest courts, the Supreme Administrative Court and the Constitutional Court, have managed to establish settled case-law on this issue... It is quite clear that throughout that decision-making process the university authorities sought to adapt to the evolving situation in a way that would not bar access to the university to students wearing the veil, through continued dialogue with those concerned, while at the same time ensuring that order was maintained and in particular that the requirements imposed by the nature of the course in question were complied with.

Consequently, the Grand Chamber overruled the applicant's submission and deemed the interference proportional. It summed up stating that the interference in issue was justified in principle and proportionate to the aim pursued.¹⁵⁴ There had, thus, been no violation of Article 9 of the Convention.

¹⁵⁰ Ibid. n. 146, § 115.

¹⁵¹ Ibid. n. 146, § 115.

¹⁵² Ibid. n. 146, § 116.

¹⁵³ Ibid. n. 146, § 118.

¹⁵⁴ Ibid. n. 146, § 122.

5 Islam and Turkish Secularism misunderstood by the Court?

Except for involving Turkish Muslim's demanding – and then being denied – redress by the Commission or Court for violations of the European Convention on Human Rights, the five cases deal with somewhat different subject matter. Two of them – *Yanasik* and *Kalaç* – concerned military servicemen claiming that they had been fired because of their religious convictions, only to be told by the Conventions organs that no such violation had taken place since their right to manifest their religion had not been interfered with. One case, *Karaduman*, involved a female university student, who were told by the Commission that a photo designated to establish the identity of the holder of a degree certificate issued from a secular university could not be used to manifest a religion since it was not meant for public attention. Thus, her case was rejected. In these three cases the Convention organs found no interference with the applicants' Article 9(1) rights.

In a – in certain respects – parallel case to *Karaduman*, *Leyla Şahin's* rights according to Article 9 *had* been interfered with, but the interference was justified in the name of protecting public order and the rights and freedoms of others. The difference seems to have been that, whereas Ms Karaduman had been denied to wear her headscarf on a photograph not intended for public use, Ms Şahin was expelled for refusing to take it off while appearing in public.

All measures complained of in *Yanasik*, *Kalaç*, *Karaduman* and *Şahin* were motivated by the Government as protecting the principle of secularism in Turkey. The same is true for *Refah Partisi v. Turkey*, where the Court for the first time took the opportunity to elaborate on that concept in its own argumentation. In that case the principle was accepted as pivotal for the maintenance of democracy in Turkey and an adequate purpose for dissolving the *Refah* Party. All five cases have in common that the Convention organs accepted the secularity argument.

Taken together, statements on secularism and religious freedom made in the five cases examined above (chapter 4), and the nature of Turkish secularism (chapter 3) leads me to examine to what extent the Convention organs' decisions have been influenced by a bias towards the Turkish conception of secularism and against Islamic expressions of belief. For the sake of analysing this issue in an as orderly fashion as possible I will try to answer the following questions:

1. How are the special characteristics and context of Turkish secularism construed by the Court, and how does it play against reality?

2. Are there any traces in the five cases of the sometimes-asserted bias against Islamic religious manifestations compared to manifestations of European mainstream religions?

5.1 Turkish Secularism and Democracy: A Bad Connection to Reality

5.1.1 ‘Turkish Secularism’ Endorsed?

In *Refah Partisi* the Court said, as reproduced above (chapter 4.2) that: ‘the principle of secularism is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy’.¹⁵⁵ In not explicitly specifying whether it meant secularism in general, or only a liberal form of secularism, or, indeed, the Turkish version of secularism the Court’s statement created some confusion. Did it mean to endorse ‘the principle of secularism’ as it can be deduced from statements in its previous case law that has been reviewed above¹⁵⁶, or did it refer to Turkey’s particular system? Considering that the quoted passage was preceded by ‘[i]n applying the above principles to Turkey the Convention institutions have expressed the view that the principle of secularism is [...]’ (emphasis added)¹⁵⁷, and the context in which it was given, it was hard to come to any other conclusion than that the Court did indeed have the Turkish system in mind. Two years later, in the *Leyla Şahin* decision, the Court unmistakably referred to and endorsed a ‘notion of secularism’, which had been formulated by the Turkish Constitutional Court in 1989, in a decision that has been referred to above in chapter 3.1.3 and 4.3.2.2. The ECtHR summarised the domestic court’s view on secularism thus:

[...] secularism, as the guarantor of democratic values, was the meeting point of liberty and equality. The principle prevented the State from manifesting a preference for a particular religion or belief; it thereby guided the State in its role of impartial arbiter, and necessarily entailed freedom of religion and conscience. It also served to protect the individual not only against arbitrary interference by the State but from external pressure from extremist movements. The Constitutional Court added that freedom to manifest one’s religion could be restricted in order to defend those values and principles.¹⁵⁸

It was, hence, this notion that the ECtHR had found consistent with the values underpinning the Convention. Gunn, analysing the Chamber’s decision¹⁵⁹ in the *Şahin* case, points out that the Court never seems to explain exactly what Turkey’s secularism means, except that it is ‘neutral’ with regard to religion and that the public and private spheres are

¹⁵⁵ *Refah Partisi and others v. Turkey*, 13 February 2003, § 93.

¹⁵⁶ The case law on secularism and its relation to democratic principles has been reviewed above in chapter 2.3.2.

¹⁵⁷ *Ibid.* n. 155.

¹⁵⁸ *Leyla Şahin v. Turkey*, 10 November 2005, § 113.

¹⁵⁹ *Leyla Şahin v. Turkey*, Chamber judgment, 29 June 2004.

separated.¹⁶⁰ However, when summarising, in their own argumentation, the features of this ‘secularism’ that they found consistent with the Convention, none of the chambers mentioned neither ‘neutral’, nor ‘separated’. These terms were only used when the Court gave an historic review and background to the case and when it echoed the arguments of the Turkish government.¹⁶¹ In conclusion it must be said that the Court seems to have referred to both the liberal concept of secularism developed in its previous case law *and* the Turkish rendition of secularism *at the same time*. Something, which would have been impossible, had the Court taken some time to scrutinise the multilayered nature of Turkish secularism.

5.1.2 The Court’s Misconception of Turkey’s Polity

The endorsement of Turkish version of secularism was, I contend, caused by, one, the Court’s defective reading of the Turkish Constitutional Court’s decision, and, two, a misconception of the nature of Turkish secular polity.

Firstly, the ECtHR in *Leyla Şahin v. Turkey* could have chosen to reflect more over those parts of the 1989 Turkish Constitutional Court judgment that it chose only to reproduce in the ‘History and background’ section¹⁶² of the Grand chamber decision, and not in connection with its evaluation of Turkish secularism.¹⁶³ In the 1989 judgement the TCC said, in the words of the ECtHR, that, *inter alia*, ‘[secularism] had acquired constitutional status by reason of the historical experience of the country and the particularities of Islam compared to other religions.’ Therefore, secularism was an essential condition for democracy and equality before the law. Secularism, further, prevented the state from discriminating against any religion or belief. ‘In a secular regime’, the TCC continued quoted by the ECtHR, ‘religion [...] is not a tool of the authorities and remains in its respectable place, to be determined by the conscience of each and everyone [...]’. Stressing its inviolable nature, the TCC meant that freedom of religion did not entail a general right to dress in religious apparels and that, once outside the private sphere of individual conscience it could be restricted on the basis of public order to safeguard secularism. In the words of the Court the TCC was of the opinion that:

[e]veryone was free to choose how to dress, as the social and religious values and traditions of society also had to be respected. However, when a particular dress code was imposed on individuals by reference to a religion, the religion concerned was perceived and presented as a set of values that were incompatible with those of contemporary society. In addition, in Turkey, where the majority of the population were Muslims, presenting the wearing of the Islamic headscarf as a mandatory religious duty would result in discrimination between practising Muslims, non-practising Muslims and non-believers on grounds of dress with

¹⁶⁰ Gunn, 2005, at 16.

¹⁶¹ Compare §§ 27 (‘separated’), 36 and 93 (‘neutral’, ‘neutrality’) of *Leyla Şahin v. Turkey*, Chamber judgment, 29 June 2004, with §§ 105-6 of that same judgment and §§ 113-4 of *Leyla Şahin v. Turkey*, Grand Chamber judgment, 10 November 2005.

¹⁶² *Leyla Şahin v. Turkey*, 10 November 2005, § 39.

¹⁶³ *Ibid.* n. 162, § 113.

anyone who refused to wear the headscarf undoubtedly being regarded as opposed to religion or as irreligious.¹⁶⁴

Some of these statements are hard to reconcile with the Convention and established case law. For example, democracy has been portrayed in a standard recital as the ‘fundamental feature of public order’¹⁶⁵, and core articles 8, 9, 10 and 11 all require that interferences of rights protected by these articles are ‘necessary in a democratic society’. The Court has said that pluralism, tolerance and broadmindedness are hallmarks of that democratic society.¹⁶⁶ A restriction must consequently also be ‘necessary’ to protect these values. The Turkish court declared that secularism was a precondition for democracy in Turkey. This may be true, but first that secularism must be in line with democracy, pluralism and tolerance, which is not obvious with regard to the TCC’s description of the concept. Plesner has observed that making ‘this notion of secularism a superior principle with which the state policies and definitions of rights should be in compliance, may undermine human rights and hence conflict with the dual purpose that secularism is – or should be – aiming to secure in the first place; the equal freedom and rights of all inhabitants to live according to their conceptions of “the good”, and peaceful coexistence in a plural society.’¹⁶⁷ This pretty well sums up the criticism in this respect.

Also, the TCC thought that a dress code based in religious precepts was incompatible with contemporary society, and would result in discrimination against those who chose not to comply with that dress code. A *secular* dress code banning headscarves was obviously not an akin problem. There is also cause to ask whether it is the state’s role to assess whether a garment is ‘contemporary’ and whether a garment’s failure to meet such a criterion should result in any action from the state. This does not seem to be in line with the state’s duty to remain neutral and impartial in issues relating to religion. And it certainly does not seem to be helpful in fulfilling the duty, stated by the Court in, *inter alia*, *Refah Partisi*¹⁶⁸, to ensure mutual tolerance between competing societal groups.

Secondly, the ECtHR could have counter-checked the Government’s description of reality, and the nature of Turkish secularism in particular. It is, admittedly, not the main role of the ECtHR to assess evidence, but this practice must have certain limits. If the Court would have juxtaposed Turkish secularism – its origins and modern practice – as described above in chapter 3, to the tales provided by the Turkish government, it might have reached a very different conclusion than it did. First of all, the Court would have benefited from noticing that the TCC on whose 1989 judgment it relied so heavily when endorsing ‘this notion of secularism’ in *Leyla Şahin v. Turkey* sat under the military junta of General Evren, and was arguably an agent of the ‘deep state’. The ECtHR could further have made a note of the fact that the lifting of the 1982 headscarf ban in issue in the TCC had been

¹⁶⁴ Ibid. n. 162, § 39.

¹⁶⁵ *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 45.

¹⁶⁶ See above, chapter 2.3.2.

¹⁶⁷ Plesner, 2005, at 3-4.

¹⁶⁸ *Refah Partisi and others v. Turkey*, 13 February 2003, § 91.

passed by the duly elected parliament (which was by no means Islamist-oriented, since such candidates had not been approved by the NSC¹⁶⁹). The ban-lifting was then held unconstitutional according to the Constitution that had been enacted by the Security Council by way of an indirectly rigged referendum in 1982. The headscarf ban itself had, however, not been passed by a parliament, but by the military-controlled Higher Education Council the same year.

Also, the ECtHR could have poked a hole in the TCC's argument that the principle of secularism prevented the state from showing any preference to any religion or belief¹⁷⁰ by pointing at the peculiar institution of the Directorate of Religious Affairs which administers the Turkish state's intervention in Islamic matters, such as hiring and firing imams, writing Friday sermons and building mosques. The Directorate also consistently refuses to fund *Alevi* places of worship and interprets the *Qur'an* exclusively in the Sunni-tradition. Ironically, the Directorate – a government agency whose purpose is to control religion – thereby helps reinforcing the Sunni dominance in Turkish society.¹⁷¹

Taking all that into consideration, the Court would, arguably, have been more vigilant in accepting the Turkish government's and the TCC's assertions as facts. Had the ECtHR also measured the TCC's 1989 judgment properly against the ECtHR's own established case law on pluralism, tolerance and broadmindedness as hallmarks of democracy, and on the state's duty to remain neutral and impartial when dealing with religious matter; and done some proper European supervision, then *Leyla Şahin* would probably have developed differently. And, since the Court's investigation into the nature of Turkish secularism was even less sufficient in the other four cases dealt with in this thesis, it might have had an even bigger impact there.

It is not possible, however, to pronounce on whether the outcome would actually have been different in all cases. They were very different in character, and the Court was swayed on varying points. The point is, nonetheless, that the Court's analysis on Turkish secularism built on false premises in all five cases.

5.2 A Bias Against Islam?

5.2.1 The Possibility of a Bias

The Court's conception of Turkish secularism as a guardian of religious rights and tolerance has thus, strangely enough, contributed to the its ungenerous attitude towards Turkish Muslims claiming religious rights before the Strasbourg organs. The question is whether there are additional illicit factors that helped sway the Court in these cases.

What immediately comes to mind is the Turkish cases' Islamic dimension. Muslims would according to this hypothesis be discriminated

¹⁶⁹ Zürcher, 2004, at 281-3.

¹⁷⁰ See *Leyla Şahin v. Turkey*, 10 November 2005, § 113, quoted above at n. 158.

¹⁷¹ Gunn, 2005, at 16-18, and Keyman, 2007, at 225-226.

against by the Court itself. In an overall evaluation of the Court's efforts Drinan writes that the Court has:

[...] reflected the views of a continent that has been Christian for centuries. The judges on the ECHR would deny that they unconsciously reflect the values of their background. But their opinions seem to be unsympathetic to Europe's non-Christians. The court's precedents are unlikely to encourage Muslims and other non-Christians – an ever-growing portion of Europe's population – to hope for rulings supporting a new pluralism based on a more expansive right to free exercise of religion¹⁷²

Gunn has also pointed out that the Convention organs have been unsympathetic to claims from adherents of non-Christian, 'less' European traditions.¹⁷³ Such broad statements are rare, and it is more common that writers confine themselves to admit that there seems to be a tendency for the Court to value Islamic manifestations less than Christian ditto. For example, it has been claimed that the ECtHR has undervalued the importance of wearing religious apparels and symbols precisely because it is a European court full of judges born into a Judeo-Christian tradition, who consider such customs marginal to religion.¹⁷⁴ Since religious dress and symbols were the core issue in two of the cases examined in this thesis, *Karaduman* and *Şahin*, and an important question in a third, *Refah Partisi*, it is mainly this last aspect of religious rights that this chapter will deal with.

It is one thing to say that the Court applies different rules to different religions, which would be tantamount to direct discrimination, and a whole other thing to say that it applies the same rules (cf. 'neutral laws') to all religions with results that are indirectly discriminating due to the different customs prescribed by different religions. Theoretically, these are two distinct types of discrimination. In reality, though, they can be hard to separate. This is because it is hard to compare one religion's practices to another's. A 'neutral law' that bans all praying at working places; is it really neutral considering the 'duty' to pray five times a day is a fundamental feature of Islam and not of Christianity, and can it be said that such a law affect Muslims more severely than Christians? Or, in this case, can a regulation banning the headscarf and other highly visible religious symbols such as, for example, the Sikh turban, be considered 'neutral' since we know for a fact that Christians normally don't rely on such outwardly symbols, especially not adherents to post-Reformation Christianity.¹⁷⁵

The question of whether the Court discriminates, in general terms, against certain religious groups certainly opens up for very complicated conceptual issues and presents huge methodological problems should we try to test the hypothesis. Probably, the question cannot be answered in certain and definitive terms. I do, however, believe that certain aspects of the

¹⁷² Drinan, 2004, at 94.

¹⁷³ Gunn in van der Vyver and Witte Jr., 1996, at 310ff.

¹⁷⁴ Such views, and views even less sympathetic to Islamic expressions, can also be found in the literature. See e.g. Robert, 1993, at 30-1, who considers that the use of Islamic headscarves by pupils 'might constitute forms of pressure provocation, proselytism or propaganda' and 'jeopardise the dignity or freedom of the pupil or of other members of the educational community'.

¹⁷⁵ On this particular dilemma in relation to proselytism, see e.g. Stahnke in Lindholm *et al*, 2004, at 623.

Court's reasoning in the five particular cases that are of concern for this thesis suggest that the Court and Commission have gone wrong precisely because it had to do with Islam, and not Christianity. This is especially true when it comes to the three decisions dealing with the headscarf.

Below I will, therefore, confine myself to suggest in what ways the Court might have gone wrong and point at some signs of this. I will also present some circumstantial evidence to show that it wasn't unexpected.

5.2.2 The Five Cases

Among the five cases chosen for this survey, are two cases where the Court¹⁷⁶ and Commission¹⁷⁷, respectively, accepted as 'necessary' the discharges of soldiers on the basis that their conduct – consisting in affiliation with fundamentalist groups – was a threat to the secular order of the military. The soldiers claimed that the real ground had been their religious beliefs *per se*. This was not examined by the Court, which accepted the Government's assertions of facts as they were. Central to the Court and Commission's assessment was that the applicant's had not been hindered to manifest their religion. Mr Kalaç had been able to fulfil the 'obligations which constitute the *normal forms* through which a Muslim practises his religion' (emphasis added).¹⁷⁸ In the headscarf cases, *Karaduman v. Turkey* in the ECmHR and *Leyla Şahin v. Turkey* in the ECtHR, the same pattern re-emerged. In *Karaduman* the ECmHR did not even acknowledge Ms Karaduman's right to use the photography on her certificate to manifest her religion by wearing the headscarf since the certificate was not meant for public display. According to the Convention organs, Ms Şahin and Ms Karaduman had also, just as Yanasik and Kalaç, been given the possibility to, in the words of *Leyla Şahin v. Turkey*, manifest their religion 'in accordance with *habitual forms* of Muslim observance' (emphasis added).¹⁷⁹

Understandably, and to no surprise, a 'habitual' or 'normal' form of manifestation did not include attending meetings of fundamentalist movements while being a part of the Turkish armed forces. Therefore, any possible discrimination against Mr Yanasik and Mr Kalaç would lie in the Court's assessment of evidence. Did either of them actually attend such meetings? It is for obvious reasons hard to follow through with these two cases since the intelligence of the Government cannot be reviewed and assessed. Suffice to say, in *Kalaç v. Turkey*, the Commission acting as first instance, as oppose to the Court, did not accept the Government's documentation as proof of Mr Kalaç's fundamentalist connections. The evidence, clearly, did not satisfy everyone. More surprisingly, however, the wearing of the Islamic headscarf on university premises was not included in 'habitual forms' of manifestations either.

The question is how the Court found this approach compatible with its view – expressed in settled case law – that the state's duty of neutrality and

¹⁷⁶ *Kalaç v. Turkey*. 1 July 1997.

¹⁷⁷ *Yanasik contre la Turquie*, 6 January 1993. (Only available in French in Hudoc.)

¹⁷⁸ *Ibid.* n. 176, § 29.

¹⁷⁹ *Leyla Şahin v. Turkey*, 10 November 2005, § 118.

impartiality in religious matters is irreconcilable with any power on the state's part to assess the legitimacy of religious beliefs or the *ways in which those beliefs are expressed*.¹⁸⁰ This is obviously what Turkey did and a behaviour that the ECtHR and ECmHR, respectively, accepted in *Şahin* and *Karaduman*.

5.2.3 A Lot of Appreciation and Not a Lot of Substantiation

Now, the standard response to such criticism would of course be that there are legitimate aims for which restrictions on the right to manifest one's religion are allowed. Accordingly, the Court has repeated on several occasions that it may be legitimate to proscribe the use of the Islamic headscarf in order to protect public order, public safety and the rights and freedoms of others.¹⁸¹ In such an assessment the Court leaves the state some margin of appreciation.

True, it is the state's privilege to assess threats to which it feels it must react, and then react to them. This is so even in cases where that threat consists of a group of people exercising a right they are entitled to *prima facie* under Article 9; that is why there is an Article 9(2) providing certain possible restrictions. But when the state takes advantage of such exceptions to the main rule, it must make sure that the measures imposed are in response to a real and imminent threat. 'Indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears – are capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention', in the words of dissenting judge Tulkens.¹⁸² The dissenting judge also found support in the Court's own established case law (*Smith and Grady v. the United Kingdom*.¹⁸³) to support this position. Furthermore, when the threat is established the state must, in order to be in compliance with the Convention, conduct a test of proportionality. Are the measures imposed a reasonable response to the threat faced?

In *Leyla Şahin v. Turkey* and *Karaduman v. Turkey* the Government's argument is constructed according to the following:

- (1) There is a threat from fundamentalist extremist elements in Turkey who wish to replace the secular democratic order with theocracy and *sharia*, and impose on everyone a dress code including the Islamic headscarf.
- (2) Ms Karaduman and Ms Şahin wear an Islamic headscarf.
- (3) Ms Karaduman and Ms Şahin are, therefore, as long as they insist on wearing their headgears, part and parcel of the threat

¹⁸⁰ *Manoussakis and Others v. Greece*, 26 September 1996, § 47.

¹⁸¹ *Refah Partisi and others v. Turkey*, 13 February, § 92, and *Leyla Şahin v. Turkey*, 10 November 2005, §111.

¹⁸² *Leyla Şahin v. Turkey*, 10 November 2005, dissenting opinion, judge Tulkens, § 5.

¹⁸³ *Smith and Grady v. the United Kingdom*, 27 September 1999, § 89.

to the secular order and democracy with all that comes with it in form of tolerance and true religious pluralism.

Notwithstanding the fact that Turkey should have been requested to evidence in front of the Court the existence of the particular extremist threat it asserted,¹⁸⁴ this is simply a *non sequitur*; Even if the two premises (1) and (2) would be true, this does not make (3) right unless the Turkish government substantiates why Ms Şahin and Ms Karaduman themselves constituted such a threat. This is simply asserted by the government saying that headscarves on campus may pressure – and help fundamentalist groups in pressuring – other student who are non-practising Muslims or non-Muslims. There was no evidence of such pressure in *Karaduman*¹⁸⁵ nor *Şahin*, and thus nothing to show that the applicants ‘through their attitude, conduct or acts, contravened that principle [secularism]’¹⁸⁶. Lewis argues that the problem with *Şahin* was that the Grand Chamber did not conduct a meaningful proportionality test.¹⁸⁷ It is hard to disagree. In its judgment the Court stated: ‘Having found that the regulations pursued a legitimate aim it [was] not for the Court to apply the criterion of proportionality in a way that would make the notion of the institution’s internal rules devoid of purpose’.¹⁸⁸ Thereby it effectively provided the state with a *carte blanche*.

5.2.4 The General Attitude to Islam; the Headscarf as a Proxy for Extremism

It is a fully legitimate to ask why the well-established practice to analyse whether the interference that the applicants had been subjected to was proportional to the aims pursued was not applied in relation to the headscarf cases. Maybe the answer can be found in the Court’s way of considering its symbolism. When the Court accepted the arguments of the Turkish government it especially noted the ‘political significance’ the headscarf had taken on in Turkey in recent years, and the threat that ‘extremist political movements’ who wished to impose their religious symbols and conceptions of a society founded on religious precepts on everybody.¹⁸⁹ As discussed above in chapter 5.2.3, it did not ask for evidence, neither on the imminent nature of the threat, nor on whether Leyla Şahin and her headscarf had anything to do with it.¹⁹⁰ As Altiparmak & Karahanogullari observe, the Court ‘preferred to discuss religious radicalism in Turkey rather than the particulars of Ms Şahin’s case.’¹⁹¹

The Court’s tendency to link the custom of wearing the Islamic headscarf to fundamentalist, even extremist, currents within Islam is

¹⁸⁴ *United Communist Party of Turkey and others v. Turkey*, 30 January 1998, § 59.

¹⁸⁵ Cf. Taylor, 2005, at 254.

¹⁸⁶ *Leyla Şahin v. Turkey*, 10 November 2005, dissenting opinion, judge Tulkens, § 7.

¹⁸⁷ Lewis, 2007, at 412

¹⁸⁸ *Leyla Şahin v. Turkey*, 10 November 2005, § 121.

¹⁸⁹ *Ibid.* n. 188, § 115.

¹⁹⁰ Fahlbeck, 2004, at 27, when commenting on *Karaduman v. Turkey* observed that the only connection between extremist groups and students wearing headscarf is the headscarf itself.

¹⁹¹ Altiparmak & Karahanogullari, 2006, at 277.

questionable, to say the least. There might be a tendency that women wearing the headscarf are more ‘fundamentalist’ in their personal beliefs than women who do not, but there is no absolute correlation. Lumping all women with headscarf together is simply no good.

Some 60 years ago the Council of Europe was set up by ten Christian Western European states. European leaders agreed that there was need for unity among the non-Communist nations of Europe in the early days of the Cold War. At the time, the threat from the Soviet Union was very real and immediate – this was the time of the Communist take-over in Czechoslovakia and the Berlin blockade.¹⁹² Western Europe perceived itself as a community of values; tolerance, humanity and fraternity were values rooted in classical antiquity and Christianity – developed and ennobled through time by the Renaissance and later the Enlightenment – that had finally turned out in the modern concepts of democracy, rule of law and human rights.¹⁹³ The Collected Edition of the *Travaux Préparatoires*¹⁹⁴ reproduces the speech of Sir David Maxwell-Fyfe¹⁹⁵ at the First Session of the Consultative Assembly. In his address to the Assembly, ‘reflecting’ as C. Evans put it ‘his perspective of the Christian/liberal homogeneity of Europe’¹⁹⁶, Maxwell-Fyfe urged ‘those nations who belong to and revere the great family of Western Europe and Christian civilisation’¹⁹⁷ to work together for the protection of human rights. This despite of the fact that the ten original states - Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the UK – had already in August 1949 been joined by Greece and Turkey as members of the Council of Europe. These states were not non-Orthodox Christian, and could at least in the case of Turkey, by no relevant definition, be seen as a part of ‘Western Europe and Christian civilisation’.

So, it was clear from the beginning that the Council of Europe was a Christian club. The first Muslim state to join was Turkey, but Turkey’s millions of Muslims were represented by a government and an elite that were essentially hostile – at best indifferent – towards Islam. Is this homogenous heritage of still alive? As Manfred Nowak and Tanja Vospernik concludes: ‘societies in many states have been influenced for hundreds of years by the values of one particular religion, [...] Often the morals or values, *ordre public*, which governments seek to protect are in fact based on one particular religion.’¹⁹⁸ This would be true also for Europe as a whole.

¹⁹² On the driving forces of European integration in the aftermath of World War II, see further Robertson & Merrills, 2001, at 4, and Beddard, 1993, at 19.

¹⁹³ The above draws on the Charter of European Identity, quoted by Zemni in Shadid & van Koningsveld, 2002, at 161.

¹⁹⁴ A. H. Robertson (ed), 1975-85.

¹⁹⁵ Sir David Maxwell-Fyfe presided over the Committee on Legal and Administrative Questions of the Consultative Assembly and had been one of two *rapporteurs* of the Juridical Section of the European Movement.

¹⁹⁶ C. Evans, 2001, at 39.

¹⁹⁷ Ibid. n. 194, vol. 1, at 124.

¹⁹⁸ Nowak & Vospernik in Lindholm *et al*, 2004, at 172.

If we contrast the Court's somewhat idiosyncratic view of Islam in general; of *sharia law*¹⁹⁹, which is essentially a legal system extracted from the *Qur'an* – a book that, as we know, can be interpreted in many ways; of a plurality of legal systems²⁰⁰ – that actually does exist in a democracy such as Israel; and lastly its conception of the symbolism of the headscarf against the Court's depiction of Christianity in the blasphemy cases *Otto-Preminger-Institut v. Austria* and *Wingrove v. UK*²⁰¹, we can quite confidently conclude the following: Whereas pluralistic values, meaning freedom of expression, were depicted as a threat to Christianity, Islam was depicted as a threat to pluralistic values.

In connection to the *Karaduman* and *Dahlab* decisions²⁰² Fahlbeck²⁰³ rejects that any tendency of 'ethnocentrism' could have been an explanatory factor. He argues that the reasoning is strictly religion-neutral and would apply to any religious garment. However, as Fahlbeck notes, there are no Christian symbol corresponding to the Islamic headscarf. Well, I would argue that there are no corresponding Christian symbols *from our European ethnocentric position*. The cross, and even more so, the crucifix, are as Fahlbeck concedes, extremely potent symbols worn by people in all places and in all situations. In most of Europe, the symbol, although important to the individual believer, is accepted and even ignored by others, since it has practically degenerated into meaning next to nothing in the eyes of most Europeans. Muslims, especially in Muslim countries where the use of headscarves is just as wide-spread as the use of the cross is in Europe, should be able to enjoy the same benefit despite of the fact that some people, notably Turkish and European judges, read all sorts of dangers into it. If the Islamic headscarf would be allowed to be just that, an Islamic headscarf – just as a cigar is sometimes just a cigar – judicial and political efforts could be concentrated on fighting real religious intolerance, including religious fundamentalism.

It is controversial, but has to be said: The tendency to equate Islam to Islamism probably reflects a general xenophobia, directed at Islam, which has long been widespread in the West.

In chapter 5.1 to 5.2 I have tried to demonstrate the Court's misconception of Turkish secularism as an important – and to Muslims unhelpful – factor in the Court's decisions on Turkey. However, it might be that it is the other way around. It has to be considered whether it is the Court's general resentments towards Islamic fundamentalism – which it has a hard time distinguishing from Islam – that has influenced its views on Turkish Secularism. This is of course an hypothesis un-testable in practice since there is no comparative material; there is no militantly secular European state, member of the Council of Europe, with a class of pious traditionalist Christians of simple and rural origin, dominated until recently by a class of urban-secular 'white Turks' who have orchestrated three,

¹⁹⁹ *Refah Partisi and others v. Turkey*, 13 February 2003, §§ 120-5.

²⁰⁰ *Ibid.* n. 199, §§ 117-119.

²⁰¹ *Otto-Preminger-Institut v. Austria*, 20 September 1994, and *Wingrove v. the United Kingdom*, 22 October 1996.

²⁰² *Karaduman v Turkey*, 3 May 1993, and *Dahlab v. Switzerland*, 15 February 2001.

²⁰³ Fahlbeck, 2004, at 39.

possibly four, consecutive *coup d'états* in order to preserve their dominance and way of life, which could provide a 'mirror case'.

6 Concluding Remarks

The European Court of Human Rights is struggling to find the proper balance between individual religious freedom of expression and manifestation to society's legitimate interest in protecting public order, public safety and the rights of others. No doubt this is an interesting and urgent challenge seeing that the cultural and religious diversity in Europe is growing, if not by the day, then by the year. On top of that, the Council of Europe has in the last 15 years welcomed new member states with populations, which far from it reflect the religious demography of the original ten Western Judeo-Christian signatory states.

Many European societies have in recent times taken, and will in the future have to take, positions on an ever-growing array of issues pertaining to religious respect and tolerance. In doing so, they will look to Strasbourg for answers. It is in this context we must assess the Court and Commission's findings in the Turkish cases. They do not set an example to follow. Comparatively, Turkey's Muslims are essentially well off religious rights-wise. Compared to their fellow Muslims in Western Europe they are not in minority, others carry that burden. Compared to their sisters and brothers of faith in Iran, Saudi Arabia, and Somalia, Turkish Muslims get to choose whether they want to live a pious life, a secular life or if they prefer to stop being Muslim altogether. Though, there are a few flaws in the otherwise rosy picture. Those flaws all stem from Turkey's peculiar breed of 'secularism', *laiklik* as they call it. In accepting the secular policies of Turkey the ECtHR has arguably paved the way for secular intolerance Europe-wide, which is just as bad as religious bigotry.

This thesis has argued that the Court took Turkish secularism for something it wasn't: liberal, modern, Western, and a prerequisite for democracy, pluralism and tolerance in Turkey. Then it looked at the headscarf and understood it to mean something it doesn't necessarily mean: fundamentalism, extremism, backwardness, and oppressive of women's rights. Then it exaggerated the seriousness of the 'Turkish context', in which it included an imminent and real threat from extremist Islamist movements, but failed to include a 'deep state', which has intervened in Turkish politics on countless occasions since the founding of the Republic in 1924, sometimes with a full blown *coup d'état*, sometimes with fatherly 'advice',

The seeming indifference to evidence and the inadequate proportionality analyses that in one way or the other surface in the Strasbourg organs' reasoning in all five cases I set out to examine, seem, in my opinion, to have a lot do with preconceived notions on the part of the European judges. First, of secularism as something inherently good, especially in a Muslim country, and, second, of Muslim practices in general. So it is hard to say what came first; the predilection for Turkish secularism, or the aversion for Islam.

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