The Strasbourg Court on Issues of Religion in the Public Schools System

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1 Religion and Education

1.1 Religions have always constituted an omnipresent phenomenon in all societies. Over the past almost 300 years, public schools have also emerged as a necessary component of a modern State. Since religious freedom assumes diversity and public schooling must maintain a certain degree of uniformity, a clash between conflicting approaches and demands becomes unavoidable. It is the function of the state to provide for a solution and, in the European legal space, it is the function of supranational jurisdictions to watch over state action affecting individual rights.

The European Convention guarantees, on the one hand, the freedom of religion and conscience, understood i.a. as the freedom "either alone or in communication with others and public or private, to manifest religion or belief, in worship, teaching, practice and observance" (Art. 9 ECHR). Freedom of religion and conscience applies not only to adherents of religious denominations, "it is also a precious asset for atheists, agnostics, sceptics and unconcerned. The pluralism, indissociable from a democratic society, depends on it".[1]

On the other hand, Art. 2 of Protocol No. 1 establishes the right to education and provides that the State would "assume functions in relation to education and to teaching" but, in the exercise of those functions, should "respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions".

Thus, the State has a right (or – rather – an obligation) to provide public schooling for all children whose parents are not ready to use private schools. At the same time, the State must respect both, the general freedom of religion and conscience and the specific guarantee of that freedom in respect to the operation of the public schools system.

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[1] Appl. No. 14307/88, *Kokkinakis v. Greece* (ECtHR 25 May 1993) para 31.

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1.2 The very essence of the European Convention is to provide for general standards that must be uniformly respected by all 47 Member States. But acceptation of universal standards is not tantamount to acceptation of uniformity.

While contemporary Europe often emphasises the need for common standards and universal values, it has never been understood as the exclusion of national, regional and local differences. Each country of Europe has its own heritage that refers to tradition and history, religious and moral values, political and constitutional conventions and, simply, the way of living of the society. In other words, each country has, usually over centuries, elaborated its own identity that may be described as its own culture. The countries of Europe may uniformly adhere to general values like human rights and the rule of law, but pluralism occupies a prominent place among those values. Thus, the current process of European integration has a dialectic nature: the trend towards uniformisation collides sometimes with the quest for preservation of traditional values, relations and attitudes, in brief – distinct cultural identities of particular states. Needless to mention, religion and – in particular – religious structure of the society, constitutes one of the core elements of those cultural identities.

The European Convention acknowledges the predominant role of national authorities: "The machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and freedoms it enshrines [...] By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in better position than the international judge to give an opinion on the exact content of the [Convention] requirements."[2]

But, at the same time, the Convention sets standards that must be universally observed in all Member States.

This produces a certain tension between subsidiarity and universality which may be addressed only on a case-to-case basis. Therefore "some interpretational tool is needed to draw the line between what is properly a matter for each community to decide at local level and what is so fundamental that it entails the same requirement for all countries whatever the variations in traditions and culture. In the European system, that function is served by the doctrine of the margin of appreciation".[3] In a nutshell, this doctrine reserves for the Contracting States some room to decide how to implement the Convention standards in a way that corresponds best to the domestic conditions. While the very idea of margin of appreciation is based upon the respect for the subsidiarity principle,[4] it has never been stated in the written text of Convention. Rather, it emerged in the Strasbourg case-law as an entirely judge-

[2] Appl. No. 5493/72, *Handyside v. United Kingdom* (ECtHR 7 December 1976) para 48.
[3] Mahoney 1998, p. 1.
[4] "It is the essence of the national margin of appreciation that, when different opinions are possible and do exist, the international judge should only intervene if the national decision cannot be reasonably justified" (Appl. No. 17419/90, *Wingrove v. United Kingdom* (ECtHR 25 November 1996), the concurring opinion of Judge Bernhardt). See also Villiger 2007, p. 624–626.

made creation. Thus, it is the ECtHR who, in the final resort, delineates the scope of what shall be left for the States.

1.3 The application of the doctrine of the margin of appreciation is based upon three assumptions: (1) the Convention sets universal standards and within those standards allows the Member States a choice; (2) the Court should respect choices taken by the domestic authorities as long as they do not collide with any of the universal standards; (3) the scope of choice varies depending on several factors: in some situations domestic authorities are allowed a "wide" or (only) "certain" margin of appreciation, in others – the margin of appreciation remains very limited or does not exist at all. And, since it is the Court's function to decide what (if any) margin of appreciation is appropriate in respect to each particular type of case, the doctrine offers a considerable degree of flexibility in the application of general standards to individual situations.

Among the factors that determine the scope of the margin left for the State, the existence of a common cultural context (i. e. of a particular traditional combination of moral, religious, ideological, political and constitutional values and attitudes) in which particular rights operate within the society, is of a particular importance. It should not be, of course, forgotten that the Convention as such is based on a certain political philosophy, and that it also presupposes a universal acceptation of certain social, cultural and moral values. In particular, such values as tolerance, pluralism and democracy, constitute the core structure of the whole Convention system. Those values must be respected and protected by all Member States.

At the same time, however, there are, as there always have been, profound differences between societies (and – in consequence – between Member States) and – in the Convention process – those different identities of Member States must be accepted and respected.

The delimitation of the national margin of appreciation appears particularly difficult when there is a conflict involving important religious or/and philosophical values.[5] The Member States differ in their tradition and history, as well as in their religious structures, in the dominant moral values, and in the existing degree of tolerance. It must not be forgotten that over the last two decades those differences became more dramatic due to the geographical expansion of the Convention system and also due to the evolution of the role of Islam in some Member States. It may be very difficult to identify common ground to approach problems of religion and – in consequence – problems like family life, sexual orientation, abortion or euthanasia.

The underlying philosophy of the Convention assumes pluralism of views and judgments and requires tolerance. Tolerance means, on the one hand, that the very fact that others may have views and values that are not shared by a majority, cannot be called into question. But, it also means that those who represent less orthodox views and values must not disrespect feelings and reactions of other social groups. Those relations develop horizontally – among individuals and groups, and only indirectly may be controlled by the Convention standards. The State's role is focused

[5] Garlicki 2012, p. 727 et seqq.

primarily on securing a peaceful coexistence of different systems of values. Quite often it calls for elaboration of compromises (or, at least, for elaboration of a framework in which such compromises becomes feasible) and for the State acting as an arbiter. While such State action must respect all standards set out in the Convention (and in the case-law of the ECtHR), assessments of "necessity", "justifiability" or "public interest" cannot be taken in the Strasbourg ivory tower. The Strasbourg judges cannot ignore the local context of each and every case and are constantly faced with the contradiction between universalism and particularism. What may be perfectly acceptable in a Nordic society, may provoke shock and distaste in some other corners of Europe.

2 The Convention Framework of the Public Educational System

2.1 The State has a right as well as an obligation to establish a system of public schools and to see that each child be included into a decent system of public or private education. The right of access to public education refers, nowadays, to all levels of education. The Convention does not guarantee, in principle, a right to educate children at home.[6]

The State's obligation to provide for public education assumes that the State has a competence to organize the system. "The right to education guaranteed by the first sentence of Article 2 by its very nature calls for regulation by the State, but such regulation must never injure the substance of the right nor conflict with other rights enshrined in the Convention or its Protocols".[7] Under the case-law of the Strasbourg Court:

- the State has a wide discretion in determining its educational system: "the right to education [...] by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of community and individuals";[8] the right to education refers to the educational institutions actually existing in the material time; that right cannot be, in principle, understood, as enhancing the State's obligations to establish new schools of a particular type, e. g. schools with a particular language of instruction;
- the setting and planning of the curriculum fall in principle within the competence of the States;
- the State has the competence to organize the operation of public schools also in respect to the internal rules of behaviour (including common manifestations, dress codes, etc.) and to apply disciplinary sanctions to enforce those rules.

[6] See Appl. No. 10233/83, *Family H. v. United Kingdom* (ECommHR 6 March 1984); Appl. No. 17678/91, *B.N. and S.N. v. Sweden* (ECommHR 30 June 1993); Appl. No. 35504/03, *Konrad v. Germany* (ECtHR 11 September 2006).

[7] Joined Appl. No. 7511/76, 7743/76, *Campbell and Cosans v. United Kingdom* (ECtHR 25 February 1982) para 41.

[8] Appl. No. 2126/64, *Belgium Linguistic Case* (ECtHR 23 July 1968) para 32.

The State's powers must, however, remain consistent with the parents' rights to have their religious and philosophical convictions respected. In other words, the margin left for the organisational and regulatory activity of the State ends where the operation of a public school becomes incompatible with children's/parents' convictions.

One of the most important criterions in this respect is the prohibition of indoctrination: "the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. This is the limit that must not be exceeded. Such an interpretation is consistent at one and the same time with the first sentence of Article 2 of the Protocol no. 1, with Articles 8, 9 and 10 of the Convention and with the general spirit of the Convention itself, an instrument designated to maintain and promote the ideals and values of a democratic society."[9] Thus, neither the curriculum (as set in general regulations and as implemented in particular schools) nor the general operation and discipline within the public school system must transgress limits resulting from the prohibition of indoctrination.

The European standards are, by their nature, rather general and they call for compromise and good faith in the process of their national implementation. The very concept of indoctrination may vary according to different cultural and religious traditions of particular States and also – as was mentioned in the *Klejdsen* case – may vary according to the actual range of alternative educational possibilities that are made available to all students.[10]

2.2 The first of the "great decisions" of the Court concerning right to education were adopted already several decades ago: the 1968 *Belgium Linguistic* Case and the 1976 *Kjeldsen* Case set several principles that are still valid in the case-law of the Strasbourg Court. In the beginning of the current century, the Court – for the first time – was invited to take a closer look at the relationship between religious education and the mission of public schools; its findings were, in particular, summarized in Grand Chamber judgments in *Leyla Şahin* (2005), *Folgerø* (2007), *Lautsi* (2001) and, albeit indirectly, in *S.A.S.* (2014).

Two questions of this case-law seem to evoke a particular interest: (1) the place of religious instruction in public schools, first of all the content of instruction and its position within the school curriculum and (2) the manner and scope of expression of religious conviction in public schools, in respect to both, individual right of

[9] Appl. No. 5926/72, *Kjeldsen and Others* (ECtHR 7 December 1976) para 53.

[10] Appl. No. 5926/72, *Kjeldsen and Others* (ECtHR 7 December 1976) para 50: "In its investigation as to whether Article 2 of Protocol no 1 has been violated, the Court cannot forget, however, that the functions assumed by Denmark in relation to education and to teaching include the grant of substantial assistance to private schools. Although recourse to these schools involves parents in sacrifices [...] the alternative solution it provides constitutes a factor that should not be disregarded in this case".

students to express their individual convictions and the regulatory power of schools to promote/impose certain forms of religious expression.

3 Religious Instruction in Public Schools

3.1 Although the *Kjeldsen* Case did not deal directly with the problem of whether a public school is allowed to include religious instruction into its curriculum,[11] it was – and still is – the leading precedent also for that area.

The Court established four principal rules:

- the State's obligation to assure access to education enhances a power to decide what kind of public schools system should be established and a power to decide on the structure and content of the school curriculum;
- Art. 2 of Protocol No. 1 and, in particular, its "religious guarantee" applies to the entire educational program; it is not possible to draw distinction between religious instruction and other subjects;
- information transmitting religious, philosophical and moral messages constitute an indissociable part of many "nonreligious" subjects included into the school curricula; the Convention cannot be read as preventing States from imparting through teaching or education information or knowledge of a directly religious or philosophical kind; it does not even permit parents to object to the integration of such teaching or education in the school curriculum;
- however, every information that may have religious or philosophical connotations must be conveyed in an objective, critical and pluralistic manner; failure to observe this requirements transforms legitimate education into a process of indoctrination, be definition constitution violation of parents' rights.

These four rules are applicable to the regulation and content of the entire curriculum and are also determinative to the regulation and content of religious instruction understood as a separate subject offered to students.

3.2 In Europe, there is no uniform system of religious instruction in public schools, as – in a broader perspective – there is no uniform system of relations between the State and the religious communities. In consequence, the choice of one or another system clearly remains within the State's margin of appreciation. The Strasbourg Court is only allowed to examine whether a particular national system does not encroach upon parents'/student' rights as guaranteed by Art. 9 ECHR and Art. 2 of Protocol No. 1.

[11] It should be recalled that in *Kjeldsen*, the Court addressed the compatibility of the sex education with parents' rights under Art. 2 of Protocol No. 1. The applicants claimed that integrated and compulsory sex education, as introduced into State schools, was contrary to the beliefs they hold as Christian parents. The question, therefore, was not whether and how religion can be taught in public schools, but – rather – what are the limitations in teaching non-religious subjects that may offend religious convictions of the parents.

National regulations vary to a considerable degree, nevertheless it seems possible to organize them into three models:

- the secular model (based, in particular, on the French tradition of secularism) in which no religious instruction is offered in public schools or, at least, no religious instruction may constitute a part of the school curriculum;
- the model of integrated religious instruction, in which teaching of religion is provided as a separate subject, but this teaching is not based upon any particular religion and is constructed as a general, denominationally neutral instruction about problems of religion; this model exists in several European states and its compatibility with the Convention has been recently assessed in regard to regulations adopted in Norway, Turkey and Germany;
- the model of parallel (denominational) religious instruction, in which teaching of religion is not only provided as a separate subject but is also taught separately for each of the denominations represented among students of a particular school; in other words, each of the primary religions is invited to take care of instruction of its principles and beliefs; it is the responsibility of the school to arrange for parallel, denominationally oriented classes in religion; students (parents) must have a right to choose a religion class that corresponds with their convictions or, alternatively, a (religion-neutral) course on general ethics.

3.3 The secular model has never been examined by the Strasbourg Court in full. The existing case-law indicates only that there is no right to have religion courses taught in the public school system. As the Court observed in 2010, "the right to manifest religion in teaching does not [...] go so far as to entail an obligation on States to allow religious education in public schools or nurseries".[12] Furthermore, it indicates that religious problems can be addressed within – secularly oriented – courses on general ethics, providing the curriculum is not conceived as an atheistic

[12] Appl. No. 7798/08, *Savez Crkava "Riječ života" and Others v. Croatia* (ECtHR 9 March 2011) para 57. Nevertheless, in this case, the Court found a violation of Art. 14 (equality) as the Croatian regulations had been applied in a discriminatory manner.

or anti-religious indoctrination.[13] Thus, it could be assumed that, in principle, the decision to adopt a secular model falls under the state's margin of appreciation.

3.4 The integrated model has been assessed at length by the Court on several occasions; the leading case being *Folgerø v. Norway*.[14] In *Folgerø*, the Court established a violation of the Convention. Although the judgment was adopted by a narrow majority in the Grand Chamber (9:8), the split was not related to the proclamation of general principles, but rather to the manner in which those principles had been applied to the modalities of the Norwegian regulation.[15]

The Court summarised the "general principles" as to the interpretation of Art. 2 of Protocol No. 1 in the following manner:[16]

- the two sentences of Art. 2 of Protocol No. 1 must be interpreted not only in the light of each other but also, in particular, of Art. 8, 9 and 10 of the Convention;
- the guarantee of parents' rights (the second sentence of Art. 2 of Protocol No. 1) "aims at safeguarding the possibility of pluralism in education [...] In view of the power of the modern State, it is above all through State teaching that this aim must be realized";
- Art. 2 of Protocol No. 1 establishes an obligation of the State "to respect parents' convictions thorough the entire State education programme";
- the parents – in the discharge of a natural duty towards their children – may require from the State to respect their religious and philosophical convictions;

[13] In Appl. No. 45216/07, *Appel-Irrgang v. Germany* (ECtHR 20 October 2009), the Court upheld the system, adopted in Berlin, that provided for a compulsory course in ethics (religious instruction was also offered at the school premises but only as a supplementary option).
First, the Court disagreed with the applicants' argument that the ethics course constituted a non-neutral form of secular indoctrination. The Court analysed the content and structure of the program and arrived at the conclusion that both, the aims and the message of the course is conform with the requirements of pluralism and objectivity. The Court noted that the course "does not attach particular weight to any particular religion or denomination and its goal is to convey certain basis values common for all students".
Secondly, the Court rejected the argument that the course did not reserve sufficient space for information about Christian religion, contrary to the historical position of this religion in Germany. The Court confirmed the *Folgerø* approach that national tradition may justify more detailed presentation of the dominant religion. However, this principle cannot be interpreted as establishing an obligation of all states to do so. These decisions belong to the State's margin of appreciation.
Finally, the Court did not accept the argument that the very introduction of a mandatory course in ethics violated religious convictions of the applicants. The Court applied a twofold test: 1) whether the course was structured in a way that offered a priority to a particular religion; 2) whether it promoted a fight against the existing religions, in particular – Christianity. Negative response to both questions convinced the Court that there had not been any violation of the Convention.
[14] Appl. No. 15472/02, *Folgerø and Others v. Norway* (ECtHR 29 June 2007).
[15] The Norwegian regulation provided that all students of elementary and secondary schools have to take classes on Christianity, Religion and Philosophy (KRL) and allowed for partial exemptions from participation upon a reasoned request of parents.
[16] See Appl. No. 15472/02, *Folgerø and Others v. Norway* (ECtHR 29 June 2007) para 84.

- a balance between individual interest and that of a group must be achieved: it must "ensure the fair and proper treatment of minorities and avoid any abuse of dominant position";
- the setting and planning of the curriculum fall in principle within the States' competence: Art. 2 of Protocol No. 1 "does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind"
- the State must "take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination";
- indoctrination means a situation in which "parents' religious and philosophical convictions are not respected".

The holding of *Folgerø* was threefold. In the general dimension, the Court accepted the model of integrated teaching as compatible with the Convention. Thus, the very fact that the subject "Christianity, Religion, and Philosophy" was included into the curriculum and, in principle, was compulsory for all students, did not constitute – in itself – a violation of the Convention. The violation resulted only from the – substantive and procedural – determination of this subject.

In the substantive dimension, the Court analysed, first, the structure of instruction. It accepted that Art. 2 of Protocol No. 1 provides for no right to isolation: it "does not embody any rights for the parents that their child be kept ignorant about religion and philosophy in their education". Furthermore – taking into account the religious context of Norway – the religious instruction may, quantitatively, focus on presentation of the Christian religion: "the fact that knowledge about Christianity represented a greater part of the curriculum [...] than knowledge about other religions and philosophies, cannot [...] of its own be viewed as a departure from the principles of pluralism and objectivity amounting to indoctrination".[17] However, the State's margin of appreciation becomes more limited as to the content of the instruction: since pupils were also invited to engage into different religious activities "which would in particular include prayers, psalms, the learning of religious texts by heart and the participation in plays of a religious nature", and since those activities offered some priority to the Christian religion, there emerged a situation of imbalance. This situation "would be capable of affecting pupils' minds in a manner giving rise to an issue under Article 2 of Protocol No. 1".[18]

In the procedural dimension, the Court placed a strong emphasis on the principle of exemption: parents (students) who regard the religious instruction, as provided by the school system, to be incompatible with their convictions must have a possibility to be exempted from instruction. The Court held that the system of (only) a partial exemption imposed too heavy a burden on the parents involved: parents were required regularly to analyse the content of upcoming lessons and exemption can be granted only if they were able to show that subjects to be taught are irreconcilable with their conviction. In addition, the requirement of written justification

[17] Appl. No. 15472/02, *Folgerø and Others v. Norway* (ECtHR 29 June 2007) para 89.
[18] Appl. No. 15472/02, *Folgerø and Others v. Norway* (ECtHR 29 June 2007) para 94.

of every exemption request could easily amount to parents' obligation to disclose their intimate convictions to the school authorities.[19] The lack of a proper exemption system combined with the actual programme of the KRL course, gave rise to a violation of Art. 2 of Protocol No. 1.

The *Folgerø* approach was followed in the *Zengin* judgment of 9 October 2007,[20] in which mandatory religious instruction in Turkish public schools was declared to violate the rights of parents guaranteed under Art. 2 of Protocol No. 1. While a possibility of exemption was provided for adherents of certain religions, it did not apply to some others, in particular to the Alevi faith that represented one of the Islamic denominations.

The Court recalled the general principles summarised in the *Folgerø* judgment. It reiterated that "in a pluralist democratic society, the State's duty of impartiality and neutrality towards various religions, faiths and beliefs is incompatible with any assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed".[21] The Court came to the conclusion that the Turkish regulation of the subject "Religious Culture and Ethics" cannot be considered to meet criteria of objectivity and pluralism and, more particularly in the applicant's particular case, "to respect the religious and philosophical convictions [of the] followers of the Alevi faith, on the subject of which the syllabus is clearly lacking".[22]

This substantive shortcoming was further strengthened by the lack of adequate procedural regulation. The procedure of exemption, being limited only to adherents of certain religions, does not provide sufficient protection for other religious minorities. This procedure was shaped in a manner that was "likely to subject them to a heavy burden and to necessity of disclosing their religious or philosophical convictions in order to have children exempted from the lessons in religion".[23]

The same approach was confirmed in *Mansur Yalçin and Others v. Turkey* in which the Court again was confronted with the lack of proper arrangements for the Alevi children. In addition the Court, in reference to Art. 46 of the Convention, noted the existence of a "structural problem" which requires the adoption of general measures. Apparently, the Turkish authorities did not implement the *Zengin* judgment in a correct manner, a reaction which, unfortunately, does happen also in other countries.[24]

This summary of the case-law dealing with the system of integrated religious instruction demonstrates certain general principles:

[19] See Appl. No. 15472/02, *Folgerø and Others v. Norway* (ECtHR 29 June 2007) para 95–100.
[20] Appl. No. 1448/04, *Hasan and Eylem Zengin v. Turkey* (ECtHR 9 October 2007).
[21] Appl. No. 1448/04, *Hasan and Eylem Zengin v. Turkey* (ECtHR 9 October 2007) para 54.
[22] Appl. No. 1448/04, *Hasan and Eylem Zengin v. Turkey* (ECtHR 9 October 2007) para 70.
[23] Appl. No. 1448/04, *Hasan and Eylem Zengin v. Turkey* (ECtHR 9 October 2007) para 76.
[24] Appl. No. 21163/11, *Mansur Yalçın and Others v. Turkey* (ECtHR 16 September 2014) para 84. The Court limited its judgment to Art. 2 of Protocol No. 1 and regarded it as "not necessary" to deal with the claim that also Art. 9 read in conjunction with Art. 14 had been violated (para 80). The latter holding provoked a (quite convincing) dissent of three judges (A. Sajó, N. Vucinić and E. Kūris).

- the decision to adopt such a system falls within the State's margin of appreciation;
- in the structure and content of such a course, quantitative distinctions, that offer certain priority for the "traditional religion of the State", are not prohibited per se; more problematic are qualitative distinctions, since they create a greater risk of (prohibited) indoctrination;
- there must be sufficiently effective procedural guarantees to be exempted from religious instruction; undue restriction of the exemption may constitute a violation of the Convention.

3.5 The third model of religious instruction is based on the principle of parallelism: every (important) denomination has the possibility to hold its "own" religious classes, each parent (student) has a right to choose one of those courses and, for those students who do not identify with any of those religions (that includes also agnostics and atheists) an alternative course of ethics must be provided.

This model has been, as yet, assessed only in respect to Polish regulation of religious instruction.[25] On the one hand, it was contested that the general model of religious instruction is incompatible with requirements of Art. 2 of Protocol No. 1. On the other hand, there were claims that the inclusion of grades (marks) for religion into school reports raises problems under Art. 9 and 14 of the Convention.

One of the possible approaches is that the general assessment of the Polish system should refer to the principles of interpretation of Art. 2 of Protocol No. 1 as recapitulated in the *Folgerø* case: the State is bound to respect parents' conviction throughout the entire public school education programme; the State must ensure the fair and proper treatment of minorities and avoid any abuse of dominant position of any particular group (religion); the curriculum – as set by the State – may include information of a religious/philosophical kind, but must assure that it is conveyed in an objective, critical and pluralistic manner; the State is forbidden to pursue an aim of indoctrination.

[25] Appl. No. 23380/94, *C.J., J.J. and E.J. v. Poland* (ECommHR 16 January 1996); Appl. No. 40319/98, *Saniewski v. Poland* (ECtHR 26 June 2001); Appl. No. 7710/02, *Grzelak v. Poland* (ECtHR 15 June 2010). Poland is a predominantly Roman-Catholic country. Under the Polish system, there are separate classes for each denomination represented by more than three pupils of a particular school. Pupils (parents) opt for one of the courses by submitting so-called "positive declarations". For pupils who do not wish to follow any of the religion courses, alternative course of ethics must be provided. A grade (mark) for those courses is included into the yearly school reports as well as into the final reports confirming the conclusion of a given level of schooling (i. e. elementary school, gymnasium and liceum). Grades (marks) obtained for religious instruction or ethics is counted towards the "average mark" obtained by a pupil in a given school year. It is provided that school reports contain a separate rubric "religion/ethics"; therefore it is not possible to determine whether a pupil followed one of the courses on religion or the course of ethics. The problem is that, in some schools, the course of ethics is not provided (because of a very limited number of interested pupils) and, in consequence, the yearly school report of pupils who did not attend the available course on Catholic religion may contain a straight line in the rubric "religion/ethics". This leaves a message that a pupil did not follow a course on the Catholic religion, and – most probably – was not a member of the Roman-Catholic Church.

It might be, however, observed that under the parallel system, each denomination holds classes on its "own" religion and, by definition, those classes must be oriented towards teaching and supporting the principles and belief of a particular religion. The requirement of objectivity and pluralism as well as the prohibition of indoctrination must also be present in that system, but must be interpreted accordingly. It is not impossible that the distinction between "bearing Christian witness and improper proselytism", adopted in the *Kokkinakis* case might be of some usefulness.[26] Therefore, while each separate Church may be allowed to convey the message on its doctrine and principles, the prohibition of "improper proselytism" would constitute an absolute limit. In other words, State tolerance of "improper proselytism" would be tantamount to indoctrination. Furthermore, the vulnerability of the school environment should also be taken into account. Thus, teaching religion (and, in particular – the dominant religion) can never result in discrimination of minorities or undue pressure on adherents of other religions as well as on atheists and agnostics.

In such a system, particular importance must be attached to the freedom of choice. Pupils (parents) should be free from any undue pressure or influence when opting for one of the courses on religion or ethics. As long as those courses remain optional and as long as the choice depends on the wish of parents and pupils, it may be assumed that such a system of teaching – in its model application – falls within the margin of appreciation as to the planning and setting of the curriculum accorded to States under Art. 2 of Protocol No. 1.

More problems may arise in practical implementation of this model. The Court seems to be clear on the matter of voluntariness: in both earlier decisions concerning (and upholding) the Polish regulation, it was emphasised that pupils were not obliged to attend religious instruction, as it was organized on a voluntary basis. An *a contrario* conclusion seems more than appropriate in this respect.

If no alternative course on ethics has been provided, it may – perhaps – be still maintained that the scope of the State's obligation depends on the number of pupils involved and that the State may not be absolutely required to provide such course for one pupil only. This problem has not yet been clearly addressed by the Court. What, however, the Court was invited to decide, was related to the "straight-line rule": if a student did not follow any of the available courses on religion and if no alternative course was provided, the school report contains a straight line in the rubric religion/ethic. In the *Grzelak* case, the Court arrived at the conclusion that this system creates discrimination of non-believers. It was argued that the fact of having no mark for religion/ethics inevitably has a specific connotation and distinguishes the persons concerned from those who have a mark for the subject. In a country, like Poland, it may amount to a form of stigmatisation of such persons.

[26] Appl. No. 14307/88, *Kokkinakis v. Greece* (ECtHR 25 May 1993) para 48.

4 Religion and Dress Codes at School

4.1 The school is a public institution and it goes without saying that the State must retain regulatory powers concerning not only the structure and content of the curriculum but also the rules governing the internal order and operation of the school. Those regulations may enter the religious sphere in two different ways:

- the school may establish prohibitions or requirements regulating individual behaviour of students that may interfere with their religious or philosophical convictions;
- the school may expose students to permanent contact with messages and/or symbols promoting a particular religion.

In practice, the former problem arises in respect to the prohibition of the Islamic scarf and the latter – in respect to the presence of a cross/crucifix in school classrooms. The Strasbourg Court has already had some opportunities to elaborate its position in both areas.

4.2 It is a valid principle that, in general, the establishment of dress codes remain within the school regulatory power.[27] Thus, only very oppressive (and clearly unreasonable) dress regulation would be regarded as undue interference with the personal autonomy of students and, henceforth, a violation of Art. 8 of the Convention. The standard of protection becomes, however, quite different when a dress code is applied to situations in which wearing a particular dress is motivated (required) by a particular religion. In such situations, recourse is made to Art. 9 of the Convention. This issue has arisen particularly in relation to the Islamic scarf and, as is well known, certain (but, by far, not all) European countries decided to prohibit the scarf to teachers and – sometimes – also to students. The problem evokes numerous controversies and is tackled from very different angles: for some, the prohibition exposes students to a grave moral dilemma and compels them to violate rules of their religion; for others – the very concept of the scarf symbolises inequality and sends a message incompatible with the basic values of the Convention.

The Court accepts that the problem of dress codes may affect freedom of religion.[28] It is clear that freedom of religion implies also freedom to manifest one's

[27] E. g. Appl. No. 11674/85, *Stevens v. United Kingdom* (ECommHR 3 March 1986): male students may be required to wear a tie at school.

[28] The problem has also been addressed in respect of non-educational environment. The general position of the Court is that restrictions must meet requirements of Art. 9.2 of the Convention. Those restrictions may be, in the first place, justified by necessities of public safety. The Court accepted regulations requiring removal of a religious dress for a security check in an airport (Appl. No. 35753/03, *Phull v. France* ([ECtHR 11 January 2005]) or in a consulate (Appl. No. 15585/06, *El Morsli v. France* [ECtHR 4 March 2008]) as well as imposing obligation to appear bareheaded on identity photos for use on official documents (Appl. No. 24479/07, *Mann Singh v. France* [ECtHR 11 June 2007]).
Also requirements of public safety and protection of the rights of others may constitute valid grounds for restriction (see Appl. No. 48420/10, 59842/10, 51671/10 and 36516/10, *Eweida and Others v. United Kingdom* [ECtHR 15 January 2013]), where the Court, heavily relying on the

religion. "Bearing witness in words and deeds is bound with the existence of religious convictions."[29] However, since – under Art. 9.2 ECHR – freedom of religion may be subjected to limitations, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and to protect a general public order. Thus, in assessing whether a particular dress code remains compatible with Art. 9, it is necessary to establish a reasonable balance between conflicting interests. In other words, once it is established that a prohibitive dress code interferes with the freedom of religion, the State must demonstrate that its establishment was "necessary in a democratic society". The basic norm of reference is here Art. 9 ECHR, a provision that leaves less room for the State's margin of appreciation than Art. 2 of Protocol No. 1.

4.3 Historically, the first question before the Strasbourg Court was raised by a teacher affected by the prohibition to wear the Islamic headscarf in the course of her teaching duties.

In the 2001 *Dahlab v. Switzerland* decision,[30] the Court upheld a dismissal of an elementary school teacher who had refused to stop wearing an Islamic headscarf. The Court, confirming the approach of the Swiss Federal Court, raised three principal arguments:

- the particular nature of the applicant's profession: a state school teacher represents the State educational authority (and the Swiss Constitution established the principle of denominational neutrality of public schools) and, in consequence enjoys a particular status involving both privileges and obligations: "State school teachers have to tolerate proportionate restrictions on their freedom of religion";
- the particular vulnerability of students/pupils affected: the applicant taught very young children and "it is very difficult to assess the impact that a powerful external symbol such as the wearing of a scarf may have on the freedom of conscience and religion of very young children [Such children] are more easily influenced

proportionality analysis, accepted a ban of wearing a Christian cross around the neck by nurses in geriatric hospitals, but rejected a similar ban imposed on British Airways personnel).
The most recent (albeit quite controversial) position was adopted by the Grand Chamber in Appl. No. 43835/11, *S.A.S. v. France* (ECtHR 1 July 2014). The Court considered the French ban on wearing burka and nijab in public places. The Court held that the ban served a legitimate aim, namely to ensure the observance of the minimum requirements of life in society as part of the "protection of the rights and freedoms of others" (para 140). As to the proportionality, the Court attached "some significance that the ban is not expressly based on the religious connotation of the clothing in question but solely on the fact that it conceals the face" (par.151). The Court accepted the Government's argument that the ban responded to a practice that the State deemed incompatible, in French society, with the ground rules of social communication and more broadly the requirements of "living together" (para 153). The legitimacy of such need to ensure "socialization" of every member of society, combined with the wide margin of appreciation in matters of general policy (para 154) justifies the restriction in question. See, however, quite convincing, dissenting opinion of Judges A. Nussberger and H. Jäderblom.

[29] See, generally, Appl. No. 14307/88, *Kokkinakis v. Greece* (ECtHR 25 May 1993) para 31.

[30] Appl. No. 42393/98, *Dahlab v. Switzerland* (ECtHR 15 February 2001).

than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytizing effect";

- the particular nature of the Islamic scarf: wearing of the scarf results from a religious precept that "as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils".

Thus, the Court's position contained a double message. On the one hand, the Court focused on particularities of the assessed situation: a combination of the public status of the school and the very young age of the affected children, reserved more room for State interference with the freedom to manifest religious beliefs. Thus, the Court left open what its reaction would have been had a similar prohibition arisen in respect of another (higher) level of education. On the other hand, the Strasbourg Court recalled the position of the Swiss Federal Court containing a substantive, and general, condemnation of the very nature of the Islamic scarf. This might suggest that the Court would adopt a more restrictive approach also to other situations in which an Islamic scarf is displayed in public.[31]

4.4 There is still no clear answer which of these approaches would dominate the Court's case-law. The most prominent judgment was adopted in the 2005 *Leyla Şahin* case.[32] The Court examined upheld the Turkish university regulation prohibiting students to wear the Islamic headscarf.

The exact scope and authority of *Leyla Şahin* remains, however, not entirely clear. On the one hand, the Court accepted the application of the head-scarf ban on university students, i. e. considerably developed the *Dahlab*'s holding: it was extended from teachers to students (even, that students, unlike teachers, cannot be regarded as "agents of the State") and it was applied to universities (where, by definition, students are more mature and less prone to undue influence). On the other hand, the Court placed a lot of emphasis on the particular situation of Turkey as a country in which Islam represents a majority religion.

The Court recalled, firstly, the general principles as to the role of the State in the matters of religion. The State cannot be regarded as a passive observer only. On the

[31] The approach adopted by the ECtHR in the *Dahlab case* was de facto rejected in the recent judgment of the German Constitutional Court (27 January 2015, 1 BvR 471/10 and 1 BvR 1181/10). The German Court – amending the decision of 24 September 2003, 2 BvR 1436/02 – held that a blanket ban on the Islamic scarf collides with the guarantees provided in Article 4 of the German Basic Law. Such a ban can be introduced only in particular situations of conflict which would endanger "the inner peace at school" or the principle of State neutrality. It can apply to individual persons as well as to particular schools or school districts. As the ECHR establishes only "minimal standards" of protection, a higher standard adopted by the German Constitutional Court remains in perfect harmony with Article 53 of the Convention. But, at the same time, the German decision proposes a different intellectual approach to the problem and – in the framework of the "dialogue between courts" – it will be difficult for the Strasbourg Court simply to ignore the position of the Bundesverfassungsgericht.

[32] Appl. No. 44774/98, *Leyla Şahin v Turkey* (ECtHR 10 November 2005).

contrary, the State plays the role of "a neutral and impartial organizer of the exercise of various religions, faiths and beliefs; this role of the State is conducive to public order, religious harmony and tolerance in a democratic society". While tension between opposing religious groups form a part of reality, "the role of the authorities is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other". Therefore, "a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position". This necessitates mutual compromises "entailing various concessions on the part of individuals and groups which are justified in order to maintain and promote the ideas and values of democratic society".[33]

Questions concerning the relationship between the State and religions are particularly complicated because, on the one hand – opinion in a democratic society may differ widely in respect to religion, and – on the other hand – it is not possible to discern throughout Europe a uniform conception of the significance of religion in society. It leaves more space for the role of national decision-making bodies, i. e. for the national margin of appreciation. "This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions". Consequently, "the institutions of higher education may regulate the manifestation of the rites and symbols of a religion by imposing restrictions as to the place and manner of such manifestation".[34]

The background for the reasoning in *Leyla Şahin* was offered by the 2003 *Refah Partisi* judgment.[35] In Refah Partisi the Court upheld the dissolution of a radical Islamic party. The Court noted that problems of religion and politics must be assessed upon the general system of values like pluralism, democracy and tolerance. The State has more room in controlling and banning actions that may represent a menace to those values.

In assessing the Turkish version of the scarf ban, the Court recalled its finding in *Dahlab* that "wearing the Islamic headscarf could not easily be reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination".[36] The Court took into account the particular situation in Turkey and, particularly "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 [. . .] 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 be regarded as meeting a pressing social need [. . .] especially since this religious symbol has taken on political significance in Turkey in recent years". In such a context, "where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable

[33] Appl. No. 44774/98, *Leyla Şahin v. Turkey* (ECtHR 10 November 2005) para 107 et seq.
[34] Appl. No. 44774/98, *Leyla Şahin v. Turkey* (ECtHR 10 November 2005) para 109, 111.
[35] Appl. No. 41340/98, 41342/98, 41343/98 and 41344/98, *Refah Partisi (the Welfare Party) and Others v. Turkey* (ECtHR 13 February 2003).
[36] Appl. No. 41340/98, 41342/98, 41343/98 and 41344/98, *Refah Partisi (the Welfare Party) and Others v. Turkey* (ECtHR 13 February 2003) para 111.

that the relevant authorities should wish to preserve the secular nature of the institution concerned". The Court noted a particular significance that the Constitution of Turkey attaches to the principle of secularism: "this 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 covered by the freedom to manifest religion".[37]

This led the Court to the conclusion that the ban on wearing religious symbols (i. e. – in reality – first of all, the scarf ban) satisfied the – quite stringent – requirements of Art. 9.2 of the Convention. Not surprisingly, it is also accepted under the – less restrictive – standards of Art. 2 of Protocol No. 1.

The holding of *Leyla Şahin* was easily applicable to other situations arising in Turkey,[38] but – at the same time – it was very much oriented towards the particular situation in this country. In the factual (social) dimension, the Court placed a strong emphasis on the dominant position of the Islamic faith in Turkey. In the legal (constitutional) dimension, the Court recalled the principle of secularism as one of the cornerstones of the Turkish democracy.

What was not clearly answered was the general scope of application of *Leyla Şahin*. The Court left open, at least to some extent, whether a similar ban would be upheld in a country in which – in the social dimension – Islam remains one of the minority religions (and, therefore, the impact of scarf wearing becomes less compulsory) and in which – in the constitutional dimension – the State decided not to adopt the principle of secularism.

4.5 Some answers were offered by the Court in the 2008 *Dogru v. France* judgment.[39] The Court accepted sanctions imposed, in 1999, on a student who refused to take off her head scarf in physical education and sport classes.[40]

The Court confirmed that "wearing the head scarf may be regarded as motivated or inspired by a religion or religious belief" and, therefore, enters into the ambit of Art. 9 and constitutes an interference with the freedom of religion.[41] Nevertheless, "having regard to the circumstances of the case, and taking account of the margin of appreciation that should be left to the States in this domain, the Court concludes that

[37] Appl. No. 41340/98, 41342/98, 41343/98 and 41344/98, *Refah Partisi (the Welfare Party) and Others v. Turkey* (ECtHR 13 February 2003) para 114–116.

[38] Appl. No. 61361/11, *Kurtulus v. Turkey* (ECtHR 24 January 2006) – head-scarf-ban can be imposed on teachers at public universities; Appl. No. 26625/02, *Köse and Others v. Turkey* (ECtHR 24 January 2006) – ban on religious symbols can be imposed on students of public schools of religious character.

[39] Appl. No. 27058/05, *Dogru v. France* (ECtHR 4 December 2008). Confirmed in a series of decisions on 30 June 2009 (Appl. No. 43563/08, *Aktas v. France*; Appl. No. 14308/08, *Bayrak v. France*; Appl. No. 18527/08, *Gamaleddyn v. France*; Appl. No. 29134/08, *Ghazal v. France*; Appl. No. 25463/08, *J. Singh v. France* and Appl. No. 27561/08, *R. Singh v. France*).

[40] Thus, the controversy preceded in date the 2004 amendments to the French Education Code that generally prohibited the wearing of signs or dress by which pupils overtly manifest a religious affiliation. The substance of the 2004 regulation has not been assessed by the Strasbourg Court.

[41] Appl. No. 27058/05, *Dogru v. France* (ECtHR 4 December 2008) para 47.

the interference in question was justified as a matter of principle and proportionate to the aim pursued".[42]

The Court raised three principal arguments:

- the lack of a common approach among the Member States: "where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance. This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions, in respect to which the approaches taken in Europe are diverse. Rules in this sphere will consequently vary from one country to another according to national traditions";[43]
- the necessity to place restrictions in order to reconcile the interests of the various groups: "the State may limit the freedom to manifest a religion, for example by wearing an Islamic headscarf, if the exercise of that freedom clashes with the aim of protecting the rights and freedoms of others, public order and public safety";[44]
- the secular nature of the French State: "in France, as in Turkey or Switzerland, secularism is a constitutional principle, and a founding principle of the Republic, to which the entire population adheres and the protection of which appears to be of prime importance, in particular in schools. The Court reiterates that an attitude that 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".[45]

A common assessment of *Dahlab*, *Leyla Şahin* and *Dogru* shows that the Court is ready to uphold reasonable restrictions on wearing religious symbols in public schools in respect to both, teachers and students. In all three cases, however, the Court attached certain significance to the fact that each of the three States adopted the principle of secularism as one of the cornerstones of the constitutional system.

More room for restrictions may result from the 2014 *S.A.S.* judgment[46] and its concept of (compulsory) "socialization". As it upheld a general ban on wearing "burkas" in public places, this clearly extends also to the educational environment. What remains unclear is how the concept of "living together" may justify other restrictive dress regulations adopted within the public school system.

4.6 All the above-mentioned cases dealt with prohibitions to wear particular religious symbols, i.e. with the traditional schemes in which the State imposes a restriction on individual action. An inverse situation emerges when an individual remains in a position of a passive addressee of actions taken by the State. The display of religious symbols by the authorities in public places represents one of

[42] Appl. No. 27058/05, *Dogru v. France* (ECtHR 4 December 2008) para 77.
[43] Appl. No. 27058/05, *Dogru v. France* (ECtHR 4 December 2008) para 63.
[44] Appl. No. 27058/05, *Dogru v. France* (ECtHR 4 December 2008) para 64.
[45] Appl. No. 27058/05, *Dogru v. France* (ECtHR 4 December 2008) para 72.
[46] Appl. No. 43835/11, *S.A.S. v. France* (ECtHR 1 July 2014).

the most prominent examples. It may raise problems particularly where individuals have no choice but to remain in a given place, in other words – in places where persons are dependent on it or in places where they are particularly vulnerable. It goes without saying that public schools belong to those places.

In the 2009 *Lautsi v. Italy* case, the Court addressed the question of mandatory display of a crucifix in classrooms in public schools and found that the Italian system had violated Art. 2 of Protocol No. 1 taken together with Art. 9 of the Convention. In 2011, however, the Grand Chamber overruled the Chamber's judgment and found no violation of the Convention.[47]

5 Concluding Observations

The case-law on issues of religion in public schools has considerably developed over the last decade; it followed trends visible in respect to other areas of religious freedoms[48] and, more generally, to almost all aspects of human rights protection. At the same time, however, matters of religious freedoms seem to raise particular difficulties and the Strasbourg jurisprudence is not always able to provide clear answers to all problems and controversies. The Court's task becomes especially complex as it faces a tri-dimensional difficulty: structural, methodological and politico-cultural.

The structural difficulty emerges from the very nature of the Strasbourg system. Problems of religion and of its place in the public sphere call for general solutions. The countries of Europe have not been, as yet, capable of agreeing on a common approach; there are still many different versions ranging from a secular State to a State-established Church. Some common rules can, of course, be elaborated by the judicial branch but it requires that courts act in a "constitutional capacity", i. e. that they are able (and willing) to establish general rules of a binding (quasi-constitutional) nature. The Strasbourg Court, however, was not conceived as a constitutional court. It deals with individual applications and, in consequence, its judgments and decisions are always strongly linked to the particular facts of a particular case. It is not always clear how the Court would react to another case arising from a slightly different set of facts. While it is true that the most important message of the Strasbourg judgments is contained in the motifs (in "The Law" part of judgments), those motifs are usually drafted rather in a form of persuasive arguments then of imperative commandments. It leaves some room for flexibility (for which, in particular, the technique of distinguishing is used), but it also creates a contradiction between the de facto constitutional role of the Strasbourg Court and its – individually oriented – ways of action.

The methodological difficulty results from the different nature and background of cases hitherto decided by the Strasbourg Court. It should not be forgotten that a good portion of the cases law, especially the case-law on the school dress codes

[47] Appl. No. 30814/06, *Lautsi and Others v. Italy* (ECtHR 3 November 2009; ECtHR GC 18 March 2011); see Blanke (2012), p. 1260 et seqq.
[48] See e. g. Sajó 2007.

(*Dahlab – Leyla Şahin – Dogru*), was created upon the scarf ban, i. e. in respect to a particular type of religious culture that (except Turkey) still remains a little foreign for the mainstream of approaches present within the European societies. Furthermore, it should not be forgotten that in the scarf cases the Court upheld the State-imposed ban on individual action, i. e. it confirmed the conventionality of the national legislation as remaining within the national margin of appreciation. Finally, those decisions of the Court should be assessed upon a more general problem, namely the obligation of the State to intervene when basic values of the Convention system are put in question. In other words, the scarf ban jurisprudence of the Court cannot be, at least intellectually, detached from its general position in respect to some radical interpretations of Islam. Thus, the scarf ban could have been seen upon the background of cases like the *Refah Partisi* judgment and it could prompt the Court to accept the national ban on wearing religious symbols in public schools. The question, however, remains to what extent this approach may find analogous application to situations in which – like in *Folgerø*, *Lautsi* or *Grzelak* – the Court is invited to reject general measures adopted by the State; those measures enjoy the support of the mainstream of public opinion in an affected country and – while those measures may interfere with certain rights of certain individual persons – there is no claim that they run counter to the very system of the Convention values.

The politico-cultural difficulty is the consequence of the lack of consensus as to the place of religion(s) in modern societies, and especially, as to its (their) place in the public sphere. The Court cannot and should not provide solutions of philosophical, sociological and political questions in a situation in which the European societies appeared unable to propose common approaches. The Court may provide certain framework (may establish certain limits) in this respect, but it cannot venture into areas that still remain uncharted. The scarf ban represents a very good example as it may be assessed from completely opposite perspectives. For some, the wearing of a scarf should be regarded as a "powerful external symbol" that may be regarded as hard to square with the principle of gender equality, i. e. with one of the basic values protected under the Convention. This approach is visible also in the Court's case-law on that matter. For others, however, the wearing of a scarf should be regarded as a manifestation of religious beliefs or, even, as an observation of an important religious obligation of every adherent to a particular religion. Therefore, any ban (understood as a State-imposed obligation to undress) may create grave moral conflicts for involved individuals (see in this respect the position of Judge *Tulkens*, the lone dissenter in *Leyla Şahin*). This argument appears in a stronger form in respect to the burka ban, as the Court was not ready to qualify the burka as a "powerful external symbol".

Since it is obvious that the width of the State margin of appreciation would become quite wide for the first approach and much more limited for the second approach, and since it is equally obvious that European states have not yet been able to adopt any common approach, the Strasbourg case-law would continue to "hang in the air" as long as European societies are unsure about their course of action. This makes the whole "religious jurisprudence" particularly open to flexibilities or – even – inconsistencies.

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