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SPECIAL CONFERENCE ISSUE
THE NEW ZEALAND BILL OF RIGHTS ACT

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TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
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# CONTENTS

## SPECIAL CONFERENCE ISSUE: THE NEW ZEALAND BILL OF RIGHTS ACT

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# NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

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PUBLIC LAW
TE WĀNANGA O NGĀ KAUPAPA TURE Ā IWI O AOTEAROA

The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

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# THE EUROPEAN COURT OF HUMAN RIGHTS AND RELIGION: BETWEEN *CHRISTIAN* NEUTRALITY AND THE FEAR OF ISLAM

***Alicia Cebada Romero****

*The European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights (the ECtHR), remains open to different constitutional formulae regarding the regulation of the relationship between state and religion. At the present moment non-secular, soft secular and hard secular constitutional arrangements coexist in Europe. A general pre-requisite of the European Convention order is the obligation for states to remain neutral towards religious beliefs and religious institutions. In both secular and non-secular constitutional frameworks, the states' commitment to neutrality is especially relevant to preserve pluralism. In this regard, it is especially disappointing to ascertain that the Court has fallen short of providing a consistent interpretation of the obligation of neutrality. The analysis of the case law provided in this paper demonstrates that the ECtHR offers a biased interpretation of the state's duty of neutrality which, on the one hand, better serves the interest and needs of the Christian churches and, on the other hand, shows the ECtHR's fear of Islam. With its simplistic and reductive reading of Islamic rules and traditions, the Court might be contributing to the negative stereotyping of public manifestations of the Islamic faith. The ECtHR should try to offer a more consistent construction of the state's duty of neutrality that is more respectful of religions other than Christianity, instead of hiding behind the doctrine of the margin of appreciation to mask its fear of Islam.*

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## *I PRELIMINARY REMARKS: RELIGIOUS DIVERSITY AND PLURALISM IN EUROPE*

The constitutional regulation of the relationship between state and religion (including religious beliefs and institutions) is far from being uniform in Europe. Contrary to those who maintain that democratic constitutionalism is a secular concept,[1] the European Court of Human Rights (the ECtHR) has assumed that, at least in a non-Muslim context, a strict separation of religion and state is not a necessary condition for democracy.[2] The ECtHR's experience, gained by assessing the relationship between state and religion in the light of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention), illustrates how it is impossible at a transnational level to opt for a particular relationship model between state, church and religion. As a consequence, a transnational instrument such as the European Convention must remain open to different formulae by granting a broad margin of appreciation to the individual states,[3] including the choice of establishing a non-secular, soft secular or hard secular arrangement. So far, only an Islamic theocratic model based on Sharia law has been deemed to be inadmissible and incompatible with the democratic standards established by the European Convention.[4]

Pursuant to art 9 of the European Convention on freedom of religion, as a general prerequisite of the European constitutional legal order, states have an obligation to remain neutral towards religious beliefs and religious institutions, although it is unclear what this obligation implies. This paper will show that the existing case law of the ECtHR on this issue remains highly controversial. In particular, the ECtHR's case law on the place of religion in state education and state schools reveals a biased interpretation of the neutrality obligation that appears to better serve the interests and needs of the Christian churches, which constitute the vast majority in Europe. Neutrality is also undermined by the Court's fear of Islam.

Deference to Christian religions becomes gradually more problematic as their leverage is in decline in Europe. This is due to a combination of factors, including: the mounting relevance of

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1 See András Sajo "Preliminaries to a Concept of Constitutional Secularism" (2008) 6 ICON 605.

2 José Casanova "Public Religions Revisited" in Hent de Vries (ed) *Religion: Beyond the Concept* (Fordham University Press, New York, 2008) 101 at 116. His empirical argument rests on the non-secular character of some of the highest quality democracies in Europe, including for example the United Kingdom and Norway.

3 *Leyla Sahin v Turkey* (2005) 44 EHRR 5 (Grand Chamber, ECHR) [*Leyla Sahin* (Grand Chamber)] at [109].

4 *Refah Partisi v Turkey* (2003) 37 EHRR 1 (Grand Chamber, ECHR) [*Refah Partisi* (Grand Chamber)] at [125]. In its earlier decision, Section III of the European Court of Human Rights [the ECtHR] had linked the risk of the emergence of a theocratic regime in Turkey both to the fact that the great majority of its population is Muslim and to the recent history of the country: *Refah Partisi v Turkey* (41340/98, 41342/98, 41344/98) Section III, ECHR 31 July 2001 [*Refah Partisi* (Section III)] at [65].

other religions, especially that of Islam;[5] the declining number of practising adherents;[6] and the reforms introduced in state family and personal law, many of which challenge religious rules (same-sex marriage or abortion are clear examples). This increasing religious diversity places an obligation on the courts to ensure that the religious rules and traditions of minority religions are approached in a sensitive and informed way. This is more necessary than ever at present. Europe is witnessing the rise of a considerable number of xenophobic political parties that have burst onto the political scene in some countries,[7] whilst at the same time Europe is still struggling to overcome the wave of Islamophobia produced by the events of 9/11. Against this backdrop, the ECtHR is being called upon to play a relevant role in thwarting these dynamics and guaranteeing the rights, in particular the right to freedom of religion, of Muslims in Europe. It is therefore striking that, far from playing this role, the ECtHR appears instead to be contributing to the negative stereotyping of public displays of the Islamic faith. Its attitude towards the wearing of the Islamic headscarf is a clear example in this regard. As discussed in this paper, the case law of the ECtHR seems to be pervaded by the underlying assumption, shared by other courts in Europe and many European Governments,[8] that Christian religions are tolerant and non-discriminatory,[9] whereas the Court approaches Islam with suspicion and mistrust.[10]

Within the emerging European scenario, the traditional majority churches struggle to preserve their presence in public spaces, whereas the religious minorities increasingly demand non-discriminatory treatment. The protection of the rights of the religious minorities is connected to the idea of pluralism and preservation of religious diversity. Neutrality towards religions becomes an

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5 In connection with immigration see José Casanova "Immigration and the New Religious Pluralism: a European Union–United States Comparison" in Geoffrey Brahm Levey and Tariq Madood (eds) *Secularism, Religion and Multicultural Citizenship* (Cambridge University Press, Cambridge, 2009) 139.

6 Parliamentary Assembly of the Council of Europe *State, Religion, Secularism and Human Rights* (Recommendation 1804, 2007) at [6].

7 The latest example is Golden Dawn, an ultra-nationalist party linked to neo-nazism in Greece. On the rise of far right parties in Europe see Laura Smith-Spark "Anger at austerity, immigration feeds far right's rise in Europe" (9 May 2012) CNN <edition.cnn.com>.

8 Erica Howard *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (Routledge, Abingdon, 2012) at 2.

9 "Christianity is the only religion committed to tolerance … the logical mechanism of exclusion of the unbeliever is inherent in any other religious conviction" see Italian Judgment of the Administrative Court as quoted by the ECtHR in *Lautsi v Italy* (2011) 54 EHRR 60 (Grand Chamber, ECHR) [*Lautsi* (Grand Chamber)] at [15].

10 See the negative vision of the headscarf in the ECtHR's decisions in *Dahlab* v *Switzerland*, 42393/98 Section II, ECHR 15 February 2001 and *Leyla Sahin* (Grand Chamber), above n 3. Another example is *Serife Yigit v Turkey* where the Court gives a very simplistic and stereotypical reading of the Islamic rules on marriage: *Serife Yigit v Turkey* (2011) 53 EHRR 25 (Grand Chamber, ECHR).

indispensable tool in guaranteeing both pluralism and diversity.[11] Pluralism is considered by the ECtHR as one of the main characteristics of a democratic society.[12] The Court has linked pluralism with freedom of speech, education, association and religion.[13]

It is in the interest of the majority religions to underline a central question in the debate on the state's duty of neutrality; that is, the tension between the collective identity of state and individual rights. It will be argued in this article that the call for preserving the collective identity of the state should be linked to the need to design a plural constitutional construction, at a transnational level, in which different state/religion arrangements can be accommodated.[14] This should not, however, be used as an excuse for the state's obligation of neutrality to become partially void of substance at the expense of the collective identity of the minority religious (or non-religious) groups. On the contrary, the connection between neutrality and pluralism should be clearly defined, so that it can contribute to the preservation of pluralism (diversity), and can ensure that it does not become a way to mask both deference to Christian religions and fear of Islam.[15]

In what follows, the conceptual framework will be examined first, together with some insights on the European notions of secularism and neutrality (Part II). Secondly, an analysis of the ECtHR's case law will be provided, with a view to examining the way in which the Court has approached and defined concepts such as secularism and neutrality in relation to the right to freedom of religion. The analysis will be limited to the case law concerning the implementation of the duty of neutrality in public education, and to the place of religion in public education institutions. This will focus on cases related to the presence and wearing of religious symbols in state schools and other public

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11 Wojciech Sadurski *Moral Pluralism and Legal Neutrality* (Kluwer, Dordrecht, 1990).

12 *Handyside v United Kingdom* (1976) 1 EHRR 737 (ECHR) at [49]; and *Leyla Sahin* (Grand Chamber), above n 3, at [108].

13 On the significance of pluralism in the ECtHR's case law, see Aernout Nieuwenhuis "The Concept of Pluralism in the Case-Law of the European Court of Human Rights" (2007) 3 EuConst 367.

14 On the concept of constitutional pluralism in the context of the Council of Europe and the case law of the ECtHR, see Alicia Cebada Romero and Rainer Nickel "El Tribunal Europeo de Derechos Humanos en una Europa asimétrica. ¿Hacia el pluralismo constitucional?" (translation: "The European Court of Human Rights in an asymmetric Europe. Towards constitutional pluralism?") in Pablo Antonio Fernández (ed) *La Obra Jurídica del Consejo de Europa* (Gandulfo, Sevilla, 2010) (translation: *The Legal Work of the Council of Europe*) 791.

15 A similar diagnosis applied to the case law of the German Constitutional Court can be found in Oliver Gerstenberg "Germany: Freedom of Conscience in Public Schools" (2005) 3 ICON 94 at 106 where he talks about a "jurisprudence of fear". Stijn Smet suggests what he calls an open neutrality as opposed to the closed neutrality that the Court currently applies, which tends to favour the religion of the majority: see Stijn Smet "Freedom of Religion Versus Freedom From Religion: Putting Religious Duties Back on the Map" in Jeouen Temperman (ed) *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Martinus Nijhoff, The Hague, 2012) 113 at 134.

education institutions.[16] In Part III, the *Lautsi* case will be presented as an illustration of the ECtHR's failure to offer an acceptable definition of the state's duty of neutrality. In Part IV, attention will turn to other cases where the ECtHR has dealt with the relationship between secularism and freedom of religion. All the cases analysed in the following sections reveal both the ECtHR's fear of Islam and its tendency to legitimate its fear by hiding behind, inter alia, the margin of appreciation.[17] Finally, some concluding remarks will be offered in the closing section.

## *II A SECULAR EUROPE?*

The secularisation of European society has not gone hand in hand with a secularisation of the European states.[18] For analytical purposes it is useful to differentiate between ideal types of relations between the state and its religious communities and institutions in Europe. I suggest using the following typology: the non-secular (1), the soft secular (2) and the hard secular (3) model of constitutional arrangements in Europe (that is, in the Council of Europe member states):[19]

(1) There are constitutional models in Europe that cannot be formally characterised as secular. In fact, the formulae enshrined in the constitutions of a considerable number of European states, which single out one religion/church as the state's religion/church, cannot possibly be regarded as secular, not even if a very loose definition of secularism is adopted. Along these lines, art 4 of the Constitution of Denmark reads as follows: "The Evangelical Lutheran Church shall be the Established Church of Denmark and as such shall be supported by the State".[20]

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16 See Heiner Bielefeldt *Report of the Special Rapporteur on freedom of religion or belief* A/HRC/16/53 (2011) at [20]. Bielefeldt underlines the importance of the right to education.

17 I am grateful to an anonymous reviewer for bringing this point to my attention.

18 José Casanova even talks about a post-secular Europe: see Casanova, above n 2, at 101. On the secularisation of Western societies, see Charles Taylor *A Secular Age* (Harvard University Press, Cambridge (Mass), 2007).

19 Rik Torfs "Church and State in France, Belgium and the Netherlands: Unexpected Similarities and Hidden Differences" (1996) 4 BYU L Rev 945; and Lasia Bloss "European Law of Religion, Organizational and Institutional Analysis of National Systems and their Implications for the Future European Integration Process" (European Jean Monnet Working Paper, 13/2003, New York University). Hard and soft secularism are also portrayed as fundamentalist and liberal secularism: see Ingvill Thorson Plesner "The European Court of Human Rights: Between Fundamentalist and Liberal Secularism" in W Cole Durham and others (eds) *Islam, Europe and Emerging Legal Issues* (Ashgate, Farnham, 2012) 63.

20 Other non-secular states are: Andorra, Armenia, Finland, Greece, Hungary, Ireland, Iceland, Liechtenstein, Malta, Monaco, the United Kingdom and Slovakia. For an overview of their constitutional regulations on this issue, see Grégor Puppinck "The Case of Lautsi v Italy: A Synthesis" (November 2011) Strasbourg Consortium < www.strasbourgconsortium.org> at 12. See also Lluis Mª de Puig "State, Religion, Secularity and Human Rights" (Doc 11298, Explanatory memorandum presented by to the Parliamentary Assembly of the Council of Europe, 8 June 2007) at [24]–[26], [34] and [37].

(2) In its soft versions, secularism is compatible with the acknowledgment of a special role of a religion as an important component of the national culture, and it is also compatible with a certain degree of cooperation between the state and religions. In Germany, the Federal Constitutional Court has admitted the dominance of the Christian culture, although the Court ultimately did not let Christian values prevail over secular values with regard to the issue of crucifixes in schools.[21] In Russia, the 1997 Law on Freedom of Conscience and Associations acknowledged "the special contribution of Orthodoxy to the history of Russia and to the establishment and development of Russia's spirituality and culture".[22] In Spain, the state pledges to facilitate both religious assistance in public military facilities, hospitals or prisons and the organisation of religion classes in state schools.[23] In practice, only religious assistance to the adherents of Catholicism is guaranteed and the only religion taught in state schools is Catholicism.[24]

How far a secular state can legitimately go in showing deference to a particular religion is a controversial question. Specific cases should be examined not only from the perspective of secularism but also from the angle of the duty of neutrality. In Germany, as a corollary of the

21 German Constitutional Court: (1995) 1 BVerfGE 1087/91 [the *Crucifix case*]: "Christianity as a cultural factor includes the idea of tolerance for the other-minded", translation into English available at Institute for Transnational Law, School of Law, University of Texas: <http://www.utexas.edu>. See also Gerstenberg, above n 15, at 96–97.

22 See de Puig, above n 20, at [40].

23 Religious Freedom Act 1980 (Spain), art 3.2.

24 In 1992, Spain concluded cooperation agreements with the Evangelical Church, the Islamic Commission and the Israel Communities in which the right of the military professing those religions to receive religious assistance was established. In practice, this aspect of the agreements has not been realised. In contrast, there is a Catholic archbishop integrated into the Armed Forces and in charge of the Religious Assistance Service (Servicio de Asistencia Religiosa). In Spain, the state hires teachers selected by the Catholic Church to teach religion at the state schools. So far, the state has not hired any teachers of Islam despite the fact that there is enough demand for these courses in some schools. The Union de Comunidades Islámicas, in Spain, has denounced these practices as discriminatory: see Foro de Marroquies de Espana "Visita a España de la delegación del Comité Consultivo sobre minorías nacionales del Consejo de Europa" (13 December 2011) <http://maes.blogfree.net> (translation: Visit to Spain of the Council of Europe's Advisory Committee on National Minorities").

judgment of the German Federal Constitutional Court in the *Ludin* case,[25] some Länder enacted and applied rules prohibiting teachers from wearing ostentatious religious symbols at state schools.[26] Some of these laws appear to be inconsistent with the obligation of neutrality,[27] as the prohibitions do not seem to be applicable to Christian symbols.[28] Paradoxically, the German authorities draw on the obligation of neutrality to legitimate the prohibitions.[29] This has led Human Rights Watch to

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25 In the *Ludin* case, the applicant was Mrs Ludin, a German citizen born in Afghanistan, who after having completed her training as a teacher, had applied for a position at a public primary school in Baden-Württemberg. The Baden-Würtemberg Ministry of Education rejected her application on the ground that Mrs Ludin's insistence on wearing the headscarf demonstrated her lack of aptitude to teach in a public school. The decision of the Ministry was backed by the state's authorities on the basis that permitting the wearing of the Islamic headscarf infringed the duty of the state to remain neutral towards religion. Mrs Ludin brought her case to the courts and eventually it proceeded to the Federal Constitutional Court: *Ludin* (2003) BVerfGE 108, 282. The Federal Constitutional Court drew a distinction between this case – where the right of a teacher to wear the headscarf was at stake – and the *Crucifix case*, above n 21. According to the Court's view, the former case had to be approached primarily from the perspective of the fundamental right of the teacher to freedom of religion while, in the latter, the state's duty of neutrality should prevail. Nonetheless, the Federal Constitutional Court conceded that in the case of teachers in public schools, the right of the teacher could clash with the obligation of the state to be neutral towards religion. On the basis of all these considerations, the Court concluded that because of the state's duty of neutrality, as well as of the right of the parents to have their children educated according to their religious convictions, and the negative freedom of religion of pupils, the right of the teacher to wear religious symbols could be restricted if such a restriction could be achieved by law. As the restriction imposed on the applicant in the instant case had not been established by law (art 80 of the Basic Law of the Federal Republic of Germany), the Federal Constitutional Court ruled in her favour. The Court thereby avoided deciding which of the (conflicting) rights would prevail and decided the case on a "technicality". It is necessary to clarify that the Court was divided in this case. Three judges expressed their dissenting opinion, arguing that the state's duty of neutrality should prevail over the right of the teacher to freedom of religion. On the *Ludin* saga, see TS Lock "Of Crucifixes and Headscarves: Religious Symbols in German Schools" in Myriam Hunter-Henin (ed) *Law, Religious Freedoms and Education in Europe (*Asghate, Farnham, 2011) 347.

26 This was the response of some German Länder to the Federal Constitutional Court's decision in the *Ludin* case. A description of the Länder's legislation can be found in Dominic McGoldrick *Human Rights and Religion: The Islamic Headscarf Debate in* Europe (Hart Publishing, Portland, 2006) at 115–117.

27 For example, the law in Baden-Württemberg reads as follows: "the respective exhibition of Christian and Occidental educational and cultural values or traditions does not contradict the duty of behaviour"; and the law in Hessen, establishes:

> On deciding if the requirements of sentence 1 and 2 are fulfilled the humanistically and in a Christian manner imbued occidental traditions of the Land of Hessen has to be taken into account.

See McGoldrick, above n 26, at 116–117.

28 Gerstenberg, above n 15; and Christine Langenfeld and Sarah Mohsen "Germany: the Teacher Head Scarf Case" (2005) 3 ICON 86 at 86.

29 Note that in the *Ludin* case, a dissenting minority of three judges at the Federal Constitutional Court contended that the teacher who wears the headscarf in a public school is violating her duty of neutrality: *Ludin*, above n 25. On the justifications used by some German authorities, see McGoldrick, above n 26, at 115.

argue that headscarf bans for teachers in Germany amount to discrimination in the name of neutrality.[30] The reality is that these prohibitions are not neutral at all and the justification for the bans is grounded on a contentious interpretation of the duty of neutrality.

These examples illustrate the softness of some secular models in Europe. In fact, in the light of these situations, it appears that in some cases there might not be a substantial difference between soft secular states and non-secular states. Additionally, as can be seen from the examples given above, it is not clear whether the obligation of neutrality is being adequately respected in practice.

(3) In contrast with the above, we also find in Europe hard secular states, where the constitutional order demands a strict separation between state and religion and where, as a result, religion is virtually banned from public spaces and public institutions.[31] While the classic examples are France[32] and Turkey, other member states of the Council of Europe that have Muslim majorities, like Albania and Azerbaijan, adhere to this formula.[33]

These hard secular models raise two kinds of questions. First, there are voices that express serious doubts about the compatibility of these formulae with freedom of religion, an important component of which is the right to manifest one's beliefs in public.[34]

Secondly, it remains contentious whether hard secular solutions are consistent with the principle of neutrality. While all religions are treated equally (for example, all of them are banned from

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30 See Human Rights Watch "Discrimination in the Name of Neutrality: Headscarf Bans for Teacher and Civil Servants in Germany" (26 February 2009) Human Rights Watch <www.hrw.org>. According to the report, half of the states in Germany (Baden-Württemberg, Bavaria, Berlin, Bremen, Hesse, Lower Saxony, North Rhine-Westphalia, and Saarland) have legislation in force prohibiting teachers in public schools from wearing religious clothing and symbols. Human Rights Watch (HRW) underlines that even if the headscarf is not expressly mentioned in the laws, it was clearly the focus of parliamentary debates. By contrast, the majority of these bans allow exemptions for Christianity and Western cultural traditions (see n 27 above). HRW concludes in the report that these bans discriminate against Muslim women. The discrimination is clear in the case of laws that set up exemptions for Christian symbols but, according to HRW, exists in practice even if the laws do not formally exclude Christian symbols from their scope of application.

31 Some authors have underlined that secularism is not fully developed even in these states. For instance, András Sajo claims that secularism "remains fragmented even in the most secularist constitutional systems": see Sajo, above n 1, at 617. See also de Puig, above n 20, at [18].

32 See David Saunders "France on the Knife-Edge of Religion: Commemorating the Centenary of the Law of 9 December 1905 on the Separation of Church and State" in Geoffrey Brahm Levey and Tariq Modood (eds) *Secularism, Religion and Multicultural Citizenship* (Cambridge University Press, Cambridge, 2009) 56.

33 Bosnia-Herzegovina has a problematic situation derived from intersecting divisions between religion and ethnicity. Fifty per cent of the population is Muslim (Bosniaks): see de Puig, above n 20, at [50]–[51].

34 Michael Freeman "The Problem of Secularism in Human Rights Theory" (2004) 26 Hum Rts Q 375. See also Jennifer M Westerfield "Behind the Veil: An American Legal Perspective on the European Headscarf Debate" (2006) 54 Am J Comp L 637. Westerfield warns of the dangers of "fundamentalist secularism, a principle that denies religious conviction or belief any place for expression in the public realm" at 639.

schools), some argue that atheists, who also benefit from the right to freedom of religion,[35] are given preferential treatment.[36] Along these lines, it has been argued that in countries like France or Turkey, *laïcité* (secularism) has become a sort of civil religion.[37]

But does the ECtHR adequately fulfil its monitoring role?

Unfortunately an examination of the case law shows that the ECtHR – with its cautious approach to the "delicate relations between state and Churches"[38] – has occasionally invoked the doctrine of the margin of appreciation to uphold state measures that are difficult to reconcile with the obligation of neutrality. It has thus contributed to an entrenchment of the Christian bias existing in many European countries. This aspect of the case law strongly contrasts with the fact that, in some contexts, the ECtHR has offered a negative vision of Islam in general, and of some manifestations of the Islamic faith in particular;[39] a vision that is grounded in a reductive interpretation of Islamic traditions, and influenced by the specific context of the Turkey. In order to illustrate all of these points, the ECtHR's case law will be examined in the following sections.

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35 United Nations Human Rights Committee *General Comment No 22: The right to freedom of thought, conscience and religion (Art 18)* CCPR/C/21/Rev1/Add4 (1993). See also *Refah Partisi* (Grand Chamber), above n 4, at [90].

36 By contrast, the organisations advocating secularism point out that it provides a framework for a democratic society. The secularists underline that although it is in the interest of atheists to support secularism, atheism and secularism need to be clearly differentiated. According to this view neither to challenge religious beliefs nor to impose atheism on anyone is on the secular agenda. See for example the definition of secularism suggested by the National Secular Society in the United Kingdom: National Secular Society "What is Secularism?" National Secular Society <www.secularism.org.uk>.

37 J Roman "La Laïcité Comme Religion Civile" (1991) 175 Esprit 108 (translation: "Secularism (Laicism) as a Civil Religion"). See also Casanova, above n 2, at 116. In this vein, there are voices that claim that the Turkish model of relations between state and religion can be described as "authoritarian secularism", under the surveillance of the military. For this perspective, see Mohammed Ayoob "Turkey's Multiple Paradoxes" (2004) 48 Orbis 451.

38 *Cha'are Shalom Ve Tsedex v France* (2000) 9 BHRC 27 (Grand Chamber, ECHR) at [84].

39 *Refah Partisi* (Grand Chamber), above n 4, at [93]. The Court held that in Turkey, secularism is one of the fundamental principles of the state, which are in harmony with the rule of law and respect for human rights and democracy:

> 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.

The Court accepted that freedom of association (as embodied in art 11 of the ECHR) could also be restricted with a view to protecting the principle of secularism: at [67]. See also *Dogru v France* (2009) 49 EHRR 8 (Section V, ECHR) at [72]. This case concerned the prohibition of wearing a headscarf in sport classes in a French public school. See below in Part IV.B.

## *III CHRISTIAN NEUTRALITY: THE* LAUTSI *CASE*

The task of formulating a coherent interpretation of the obligation of neutrality in Europe is not an easy endeavour. Part of the difficulty stems from the fact that the duty of neutrality has to be constructed over the illusion that non-secular arrangements are compatible with the state's obligation to remain impartial. The duty of neutrality has been qualified and limited so that states are allowed, on the basis of their margin of appreciation, to express their deference to certain religions in various manners. Under these circumstances it is crucial to define the core of the duty of neutrality. In fact, the ECtHR has devoted a considerable amount of effort to defining the substance of the obligation of neutrality – as it does when it repeatedly declares that the obligation of neutrality is incompatible with any power on the state's part to assess the legitimacy of religious beliefs.[40] However, the ECtHR has also contributed to the distortion of the neutrality principle by upholding the obligation to display a Christian symbol in state schools in the Grand Chamber's decision in the *Lautsi* case.[41]

Hundreds of pages and comments have already been written about this case and about the two judgments of the ECtHR.[42] The end of this saga is well known: in the final judgment, the Grand Chamber found that the Italian pre-constitutional rules,[43] imposing the obligation to display a crucifix in the classrooms of state schools, did not constitute a breach of the European Convention.[44] In order to arrive at this decision, the Grand Chamber had to reverse the previous

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40 See for example *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 13 (Section I, ECHR) at [123].

41 *Lautsi* (Grand Chamber), above n 9. The applicants – Ms Soile Lautsi acting in her own name and on behalf of her children, Dataico and Saimi Abertin – had lodged a complaint with the ECtHR, alleging that the Italian rules imposing the obligation to display the cross in the classroom of state's schools contravened art 2 of Protocol 1 on the right to education, art 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [the European Convention] on the right to the freedom of religion and thought, and art 14 on non-discrimination.

42 For a position contrary to that of the ECtHR in this judgment see Lorenzo Zucca "A Comment on *Lautsi*" (19 March 2011) EJIL: Talk! <www.ejiltalk.org>; and Susanna Mancini "La Sentenza della Grande Camera sul Crocifisso: è corretta solo l'opinione dissenziente" (2011) 2 Rivista Italiana de Diritto Costituzionale 425 (translation: The Grand Chamber's Decision on the Crucifix: only the dissenting opinion got it right"). Compare Puppinck, above n 20 (supporting the ECtHR's judgment). Puppinck is the Director of the European Centre for Law and Justice, which intervened as amicus curiae before the Grand Chamber in the *Lautsi* case. Its intervention was in support of the Italian Government's pleas. See also Wouter de Been "*Lautsi*: a Case of Metaphysical Madness?" (2011) 6 Religion and Human Rights 235; and Jean-Marc Piret "A Wise Return to Judicial Restraint" (2011) 6 Religion and Human Rights 273. An impressive collection of papers on the *Lautsi* case can be found in Jeouen Temperman (ed) *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Martinus Nijhoff, The Hague, 2012) 113 at 134.

43 Italian Royal Decrees of 30 April 1924 and 26 April 1928.

44 The obligation is confirmed by Instruction 2666 of the Italian Minister of Education, University and Research: see *Lautsi* (Grand Chamber), above n 9, at [24].

Chamber's judgment, which had held that among the different meanings attributed to the cross, the religious meaning was predominant and that, as a consequence, the obligation to display the cross infringed the obligation of neutrality.[45] In its decision, the Chamber emphasised the state's obligation to organise the school environment in a pluralistic way in concluding that the Italian obligation to display the cross in state schools constituted a breach of art 9 of the European Convention, as well as of art 2 of Protocol 1, establishing the right of parents to have their children educated in accordance with their own religious and philosophical convictions.

The judgment of the Chamber, which was an important (if only temporary) victory for the secular movement, became the epicentre of an ideological earthquake in Europe.[46] It was presented by the non-secular ranks as an attack against European identity. In an unprecedented reaction, the supporters of a non-secular Europe responded quickly and in a coordinated way to avoid what they saw as a step towards the secularisation of Europe.[47] The Italian government reacted in an irate manner, with some of its members, including Prime Minister Berlusconi, strongly contesting the Chamber's decision.[48] Up to 10 member states of the Council of Europe came to the fore and intervened in the *Lautsi* case as amicus curiae in support of the position of the Italian Government. Additionally, a number of other countries' governments publicly challenged the Chamber's decision. Most of those who reacted strongly against the decision of the Chamber deliberately ignored the fact that it did not rule against the mere presence of the crucifixes in the school, but against the fact that their presence was compulsory.

Although secularism is not expressly provided for in Italian law, the Italian Constitutional Court has derived it from arts 2, 3, 7, 8, 19 and 20 of the Italian Constitution. The Constitutional Court has

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45 *Lautsi v Italy* (30814/06) Section II, ECHR 3 November 2009 [*Lautsi* (Section II)]. See also *Lautsi* (Grand Chamber), above n 9, at [32]. On the first instance judgment, see Maria José Parejo Guzmán "Reflexiones Sobre el Asunto *Lautsi* y la Jurisprudencia del TEDH sobre símbolos religiosos: hacia soluciones de carácter inclusivo en el orden público europeo" (2010) 14 Revista de Derecho Comunitario Europeo 865 (translation: "Reflections on the *Lautsi* case and on the ECtHR's jurisprudence on religious symbols: towards inclusive solutions in the European public order"); and Susanna Mancini "The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty" (2010) 6 EuConst 6.

46 See Puppinck, above n 20, at 1. He notes that: "Never before in the history of the Court and the Council of Europe has a case raised so much public attention and debate". At 7, he refers to the creation of an "Alliance against secularism".

47 See Puppinck, above n 20, at 8.

48 More details on the reactions provoked by the Chamber's judgment and excerpts from the declarations of different members of the Italian Government can be found in Tommaso Pavone "Redefining Religious Neutrality: *Lautsi* v Italy and the European Court of Human Rights" (3 April 2011) Social Science Research Network <www.ssrn.com>.

observed that secularism is a supreme principle of the Italian constitutional order.[49] Italy embraces a soft model of secularism where the state is not indifferent to religion. Within this legal framework, the Italian courts' case law remained fragmented as to the consistency of the displaying of a cross with the principle of secularism. In the *Lautsi* litigation, both the Veneto Regional Administrative Court and the Consiglio di Stato (Supreme Administrative Court) found that the obligation to display a Christian cross in the classrooms of state schools did not run counter to the principle of secularism. The Regional Administrative Court had referred the case to the Constitutional Court, but the latter declared the question manifestly inadmissible.[50] In contrast to the case law of the Administrative Courts, the Constitutional Court – in a case related to the presence of a cross in a polling station – found that the display of a crucifix infringed not only the principle of secularism but also the impartiality of the state.[51]

Among the different arguments presented by the Italian Government before the Grand Chamber, there was one directly related to the definition of the neutrality obligation. The Italian Government argued that if the European Convention, as interpreted by the Court "did not prevent Member States from having a State religion or from showing a preference for a particular religion, or from providing pupils with more extensive religious teaching in relation to the dominant religion", why should the states be prevented from prescribing the display of the cross?[52]

This idea that the state should be allowed to refer to religion as a way to define its identity was also underlined by Joseph H H Weiler, who gave testimony before the Grand Chamber on behalf of some of the nations that intervened in favour of Italy. He presented the case as an example of the tension between individual rights and collective identity, and described the Chamber's judgment as an attack against the ability of a state to assume its own identity.[53]

The decision of the Grand Chamber was anxiously anticipated by many states and churches, as well as secular and non-secular organisations throughout Europe. However, the judgment that was

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49 Corte Costituzionale [Italian Constitutional Court] (1989) 34 Giurisprudenza Costituzionale 890. See Paolo Ronchi "Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi* v Italy" (2011) 13 Ecc LJ 287.

50 On the ground that the claim was in reality directed towards texts which, not having the status of law but only that of regulations, could not form the subject of a review of constitutionality: see *Lautsi* (Grand Chamber), above n 9, at [14].

51 Judgment, 1 March 2000 (no 4273) as cited in *Lautsi* (Grand Chamber), above n 9, at [23].

52 *Lautsi* (Grand Chamber), above n 9, at [37].

53 Joseph Weiler gave testimony pro bono. The video of his testimony is available online: see "Joseph Weiler's Testimony before the European Court of Human Rights" (28 July 2011) Dotsub <www.dotsub.com>. See also Pavone, above n 48, at 14. He contends that Weiler's testimony was decisive. A problem with this kind of approach is that the evolving and dynamic nature of the process of national identity formation is neglected.

eventually rendered was weakly reasoned, to say the least, which was surprising given the high expectations of both sides and the anticipated complexity of the case. The Grand Chamber failed to provide extensive reasons to justify its decision and failed to address adequately all the arguments that had been presented by the parties and their supporters. A far more complex analysis would have been necessary in order to explain a result that was not easily explicable in the light of the Court's previous case la and the recommendations of human rights monitoring mechanisms operating in the field of freedom of religion within the framework of the United Nations.[54] For example, the United Nations Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, had maintained, shortly before the judgment was given by the Grand Chamber, that "it may be difficult to reconcile the compulsory display of a religious symbol in all classrooms with the state's duty to uphold confessional neutrality in public education".[55] Along the same lines, a report by his predecessor underlined that the situation was even clearer in cases where regulations privileged the symbolic presence of some religions at the expense of others.[56]

This was not the only flaw in the Grand Chamber's judgment. In the following paragraphs it is argued that the final decision of the ECtHR in the *Lautsi* case defies the very core of the obligation of neutrality and is seriously flawed.

The Court observed that its task was to decide whether the *presence* of the cross in state classrooms was consistent with the European Convention. It is somewhat surprising that the Court, when defining the issue that it was called upon to settle, did not refer to one of the most important aspects of the case, namely, the *compulsory* character of the presence of crucifixes in the classrooms. It was part of the Italian Government's strategy to shift the focus away from the *obligation* to display the cross, and onto the presence of the cross as an expression of the state's identity, and the Court took the bait.[57] By not presenting the case as a conflict arising from the mandatory presence of the crucifix in the classrooms, the Grand Chamber made its first mistake.

The Grand Chamber made clear from the outset that its decision had a limited scope. First, it underlined that it was going to rule exclusively on the question of whether the presence of crucifixes in the classrooms (and not in other public spaces) constituted a breach of art 2 of Protocol 1, and art 9 of the European Convention. Secondly, the Court pointed out that it would not give any guidance on whether the presence of the cross was consistent with secularism as enshrined in the Italian

54 More generally on the incompatibility of the ECtHR's decision in the *Lautsi* case with United Nations standards regarding human rights protection, see Jeroen Temperman "Religious Symbols in the Public School Classrooms" in Jeroen Temperman (ed) *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Martinus Nijhoff, The Hague, 2012) 143.

55 Bielefeldt, above n 16, at [44].

56 Asma Jahangir *Report of the Special Rapporteur on freedom of religion or belief* E/CN4/2006/5 (2006) at [51]–[60].

57 The strategy is explained by Puppinck, above n 20, at 18–19.

Constitution.[58] To this important aspect of the context – a soft secular context in the instant case – was the second mistake of the Court. In fact, the approach of the Court in *Lautsi* contrasts with its attitude in other cases.[59]

It comes as no surprise that the Grand Chamber's self-restraint was celebrated by the anti-secular ranks.[60] Whilst superficially, it seemed that the Court was abstaining from interfering in a domestic controversy, in reality it was bursting into the debate. The influence of its ruling on the Italian issue was inevitable.[61] Given that the Italian principle of secularism is a crucial part of the national context in which the case has to be examined, the exclusion from the analysis of the secular framework in Italy is difficult to understand.

The Court decided to examine the complaint from the point of view of parents' rights to have their children educated in agreement with their own religious and philosophical convictions, as established in art 2 of Protocol 1, which is considered by the Court to be lex specialis in relation to art 9.[62] The Court stressed the importance of neutrality by pointing out that art 2 of Protocol 1 should be read in the light of art 9, which imposes on contracting states a "duty of neutrality and impartiality".[63] However, the obligation of neutrality would have played a more prominent role in the resolution of the case if the Court had examined the issues not only from the perspective of parents' rights, but also from the perspective of pupils' rights under art 9.[64] In fact, it might be argued that the Grand Chamber's third mistake was to focus exclusively on the rights of parents. If it had approached the case from the perspective of the rights of pupils, it might have arrived at a different conclusion with regard to the influence of the compulsory presence of the cross on students, especially on the youngest ones.

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58 *Lautsi* (Grand Chamber), above n 9, at [57].

59 For example, in *Leyla Sahin* the Grand Chamber engaged in a thorough analysis of the historical background and basic features of the Turkish secular model: *Leyla Sahin* (Grand Chamber), above n 3. See also *Dogru v France*, above n 39, where the Court engaged in an analysis of the principle of secularism in France.

60 See Puppinck, above n 20, at 8.

61 Carlo Panaro "Another Defeat for the Principle of Secularism: Recent Developments on the Display of the Crucifix in Italian Courtrooms" (2011) 6 Religion and Human Rights 259.

62 On the different meanings of neutrality reflected in the arguments of the parties, see Roland Pierik and Wibren Van der Burg "The Neutral State and the Mandatory Crucifix" (2011) 6 Religion and Human Rights 267.

63 *Lautsi* (Grand Chamber), above n 9, at [60].

64 For a critical view of the Court's decision to focus on the rights of the parents rather than on children's rights, see Jeroen Temperman "*Lautsi* II: A Lesson in Burying Fundamental Children's Rights" (2011) 6 Religion and Human Rights 279.

The Italian Government and its supporters underlined the wide variety of arrangements with regard to state/religion relations existing in Europe. They insisted, more specifically, that there was a broad array of regulations in force concerning the display of religious symbols in state schools. The first claim is easy to prove, whereas the second one is much less evident. If truth be told, the opposite could be contended in view of the information provided by the Grand Chamber itself. As shown in the overview offered by the Court of the law and practice of member states of the Council of Europe with regard to the presence of religious symbols in state schools, the display of the cross is prescribed only in two countries – Italy and Austria.[65] The Grand Chamber reported that, although it was also formally prescribed in some Länder in Germany, some cantons in Switzerland and some communes in Poland, the prescription had become obsolete in those three countries.[66] Especially interesting is the reference by the Court to the decision of the Polish Constitutional Court, according to which the display of the cross was considered compatible with secularism and freedom of religion, "given that it did not make such display compulsory".[67]

In contrast with the Italian Government's claims, the overview offered by the Grand Chamber seemed to show that there was a broad consensus in Europe, at least on the incompatibility between the obligation of neutrality and the obligation to display a cross. But against all evidence and in a surprising twist, the Court came to the totally opposite conclusion[68] and found that:[69]

> … the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State. Moreover, the fact that there is no European consensus on the question of the presence of religious symbols in State schools … speaks in favour of that approach.

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65 *Lautsi* (Grand Chamber), above n 9, at [26]–[28].

66 At [26]–[28]. As the ECtHR pointed out, the Swiss Federal Court considered that the presence of crucifixes in the classrooms of primary schools is incompatible with the requirement of neutrality. In Germany, the Federal Constitutional Court has ruled that a Bavarian Ordinance imposing the obligation was contrary to the principle of state neutrality: *Crucifix case*, above n 21. As a consequence, pupils have the right to request the removal of the cross. The so-called Bavarian solution will be analysed below in more detail.

67 Polish Constitutional Court No U 12/32, 20 April 1993, cited by the ECtHR in *Lautsi* (Grand Chamber), above n 9 at [28].

68 Judge Malinverni, joined by Judge Kalaydjieva, points in the same direction in a dissenting opinion: see *Lautsi* (Grand Chamber), above n 9, at 1–8.

69 At [70]. One of the Chamber's big mistakes in *Lautsi* (Section II), above n 45, was its lack of consideration of the margin of appreciation. It did not mention it even once. The Italian Government stressed this point in its allegations before the Grand Chamber: see *Lautsi* (Grand Chamber), above n 9, at [34]. In contrast, the Grand Chamber referred to the margin of appreciation extensively. The Chamber should have elaborated further on the reasons why the decision to impose the presence of the cross in the classrooms exceeded the margin of appreciation.

The Grand Chamber ignored the existence of a broad consensus on the question of the compulsory presence of religious symbols in state schools. Instead, it chose to focus on the diversity of arrangements concerning the display of religious symbols in general, neglecting the fact that the most problematic aspect of this case was that the presence of the cross was mandatory.

Additionally, although the Grand Chamber considered that the cross is above all a religious symbol,[70] it endorsed the argument posed by the Italian Government that the crucifix also has an "identity-linked" connotation.[71] The Grand Chamber upheld the Italian argument that the cross had become a tradition which might be important to preserve and it considered that the decision on whether to perpetuate that tradition fell within Italy's margin of appreciation.[72] Although the Court pointed out that there was no evidence that the hanging of the cross in the classroom is without effect on "young persons whose convictions are still in the process of being formed",[73] it failed to take a precautionary approach. Instead, the Court found that the applicant's allegation was a "subjective" perception. A precautionary approach would have been favoured if the focus had been on pupils' rights, as guaranteed by art 9, rather than on parents' rights.

The ECtHR declared that the organisation of the school environment, including the decision on whether crucifixes should be present in state classrooms, is a function assumed by the state in relation to education and teaching.[74] In contrast with the judgment of the Chamber, where the margin of appreciation was not taken into consideration, the Grand Chamber underlined that states enjoy a wide margin of appreciation to organise education, teaching and the school environment, provided that they respect the right of parents to ensure that all of the above are consistent with their religious and philosophical convictions.[75] The Court pointed out that it was obliged to respect a state's decisions in these matters, including the place they accorded to religion, provided that the decisions did not lead to a form of indoctrination. According to the Court, although the cross gives a greater visibility to Christianity, it does not necessarily denote a process of indoctrination. It referred to its previous case law with a view to pointing out that, with regard to religious education, states were allowed to give more weight to the majority religion in the curriculum. This case law was also

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70 At [66].

71 At [67].

72 The Court emphasised that the reference to a tradition could not be an excuse for not respecting the rights and freedoms enshrined in the European Convention and its Protocols at [67]–[68].

73 *Lautsi* (Grand Chamber), above n 9, at [66].

74 At [64]–[65]. The Italian Government defended the argument that the obligation imposed on states by the second sentence of art 2 of Protocol 1 concerned only the content of the curriculum.

75 At [69].

referred to by the Italian Government and by many of those who acted in its support, with a view to minimising the obligation of neutrality.[76]

The Grand Chamber failed to consider the importance of guaranteeing pluralism within the realm of education.[77] Although it is true that the Court had restricted the scope of the obligation of neutrality, it is equally true that in its previous case law – such as *Folgerø*[78] or *Zengin*[79] – the Court had also underlined that religious instruction has to be provided in a pluralistic and objective manner. As pluralism is considered by the Court to be one of the main characteristics of a democratic society,[80] it is difficult to see how the obligation to display a cross can be reconciled with the obligation to organise the school environment[81] in a pluralistic way.[82] Furthermore, the Court has underlined the primary importance of offering pupils the chance to opt out of religious education classes.[83] The possibility of opting out of religious education could have been translated into the possibility of requesting the removal of the cross from state classrooms.[84] Following this line of argument, the Court could have favoured a model similar to the so-called Bavarian solution applied in Germany, according to which the presence of the cross is tolerated unless a pupil's parents

76 See Puppinck, above n 20, at 5.

77 By contrast, this aspect was granted a crucial relevance in the Chamber's decision: see Lautsi (Section II), above n 45, at [47]: "in the context of teaching, neutrality should guarantee pluralism".

78 *Folgerø and Others v Norway* (2007) 46 EHRR 57 (Grand Chamber, ECHR).

79 *Hasan and Eylem Zengin v Turkey* (2008) 46 EHRR 44 (Section II, ECHR).

80 *Handyside*, above n 12, at [49]; and *Leyla Sahin* (Grand Chamber), above n 3, at [108].

81 In *Lautsi* (Grand Chamber), above n 9, at [63] the Court stated that the obligation imposed on contracting parties by the second sentence of art 2 of Protocol 1 concerns not only the content of school curriculum, but also the organisation of the school environment, including the decision to display religious symbols in classrooms.

82 Along these lines, see the dissenting opinion of Judge Maieverni, joined by judge Kalaydjieva: *Lautsi* (Grand Chamber), above n 9 at [3].

83 *Hasan and Eylem Zengin*, above n 79, at 71. In this case, the Court stated that the possibility to be exempted from attendance at such classes should be provided without requiring pupils to reveal their faith. This is in line with the *United Nations Declaration on the elimination of all forms of intolerance and of discrimination based on religion or belief* GA Res 36/55, A/RES/36/55 (1981), adopted by consensus, which establishes in art 5.2 that the child "shall not be compelled to receive teaching on religion or belief against the wishes of his parents". Along the same lines, see Bielefeldt, above n 16, at [50]. See also United Nations Human Rights Committee *General Comment 22 on Article 18 of the Covenant on Political and Civil Rights* HRI/GEN/1/Rev1 (1993) at [6] at 35.

84 *Hasan and Eylem Zengin v Turkey*, above n 79, at 76.

request that it be removed.[85] If so requested, the cross is removed – at least during the time that the respective pupil is present in the classroom.[86]

In the *Lautsi* affair the permanence of the crucifix had been backed by a school governing body's decision. In fact, the Italian Government claimed that, in practice, the school governing bodies were entitled to decide not to display the cross.[87] However, the Italian solution is substantially different from the Bavarian one. While in Italy, the obligation to display a cross can be circumvented only by a decision taken by the governing body of the school, under the Bavarian model the removal of the cross comes as a consequence of an individual request. The Italian arrangement, under which the majority is granted the right to determine the rights of an individual, can hardly be seen as a solution, but could rather be presented as an additional problem.[88] The Grand Chamber simply ignored this aspect of the case.

The prescription to display a particular religious symbol is very difficult to reconcile with the pluralistic approach that the state is obliged to apply when organising the school environment.[89] In order to justify its position, the Court emphasised that the cross was essentially a passive symbol – as alleged by the Italian Government – and that, as a consequence, its presence could not be considered as indoctrination.[90] However, all symbols are passive. By definition, a symbol is different from an action such as oath-taking. Their significance and not their passiveness should be

85 See Zucca, above n 42.

86 Following the German Federal Constitutional Court judgment on the compulsory presence of crucifixes in Bavaria (the *Crucifix case*, above n 21), the Länder passed a new regulation granting parents the ability to challenge the presence of crucifixes in classrooms attended by their children: see *Lautsi* (Grand Chamber), above n 9, at [28].

87 See Puppinck, above n 20, at 18–19.

88 According to the ECtHR in *Young, James and Webster v United Kingdom* (1982) 4 EHRR 38 (ECHR) at [63]:

> … democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensure the fair and proper treatment of minorities and avoids any abuse of a dominant position …

See also *Leyla Sahin* (Grand Chamber), above n 3, at [108].

89 Neutrality is indispensable to protect pluralism. On this topic see Sadurski, above n 11.

90 This contrasts with the Chamber of the Second Section, which had focused on the powerful character of the cross as a religious symbol: see *Lautsi* (Section II), above n 45 at [73].

the relevant factor. The power of the cross as a Christian symbol is beyond doubt[91] and the intention of those who decide to impose its compulsory presence in schools is by no means passive.[92]

The Court endorsed part of the argument used by the Italian Government to convey the image that, in spite of the "the greater visibility which the presence of the crucifix gives to Christianity in schools", pluralism was not completely absent from Italian schools:[93]

> Firstly, the presence of crucifixes is not associated with compulsory teaching about Christianity …. Secondly, according to the indications provided by the Government, Italy opens up the school environment in parallel to other religions. The Government indicated in this connection that it was not forbidden for pupils to wear Islamic headscarves or other symbols or apparel having a religious connotation; alternative arrangements were possible to help schooling fit in with non-majority religious practices; the beginning and end of Ramadan were "often celebrated" in schools; and optional religious education could be organised in schools for "all recognised religious creeds" …. Moreover, there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions.

It can easily be observed that most of the examples enunciated by the Court with a view to illustrating that the Italian schools were open to other religions concerned the right of a student to manifest his religious beliefs in public, rather than the identification of state schools with a particular religion. The lack of a prohibition to wear Islamic headscarves should be compared with the possibility to wear the crucifix on a necklace but not with the obligation to display the crucifix in state schools. The celebration of Ramadan should be compared to the celebration of Easter or Christmas but, again, not with the compulsory display of the crucifix in classrooms.

As a consequence of the above-described series of flaws and mistakes, the ECtHR came to the conclusion that, in the instant case, there had been no violation of art 2 of Protocol 1 and that no separate issue arose under art 9.[94]

The display of a crucifix in state schools is not neutral in itself. Neutrality as construed by the Court does not necessarily mean that the state has to be equally distant from all religions.[95] The

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91 It is worth noting the relation between the display of a symbol and worship. According to the *General Comment 22 on Article 18*, above n 83, at [4]: "The concept of worship extends to the display of symbols."

92 Compare the approach taken in *Dahlab*, where the Islamic headscarf was recognised as a powerful religious symbol: *Dahlab*, above n 10. See also, below Part IV.A.

93 *Lautsi* (Grand Chamber), above n 9, at [74].

94 With regard to the alleged violation of art 14 (discrimination), the Court did not see in the applicants' complaints any issue distinct from those it had already determined under art 2 of Protocol 1: *Lautsi* (Grand Chamber), above n 9, at [80].

mere presence of the cross in schools might be considered compatible with the obligation of neutrality. What appears to be impossible to reconcile with neutrality, even with the limited construction of neutrality that the Court has put in place, is the *compulsory* display of the cross. Following the path traced by the German Constitutional Court or the Polish Constitutional Court, the ECtHR could have focused on the compulsory character of the presence of the cross.[96] In line with the interpretation given to the obligation of neutrality in its previous case law, by applying this approach, the Court could have preserved the possibility of having the cross present in state schools unless there is a request for it to be removed. Unfortunately, the Grand Chamber took a different direction, with its final judgment contributing to the distortion of the essence of the neutrality principle.[97]

## *IV THE LIMITATIONS ON THE RIGHT TO FREEDOM OF RELIGION: FEAR OF ISLAM*

Another issue that has not been satisfactorily resolved by the ECtHR concerns the relationship between secularism, neutrality and the right to freedom of religion. Especially problematic are the bans on the wearing of religious symbols in education.[98] Although there are other areas in which the Court expresses its fear of Islam,[99] in cases related to the wearing of religious symbols in public schools the Court has offered a contentious interpretation of the wearing of the Islamic headscarf, which perfectly illustrates its cautious and fearful approach to Islam. The purpose of this section is to examine two cases in which the Court's opinion on the meaning of the wearing of the Islamic headscarf is clearly formulated: the *Dahlab v Switzerland* case and the *Leyla Sahin* case.[100]

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95 The Italian Constitutional Court has established that the state is required to be equidistant and impartial in its relations with religions: Corte Constituzionale, No 508, 20 November 2000 as cited in *Lautsi* (Section II), above n 45 at [24].

96 The *Crucifix case*, above n 21; and Polish Constitutional Court No U 12/32, above n 67.

97 See Pierik and Van der Burg, above n 62.

98 For a general analysis of the European bans on the wearing of religious symbols in education, see Howard, above n 8.

99 Christian Moe "*Refah* Revisited: Strasbourg's Construction of Islam" in W Cole Durham and others (eds) *Islam, Europe and Emerging Legal Issues* (Ashgate, Farnham, 2012) 235; and *Refah Partisi* (Section III), above n 4. Another example is *Serife Yigit v Turkey* where the Court gives a very simplistic and stereotyping reading of the Islamic rules on marriage: *Serife Yigit*, above n 10. In his concurring opinion, Judge Kovler expresses his disagreement with this "reductive and highly subjective" interpretation of Islam. See also his concurring opinion in *Refah Partisi* (Grand Chamber), above n 4.

100 *Dahlab*, above n 10; and *Leyla Sahin* (Grand Chamber), above n 3.

## *A The* Dahlab *Case*

The ECtHR confirmed in *Dahlab* that the state enjoyed a broad margin of appreciation to place restrictions on the freedom of teachers to manifest their religious convictions in public schools.[101] In this case, a Swiss teacher, Ms Dahlab, was prohibited from wearing the headscarf in a Swiss school in the secular canton of Geneva.[102] In the most controversial part of its decision, the ECtHR observed – echoing the arguments of the Swiss Federal Court – that the wearing of an Islamic headscarf is hard to reconcile with the principle of gender equality and with the message of tolerance, respect for others, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.[103]

These statements are reductive, to say the least.[104] The Court failed to consider properly that the wearing of an Islamic headscarf is also a valid option within the framework of the right to freedom to religion.[105] There are multiple meanings associated with the headscarf, which has even become a

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101 *Dahlab*, above n 10. The Court declared the application inadmissible. On this case, see for example Smet, above n 15, at 124–129. According to the Swiss Government, in Switzerland the schools are organised under the denominational neutrality principle.

102 The Swiss Government presented the prohibition as necessary in order to preserve denominational neutrality in the schools. Section 120(2) of the Public Education Act 1940 (Canton of Geneva, Switzerland) provides that "civil servants must by lay persons; derogation from this provision shall be permitted only in respect of University teaching staff". And the Swiss Federal Court had found that the interference with the right to freedom of religion in this case was necessary in a democratic society because the wearing of the Islamic headscarf could interfere with the religious beliefs of the applicant's pupils, other pupils at the school and the students' parents: Federal Court of Switzerland 12 November 1997. See *Dahlab*, above n 10.

103 *Dahlab*, above n 10.

104 It can even be sustained that the Court itself violates the prohibitions imposed on the state under the duty of neutrality: "The State's duty of neutrality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed": see *Manoussakis v Greece* (1996) 23 EHRR 387 (ECHR) at [47].

105 Another aspect of the problem is presented by Susanne Baer "A Closer Look at Law: Human Rights as Multi-Level Sites of Struggles over Multi-Dimensional Equality" (2010) 6 Utrecht Law Review 56. She notes (at 65) that:

> … mostly, cases about religion in schools have been discussed as such, but should also be understood as issues of sex segregation. For example, a prohibition on wearing a headscarf for teachers does in fact exclude women, and not men, from specific spheres of employment.

At 70, she applies what she calls the "fundamental triangle of liberty, equality and dignity" to argue that it would be reasonable:

> … to prohibit a face-covering veil because it seriously inhibits communication, yet it is a violation of fundamental human rights to prohibit a headscarf, a turban or a yarmulke since there is no violation of additional concern.

In *Dahlab*, the ECtHR rejected the claim that prohibiting the wearing of an Islamic headscarf amounted to gender discrimination: see *Dahlab*, above n 10, at [2].

symbol for some Muslim feminists.[106] In this particular case there was no reason to think that the decision to wear the headscarf was not the result of a free choice. Moreover, the stance taken by the ECtHR is not of any help when it comes to disavowing those who present the Islamic headscarf and Islam as threats[107] and it does not contribute to "the elimination of negative stereotypes which frequently poison the relationship between different communities" in schools.[108]

In *Dahlab*, the Court eventually found that the right of a teacher to manifest her religious beliefs has to be weighed against the need to protect pupils by preserving religious harmony, and that the Swiss authorities had not exceeded their margin of appreciation.[109] The biased description of the meaning of the headscarf offered by the Court is not an acceptable argument to explain how the wearing of the Islamic headscarf can put the religious harmony of a school at risk. In fact, the Court was aware that Ms Dahlab had been wearing the Islamic headscarf for three years without any action taken by the head teacher or by school inspectors or any complaint being raised by parents.[110] Furthermore, the Court accepted that there was no evidence that the wearing of the Islamic headscarf – a powerful religious symbol – could have a negative impact on the pupils.[111]

An additional reason for concern in this case is that the Court did not provide any guidance on the relationship between secularism and possible restrictions on the right to freedom of religion. This is despite the fact that the protection of denominational neutrality and secularism in Swiss schools had been one of the reasons alleged by the Swiss Government for restricting the teachers' freedom of religion. The Court did not seize the chance to express its opinion on whether the freedom of religion of public servants could be restricted in the name of secularism. In the light of the ECtHR's decision in *Dahlab* it seems that, in the eyes of the Court, the aim of protecting denominational neutrality in schools was not a sufficient reason to justify the prohibition. As a

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106 Westerfield, above n 34, at 638.

107 This interpretation of the meaning of the headscarf was reiterated in *Leyla Sahin* (Grand Chamber), above n 9, at [111]. See the contestation by Judge Tulkens in his dissenting opinion in *Leyla Sahin* (Grand Chamber), above n 3, at [12].

108 The United Nations Rapporteur on Freedom of Religion and Belief called upon states to eliminate this stereotyping in the schools: see Bielefeldt, above n 16, at [29].

109 See *Dahlab*, above n 10, at [1].

110 The applicant, Ms Dahlab, converted to Islam in 1991 and had been wearing the Islamic headscarf since then. Brett Scharffs contends that the courts should avoid acting in a juripathic war, namely they should avoid deciding on the meaning of a symbol, particularly if it is a religious symbol: see Brett Scharffs "The Role of the Judges in Determining the Meaning of Religious Symbols" in Joeuen Temperman (ed) *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom (*Martinus Nijhoff, The Hague, 2012) 35.

111 The Court focused on the age of Ms Dahlab's pupils (they were aged four to eight) and on the power of the religious symbol. Observe the difference with the approach applied subsequently by the Court in *Lautsi* (Grand Chamber), above n 9.

consequence, it felt compelled to present the headscarf as a threat. Therefore, the question remains open whether the Court would consider prohibitions on wearing less contentious religious symbols compatible with the European Convention. The comparisons that would then be needed between the meaning and effect of different religious symbols would certainly create a very slippery slope.

## *B The* Leyla Sahin *case*

Another reason for concern appears when the relationship between the state and religion interferes with the right to freedom of religion of persons in their individual capacity. For example, the prohibition imposed on students wearing conspicuous religious clothing and symbols in state schools is presented as a way to preserve secularism. A notable example is the 2004 French law banning the wearing of ostentatious religious symbols in state schools.[112] The ECtHR has not ruled on the French prohibition yet, but there are voices who have claimed that, if it was called upon to do so, the Court would follow the direction taken in *Leyla Sahin v Turkey*[113] and would find the prohibition to be in compliance with the European Convention.[114]

*Leyla Sahin* is another well-known and controversial case lodged with the Court by a Turkish university student who claimed that the Turkish prohibition on wearing a headscarf at university infringed art 9 of the European Convention and art 2 of Protocol 1.[115] The Court ruled that, while the prohibition interfered with art 9 of the European Convention, the interference was justified under para 2 of art 9; namely, it was necessary in a democratic society to pursue the legitimate aims of

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112 Law No 2004-228 (France) JO 17 March 2004 at 5190:

> In State primary and secondary schools, the wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited. The school rules shall state that the institution of disciplinary proceedings shall be preceded by dialogue with the pupil.

The prohibition was contested by leading human rights NGOs, like Human Rights Watch: see Human Rights Watch "France: Headscarf Ban Violates Religious Freedom" (27 February 2004) Human Rights Watch <www.hrw.org>.

113 *Leyla Sahin* (Grand Chamber), above n 3.

114 Emmanuel Tawil "Strasbourg vu du Palais Royal: Invokation et Reception de la Convention Européene des Droits de l'homme dans le Traitement Juridique du Voile Islamique en France" (29 July 2005) Strasbourg Consortium <strasbourgconsortium.org> (translation: "Strasbourg as seen from the Royal Palace: Reference and Integration of the European Convention of Human Rights with regard to the Approach to the Islamic Headscarf in France"); Kathryn Boustead "The French Headscarf Law before the European Court of Human Rights" (2007) 16 J Transnat'l L & Pol'y 16. Dominic McGoldrick also points out that Jean Paul Costa, Vice-President of the ECtHR at the time, "reportedly indicated that a law banning religious signs in schools would not in itself be contrary to the European Convention on Human Rights": see McGoldrick, above n 26, at 98.

115 See Aernout Nieuwenhuis "European Court of Human Rights: State and Religion, Schools and Scarves. An Analysis of the Margin of Appreciation as Used in the Case of *Leyla Sahin v Turkey*" (2005) 1 EuConst 495.

protecting public order and the rights and freedoms of others.[116] The Court found that there had been no violation of art 2 of Protocol 1 either. Additionally, in *Leyla Sahin*, the Court stressed the broad margin enjoyed by States when it comes to regulating the wearing of religious symbols in educational institutions.[117]

In *Leyla Sahin*, the ECtHR endorsed the Turkish Constitutional Court's opinion that secularism was necessary to protect democracy in Turkey, and that freedom of religion may have to be sacrificed in order to protect secularism.[118] The ECtHR also pointed to the deliberative character of the prohibition, presenting it as the result of a long process that had been accompanied by a major debate within Turkish society.[119] The main weakness of the ECtHR's decision in *Leyla Sahin*, as underlined by Judge Tulkens in his dissenting opinion, is that the Court failed to establish that a ban on wearing the Islamic headscarf was necessary to protect the principle of secularism.[120] Radical Islamism can seriously challenge secularism and – as Judge Tulkens pointed out – there is general agreement on the need to prevent radical Islamism, especially in Turkey, where it constitutes a real risk. However, what is clearly wrong is to equate the wearing of the headscarf with fundamentalism.[121] In fact, the personal experience of the applicant, who had worn the headscarf

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116 Previously, in *Karaduman v Turkey*, the European Commission of Human Rights held that the prohibition did not even interfere with the freedom of religion as guaranteed in art 9: *Karaduman v Turkey* (1993) 74 DR 93.

117 At [109].

118 At [114]. The Court contended that the Turkish notion of secularism is:

> … consistent with the values underpinning the Convention. It finds 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.

119 At [120]. The Court (at [29]) listed and reproduced all the relevant provisions of the Turkish Constitution. Among the articles quoted by the Court, we find art 2:

> The Republic of Turkey is a democratic, secular (laik) and social State based on the rule of law that is respectful of human rights in a spirit of social peace, national solidarity and justice, adheres to the nationalism of Atatürk and is underpinned by the fundamental principles set out in the Preamble.

And art 14:

> The rights and freedoms set out in the Constitution may not be exercised with a view to undermining the territorial integrity of the State, the unity of the nation, or the democratic and secular Republic founded on human rights.

120 For a critical analysis of the judgment, see Jeremy Gunn "Fearful Symbols: The Islamic Headscarf and the European Court of Human Rights" (7 April 2005) Strasbourg Consortium <www.strasbourgconsortium.com>.

121 See *Leyla Sahin* (Grand Chamber), above n 3, at [5] and [10] per Judge Tulkens dissenting.

peacefully for four years at the University of Bursa, pointed exactly in the opposite direction.[122] The negative stance of the ECtHR towards the headscarf, already expressed in *Dahlab*, was reconfirmed in *Leyla Sahin*.[123] No consideration was given by the Court either to the multiple meanings of the headscarf, or to Ms Sahin's protestation that she had not expressed any opinion against secularism. The Court also disregarded the fact that she wore the headscarf in a manner that was neither ostentatious, nor intended as a means of protest, nor as a form of pressure, provocation or proselytism.[124]

Since the Court ruled in *Leyla Sahin* that the prohibition on wearing the headscarf at universities, specifically addressed at adults of full capacity, was compatible with the Convention,[125] it might seem reasonable to expect that it would consider the 2004 French ban on the wearing of ostentatious religious symbols in state schools compatible with the right to freedom of religion. The French government itself relied widely on the *Sahin* judgments to support its position in a later case – *Dogru v France*.[126] This case was lodged with the Court in 2005 by the applicant, an 11 year-old student, who had been expelled from her school after refusing to remove her headscarf in sports classes. She alleged that the French authorities had infringed her right to freedom of religion. The French government admitted that there had been an interference, but claimed that it was justified on the grounds of para 2 of art 9 of the Convention. Both the respondent and the Court referred to the judgments in *Leyla Sahin*. Interestingly in this case, the Court established that:[127]

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122 See *Leyla Sahin* (Grand Chamber), above n 3, at [11].

123 See Parliamentary Assembly of the Council of Europe *Islam, Islamism and Islamophobia in Europe* Resolution 1743 (2010) at [1]: "The Assembly is deeply concerned about Islamic extremism as well as about extremism against Muslim communities in Europe. Both phenomena reinforce each other". On the debate on the Turkish ban on the headscarf, see Ali Çarkoğlu "Public Attitudes towards the Türban Ban in Turkey" (2010) 6 Utrecht Law Review 145 at 152. For a particularly critical perspective on the ECtHR's view of the headscarf, see Peter G Danchin "Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law" (2008) 33 Yale J Int'l L 1.

124 See *Leyla Sahin* (Grand Chamber), above n 3, at [11]–[12] per Judge Tukens dissenting. See also Benjamin D Bleiberg "Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in *Leyla Sahin v Turkey*" (2005) 91 Cornell L Rev 130 at 162. Bleiberg claims that the headscarf ban is the real threat to gender equality.

125 It is worth noting that in 2008, the Turkish Parliament passed a constitutional amendment with a view to lifting the headscarf ban. Although the amendment was eventually annulled by the Turkish Constitutional Court (2008) TC Resmi Gazete (Official Gazette of Republic of Turkey) No 27032. Erdogan's political party (Justice and Development – AKP) has continued to campaign against the prohibition. Indeed, since 2010, most Turkish universities have ignored the formal prohibition and informally permit students to wear the headscarf by not taking disciplinary measures against them. See Jonathan Head "Quiet End to Turkey's College Headscarf Ban" (31 December 2010) BBC News <www.bbc.co.uk>.

126 *Dogru*, above n 39.

127 At [70].

> … the wearing of religious signs was not inherently incompatible with secularism in schools, but became so according to the conditions in which they were worn and the consequences that the wearing of a sign might have.

Given that the ban only applied to physical activity and sports classes, and that it had been imposed on grounds of compliance with the school's health and safety regulations, the Court found that there had been no violation of art 9. Although the Court stressed the relevance of French secularism and declared that, as in Turkey,[128] "an attitude which fails to respect that principle will not necessarily be accepted as covered by the freedom to manifest one's religion",[129] it is unclear whether the Court would arrive at the same conclusion as in *Leyla Sahin* if called upon to consider the more radical concept of secularism embodied in the 2004 French law. Considering the peculiarities of the Turkish context, it does not appear to be that easy to extend the ECtHR's reasoning in *Leyla Sahin* to cases raised in other countries. When, as in *Leyla Sahin*, secularism encroaches on the right to freedom of religion, the approach of the Court should be particularly cautious, and an automatic extension of the *Leyla Sahin* decision to other scenarios should not be expected, especially as the position taken by the Court in *Leyla Sahin* is contentious.

If the association between the headscarf and Islamic fundamentalism is highly controversial in the case of Turkey, it would have been even more divisive in the case of France, where Islamic fundamentalism is not a real threat to democracy. Furthermore, given the idea in *Dogru* that wearing religious symbols in state schools is not inherently incompatible with secularism, the Court may find it more difficult to declare the French ban consistent with art 9 of the Convention.[130] The fear of Islam inspired by the situation in Turkey should not influence the decision of the Court in a way that might lead to undesirable consequences with regard to the definition of freedom of religion in secular frameworks.[131]

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128 *Refah Partisi* (Grand Chamber), above n 4, at [93].

129 *Dogru*, above n 39, at [72].

130 This conclusion would be in line with the international standards; see in this regard Bielefeldt, above n 16, at [44], where the Special Rapporteur on Freedom of Religion or Belief observes that there is a presumption of the student's right to wear religious symbols in school and that the application of criteria for possible limitations on the freedom to manifest one's religion requires "diligence, precision and precaution".

131 The opposite view is expressed in Boustead, above n 114, at 196. She refers to the French riots of 2005 as a demonstration that Islamic fundamentalism is also a threat there:

> With Islamic fundamentalism identified as a probable cause of the recent rioting, France may have a stronger argument than ever that certain limitations on religious freedom are necessary to remedy the failure of Muslim integration.

In my view, the freedom of religion of Muslim individuals should not be limited as a consequence of the Government's failure to implement an adequate integration policy. In addition, it is somewhat tendentious to consider Islamic fundamentalism as a cause of the riots. See in this regard de Puig, above n 20, at 54.

## *V CONCLUDING REMARKS*

As has been seen in the paragraphs above, the ECtHR has contributed to the European debate on the relationship between state and religion with controversial case law. In the previous sections it has been shown that the European Convention, as interpreted by the ECtHR, is very flexible with regard to the relationship between state and religion. The Court has granted a wide margin of appreciation to states, who are free to choose between non-secular and secular arrangements, with the significant exception of Turkey, where the Court has considered that in view of the particular history of the country, the principle of secularism has acquired a fundamental constitutional relevance and has become crucial to protect and guarantee Turkish democracy. In both secular and non-secular frameworks, states' commitment to neutrality is especially relevant to preserve pluralism. Against this backdrop it is particularly disappointing that the Court has fallen short of providing a consistent interpretation of the obligation of neutrality. In the light of the *Lautsi* case, it appears that both the Court's cautious approach to the issue of state/church relations, and its use of the margin of appreciation, are in reality ways to mask a Christian bias or, at least, to entrench the Christian bias already existing in many European states. Although secular arrangements are not free from concerns about their consistency with neutrality, the main issue is their interference with freedom of religion. In the *Dahlab* case, the most problematic aspects were, on the one hand, that the Court failed to provide guidance on the relationship between secularism and freedom of religion and, on the other, that the Court gave a very negative presentation of the meaning and effects of the Islamic headscarf in order to justify interference with teachers' freedom of religion. In *Leyla Sahin*, the association of the wearing of the headscarf with Islamic fundamentalism was used to justify the interference with the right of an adult of full capacity to manifest her religious convictions by wearing the headscarf at university. In both cases, the reasoning of the Court is reductive and portrays a fear of Islam. With its simplistic and reductive reading of Islamic rules and traditions, the Court might end up contributing to the negative stereotyping of public manifestations of the Islamic faith.

It has been argued that a more consistent construction of the obligation of neutrality is urgently needed. On the transnational level, the wide margin of appreciation granted to the states with regard to the regulation of their relationship with religion should be accompanied by a clear and consistent definition of the core of the obligation of neutrality. It is important to note in this regard that the role of the Court is not to preserve the position of the majority religions in the collective identity of states, but to guarantee a fair balance between collective identities and individual rights. In order to adapt to the increasing religious diversity in Europe, the ECtHR should reformulate its "Christian" approach to neutrality, and should in the future avoid controversial statements about Islamic traditions and rules, merely inspired by a fear of Islam.