

Religious Freedom in European Democracies

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I. THE POLITICS OF RELIGIOUS SYMBOLS IN MODERN EUROPE

Freedom of religion is one of the most fundamental human rights. Ideas, conscience, and religious beliefs belong to most intimate spiritual sphere of the individual, so any state intervention into the rights of individual’s must be restricted to cases in which there is a genuine need. Although European countries uphold the right to religious expression in their constitutions and international conventions, in recent times there has been a steady rise in restrictions of this right.

In the last two years, Western democracies have been increasingly concerned with the right of the individual to express and practice their religion. A particular issue has been the expression of religious belief through the wearing of external Islamic symbols (primarily the wearing of Islamic headscarves in public buildings) and with the building of Islamic religious buildings—mosques. Although the freedom of religion is protected by the very highest legal instruments, the limits of that protection depend on political and social factors. One consequence of the increase in global terrorism has been limitations on the rights of Islamic religious groups in European countries. Restrictions on freedom of religion are imposed in line with the European Convention on Human Rights not only in terms of protecting “rights and freedoms of others”, but even more politically—in terms of maintaining “public order”.

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The European Court of Human Rights (ECHR) recently decided that banning Muslim headscarves in state schools in Turkey did not violate the freedom of religion and is a valid way of countering Islamic fundamentalism. In the case of *Leyla Şahin v. Turkey*¹ the Court held unanimously that there had been no violation of Article 9 of the European Convention on Human Rights (*Freedom of Thought, Conscience and Religion*). In the case against Turkey the Court pointed out as relevant the fact that a great majority of the population belong to a particular religion. The measures taken in universities (the applicant Leyla Şahin was a medical student) to prevent fundamentalist religious movements from exerting pressure on students who do not practice that religion or on those who belong to another religion could therefore be justified under Article 9, §2 of the Convention.

In terms of human rights issues, the recent ECHR judgment was a telling indicator that Turkey is ready to begin negotiations for European Union membership. The country has to demonstrate that it can guarantee the stability of its democracy, the rule of law, human rights, and respect for and protection of minority groups, as well as the existence of a functioning and competitive market economy. A further benefit of seeking EU membership has been the opportunity for Turkey to carry out human rights reforms that its traditionally chaotic political system had prevented for years. In spite of Turkey's secular constitution the recent critics of its EU membership are concerned about the country's Islamic identity. It is impossible to demonstrate *a priori* that Islam is compatible with liberal democracy. Turkey is a good test case to prove that point. The United States and its allies are seeking to foster liberal democracy in the Middle East. In the post-September 11 world, a no to Turkey could have catastrophic consequences. If the EU were to turn its back on Turkey now, not only might Turkey's own reforms be under threat but it would be widely interpreted in the Muslim world as a rejection of Islam in its entirety. The real challenges in Turkey thus lie in the religious-cultural sphere. The question is can Turkey accommodate European values, and will the European Union let it join. I agree with Quentin Peel who said that "*if the world is going to resist the present drive of fanatics and extremists to divide it into some disastrous clash of civilizations, we must hope that the answer . . . is Yes*"².

1. *Leyla Şahin v. Turkey* (Application no. 44774/98), Decision on June 29, 2004.

2. Quentin Peel, *The Case for Letting Turkey In*, FIN. TIMES, Sept. 16, 2004, at 15; *The Impossibility of Saying NO*, THE ECONOMIST, Sept. 18, 2004 (Vol. 372, No. 8393), at 13, 32-34.

Europe's first law banning the wearing of religious symbols in public schools was passed in March 2004 in France. It has led to arguments over religious freedom and freedom of expression as well as secularism. France's National Assembly passed a bill which outlaws the wearing of Islamic headscarves, Jewish yarmulkes and large Christian crosses, but makes provision for allowing more discrete signs of religious affiliation, such as small pendants. However, it is aimed at Islamic headscarves and intended to counter a rise in Muslim fundamentalism reportedly taking root in schools.³ The authorities also want to bolster France's much cherished principle of secularism, seen here as a way to guarantee peaceful coexistence among various religions and communities. The French Government said the Muslim scarves should be banned from public schools because "*they undermine the French republican ideal of freedom and equality . . . they are taking on a political meaning.*"⁴ Muslims counter that not all those who wear headscarves, which are considered *a sign of modesty*, are fundamentalists, and that girls are being forced to choose between their religious beliefs and staying in school. Individual schools, using their internal rules, have the final say. While all schools must conform, the law leaves it to each school to decide whether bandanas are acceptable. Some schools have simply opted to ban all headwear.

Although France wanted its ban on religious symbols to send a message to the Western world that it stood for sexual equality, the emancipation of women, and modernity, the message is somewhat mixed. The political paradox is that it was France most of all that opposed the US-led invasion of Iraq, while at the same time it was restricting the rights of its own Muslim citizens. This means that the French stance on secularization should be assessed in a global context, rather than just in a national or European context.⁵

The European Court of Human Rights decision on Turkey could on that ground help the French Government face national court cases which are expected this school year. In particular there is a widespread

3. <http://edition.cnn.com/2004/WORLD/europe/09/02/france.school.ap/index.html>.

4. E. Sciolino, *Debate Begins in France on Religion in the Schools*, N.Y. TIMES, Apr. 2, 2004, <http://www.nytimes.com/2004/02/04/international/europe/04FR> ("in all of France, home to almost five million Muslims, no more than 1,250 veiled students currently attend secondary schools, interior minister Nicholas Sarkozy reported recently."); U. Siemon-Netto, *Veils to be Banned in French Schools*, UNITED PRESS INT'L, Nov. 12, 2003, <http://www.upi.com/view.cfm?StoryID=20031211-032204-3206r>.

5. See also Michel Wieviorka, *The Stakes in the French Secularism Debate*, (09/28/04) <http://www.dissentmagazine.org/menutest/articles/su04/wieviorka.htm>.

expectation that a number of court cases will be brought by Muslims testing the law by wearing “discreet” head coverings like bandannas. The law allows discreet religious signs.

Both France and Turkey issued bans in the name of the separation of church and state. The principle of secularism in Turkey is undoubtedly one of the fundamental principles of the State, which is in harmony with the rule of law and respect for human rights.⁶ Turkey bans women from wearing headscarves in schools, universities and public building. But Turkey does not just ban women from wearing religious symbols on the grounds of prohibiting sexual discrimination, but on the ground of religious discrimination and secularism.

The current trend towards banning Islamic symbols in the West stems primarily from a fear of increasing terrorism linked to Islam and the Muslim world. Turkey is an exception to the rule, as it is a predominantly Islamic country with a democratic regime and Western European values, which has maintained its policy of banning conspicuous Islamic symbols in part because of its desire to join the European Union.

Teachers in German public schools are also banned from wearing Islamic headscarves. Legislators in the southern state of Baden-Württemberg approved the law (with dissent only from the opposition Green party, which contended that it is unbalanced because it still allowed Christian symbols in the classroom). Germany’s supreme court ruled last year that the teachers are allowed to wear headscarves unless state laws ban them, and said that any such bans should treat all religions equally.⁷ The ban does not apply to religious educational classes, and Christian and Jewish symbols are not banned.

Wearing the headscarf was described in the German court ruling as “*part of the history of women’s suppression*”, while it described Catholic symbols as “*part of the Western tradition*”. The German federal government defined Islamic headscarves as an “*Islamic political symbol*”. This meant that primary school teachers could not wear headscarves in their place of work. The case is comparable to *Dahlab v. Switzerland*⁸, in which the European Court of Human Rights ruled on a

6. *Leyla Şahin v. Turkey* (Application no. 44774/98), Decision on June 29, 2004.

7. The law was passed as a consequence of the judgment of the German Supreme Court in the *Fereshta Ludin* case. Fereshta Ludin is a German citizen of Afghanistani origin who was banned from wearing her Muslim headscarf by the board of the school wear she taught. She lost her job in 1998 for wearing the headscarf during lessons.

8. *Dahlab v. Switzerland*, No. 42393/98, ECHR 2001-V.

violation of Article 9 of the Convention in 2001 “*in a democratic society the State was entitled to place restrictions on the wearing of the Islamic headscarf if it was incompatible with the pursued aim of protecting the rights and freedoms of others, public order and public safety*”. The ECHR ruled that the Islamic symbol—the headscarf worn by the appellant in an elementary school—had a range of impacts on younger schoolchildren. The Commission stressed among other matters the impact that the “powerful external symbol” conveyed by her wearing a headscarf could have, and questioned whether it might have some kind of proselytizing effect, seeing that it appeared to be imposed on women by a precept laid down in the Koran that was hard to reconcile with the principle of gender equality.

In defining the acceptability or otherwise of symbols that individuals wear or that are displayed in public places (e.g., headscarves, symbols in public school classrooms) the US ‘Acceptability Test’ could be used. This test comes from the separate opinion of the Supreme Court Justice Sandra O’Connor in the case *Allegheny County v. ACLU*.⁹ Judge O’Connor stressed that the essence of the “acceptability test” lay in the message of the symbol. If a symbol implies to an individual not of the faith in question that they do not belong to that specific social, political or religious group, while indicating group membership to other individuals that do belong to that group, then the symbol has *religious meaning*. Also significant is the meaning of the symbol as seen and understood by individuals. The “acceptability test” itself is unacceptable to some, as some theoreticians have posed the problem of finding a representative sample to assess the meaning of a symbol. Judge O’Connor herself proposed that the standard should be determined using a “*reasonable observer*”.¹⁰ The representative sample is always linked to the issue of objectivity, so that the problem is no different from any other analytical, statistical method or research. The fact that a test involves subjective decision about an objective matter does not devalue the concept of assessing the meaning of religious symbols.

Applying the test using a reasonable observer would provide secular countries with a less political basis for a ban on wearing religious symbols.

9. *Allegheny County v. ACLU*, 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989).

10. Laurence Tribe suggests a kind of observer who would be a ‘*reasonable non-adherent*’. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1296 (2d ed. 1988).

In Italy, the presence of Catholic symbols such as crucifixes in courtrooms, schools, and other public buildings has also drawn criticism and has led to a number of lawsuits. In 2003, the Italian Parliament tabled proposed legislation from several parties requiring display of crucifixes in all public classrooms. In the same year the Appeals Court of Pescara overturned a judicial ruling that ordered the removal of a crucifix from a classroom (the earlier court had accepted the argument made by one student's father, who is the leader of a small Islamic association, that its presence discriminated against children of other faiths). President Ciampi, for example, argues that "*the crucifix is a symbol of the national identity and not only a religious emblem and was praised by several politicians and intellectuals for his position*".¹¹

In some countries the ban on Islamic headscarves only applies to teachers, such as in Switzerland and Germany, while schoolchildren are allowed to wear headscarves in public school classes (just as in the Netherlands and the UK). The most recent European Court of Human Rights judgment on religious symbols in the case *Leyla Şahin v. Turkey*, includes an even stricter ban. The court confirmed the grounds for banning the wearing of headscarves in public universities as well.

In Austria students cannot be prohibited from wearing a headscarf. That practice originates from a court-mediated case in which a teacher at a fashion institute removed the headscarf of a Muslim girl during class, claiming that it posed a danger to her safety. A high school in the state of Upper Austria prohibited students from covering their heads in school. A Muslim parent filed a complaint for discrimination with the local police authorities, who ordered that his daughter be allowed to wear a headscarf. The head of the Upper Austrian State School Council and the Ministry of Education confirmed that Muslim girls and women had the right, according to legal provisions on religious freedom, to wear headscarves.

In Europe, France has made the most radical intervention into the right of religious expression on grounds that "*a religion cannot be a political project*". While Germany does not practice separation between religion and state with full rigor, in France the concept of *laïcité*, meaning the state's absolute neutrality with respect to the plurality of religions, is deeply ingrained.

11. See the opposite views about Italian Catholicism: Mark Donovan, *The Italian State: 'No Longer Catholic, No Longer Christian'*, in J. Madeley & Z. Enyedi (eds.), *Church and State in Contemporary Europe*, W. EUR. POLITICS 26/1 (Jan. 2003), at 95-117.

Dress continues to be a major issue in a number of European states.¹² In Belgium, an official *opinion*¹³ stated that a distinction should be made with regard to whether the wearing of a headscarf was an expression of personal choice or the manifestation of oppression by the environment of origin. If the latter, the public authorities should provide effective aid. It is, however, in the context of employment that the issue of wearing religious insignia has manifested itself on several occasions in Germany and Belgium, where courts required employers to respect the religious freedom of their Muslim workers. In Sweden, several similar cases of discrimination due to the growing climate of intolerance and negative attitudes in society have been referred to the Ombudsman.¹⁴

A. *East European Religious Practice (Case of Slovenia)*

Justifying restrictions on people's freedom of religion on the basis of an "urgent need" to protect secularism and equality is not found only in the countries of Western Europe. The "new democracies" of Eastern Europe are also addressing the issue of restricting religious, primarily Islamic, freedoms. Fears of the spread of Islam are justified by appeals to the fear of terrorism. This article looks at the example of Slovenia, as one of the new EU members.¹⁵ Slovenia has a relatively unusual status in the Eastern European context, as before independence in 1999 it was part of the socialist Yugoslavia. The mix of a predominantly Catholic population in Slovenia (72%) with national groups that have origins in the other former Yugoslav states includes a 2.4% Muslim population, primarily with origins in Bosnia and Herzegovina. Today this presents a source of discomfort to Slovenes.¹⁶ One expression of the Slovenes'

12. Report on the situation as regards fundamental rights in the European Union (2002), (2002/2013(INI) Committee on Citizens' Freedoms and Rights, Justice and Home Affairs.

13. Committee for Equal Opportunities for Men and Women issued opinion No 54 of September 13, 2002.

14. <http://www.hrwf.net/html/0804courtfinal.htm>.

15. Slovenia joined the European Union on May 1, 2004.

16. Information on religious affiliation in the Republic of Slovenia is taken from the 2002 census, *Statistične informacije*, 92/2003, Statistical Office of the Republic of Slovenia. Information issued by international organizations differs significantly from the national data, but both place Catholics significantly in the majority. See *International Religious Freedom Report*, released by the Bureau of Democracy, Human Rights, and Labor, <http://www.state.gov/g/drl/rls/irf/2001/5735.htm>:

Estimates of religious identification vary, but according to the 1991 census, the numbers were: *Roman Catholic*, 1.4 million (72 percent); No answer, 377,000 (19 percent); Atheist, 85,500 (4.3 percent); Orthodox, 46,000 (2 percent); Muslim, 29,000 (1.5 percent); Protestant, 19,000 (1 percent); Agnostic, 4,000 (.2 percent); and Jewish, 201 (.01 percent). According to the 2002 census, the numbers are: *Roman Catholic*,

rejection of their citizens from a former common state came in response to proposals to build a mosque in Ljubljana, the capital of Slovenia. Local municipal institutions held a referendum on planning permission for the mosque, after pressure was applied by people in their municipality. The purpose of the referendum was to stop the building of a mosque. The explicit decision on the planning issue would indirectly decide whether adherents of the Islam religion could express their beliefs in a mosque or not. A constitutional provision on the equal rights of religious communities and the general principle of equality should have ensured that Muslims were able to exercise their rights in the same manner as adherents of other religions, including the construction of religious buildings. The referendum, public appearances by those who called the referendum, and public debates on the issue were a clear expression of religious intolerance, which is expressly prohibited by the constitution.¹⁷ A referendum of that kind would in fact affect the right to free expression of religious beliefs.

Slovenia's Constitutional Court ruled on the referendum question and removed all the obstacles to the construction of the planned Islamic religious and cultural center. This case is a typical example of intolerance of Muslims within modern democratic Europe.

In Slovenia the constitution clearly declares the separation of church and state, despite the fact that the majority of the population is Catholic. In practice this means that the state does not become involved in an individual's right to express religious beliefs, nor does it support religious organizations, financially or in any other way. The Constitution states that all religions are equal, which different legal experts have interpreted differently, depending on their personal political views. Some have interpreted religious equality as meaning equal status regardless of the number of adherents a religious has in Slovenia, while others have sought to interpret this equality in terms of discrimination, i.e., numerically better represented religious groups should have a more significant role as any other interpretation would actually mean positive discrimination for religions with fewer adherents. Despite these theoretical positions, until

1,135,626; Evangelical, 14,736; Other Protestant, 1,399; Orthodox, 45,908; Other Christian, 1,877; Islam, 47,488; Jewish, 99; Oriental, 1,026; other religion, 558; Agnostic, 271; Believer, but belongs to no religion, 68,714; Unbeliever/atheist, 199,264; Did not want to reply, 307,973; Unknown, 139,097.

17. 'Extreme supporters of the referendum effort said that the country could become a 'terrorist breeding ground' if the mosque were built.' See <http://www.state.gov/g/drl/rls/irf/2004/35484.htm>.

the parliamentary elections in October 2004 the state had maintained a very secular relationship between church and state, without supporting the church or intervening in its functioning.

The October 2004 elections saw a change in the political make up of the parliament, and for the next four years the majority will be held by a center-right coalition. The run up to the election saw parties on the right promising that the Catholic church would increase its social significance, particularly in the education system, with the creation of private elementary schools and kindergartens and the introduction of religious education as a compulsory subject in public schools. The anticipated changes in cooperation between church and state will rank Slovenia alongside countries that are constitutionally secular, but in which the state subsidizes the church and allows interaction between the state and church spheres. These countries today include the Netherlands, Hungary, Romania, Russia and San Marino. Actual constitutional change would place Slovenia among the more religious states, with a more significant form of cooperation between church and state. Regardless of the formal secularity at present, some commentators already consider Slovenia as a religious country (albeit with a formal policy of mutual non-intervention between church and state).¹⁸ The fact that 72% of Slovenes call themselves Catholic does not mean that the state is religious, because there actually has been a separation of church and state to date.¹⁹

In early 1990, as Slovenia gained its independence from Yugoslavia the center right political elite then in power—and which returned to power in the October elections—introduced the secular basis of the state. This system enjoyed wide support from society at large, the people and the political classes. The center left won the leadership of the governing coalition from the center right parties, and maintained that status until the present day. The attitude towards secularism has only started to change in the last few years, as the Catholic church has strengthened its position amongst its adherents and the center right parties.²⁰ Slovenia is more and

18. See John T. Madeley, *European Liberal Democracy and the Principle of State Religious Neutrality*, in J. Madeley & Z. Enyedi (eds.), *Church and State in Contemporary Europe*, W. EUR. POLITICS 26/1 (Jan. 2003), at 1-23.

19. *Supra* note 14, <http://www.state.gov/g/drl/rls/irf/2001/5735.htm>.

20. Societal attitudes toward religion are complex. Historical events dating long before Slovene independence color societal perceptions of the dominant Catholic Church. Much of the gulf between the (at least nominally) Catholic center-right and the largely agnostic or atheistic left stems from the massacre of large numbers of alleged Nazi and Fascist collaborators in the years 1946-48. Many of the so-called collaborators were successful businessmen whose assets were

more frequently compared to Italy or Poland, in which the Catholic church has an important role in socio-political life.

The situation is similar to that in France where a majority of the population describe themselves as Catholic, while figures on the number of churchgoing Catholics are considerably lower. In Slovenia the important question is in what form and to what extent the new governing coalition will introduce changes in the relationship between the Catholic church and the state. That some changes will occur is certain. For example two days after winning the election, a member of the center right coalition raised the question in a daily newspaper concerning what nuns teaching catechism in public schools should be allowed to wear.²¹ So far the issue of religious clothing, for teachers or pupils, has not been raised in Slovenia. The center right's previously unsuccessful attempts in opposition to change the state from a secular country into one in which the Catholic church has an important role, will now come from parties in government. The composition of the new parliament and new government will lead to legislative changes, primarily in education. The introduction of Catholic catechism or religious education into public elementary schools will probably be one of the first acts of the new governing coalition. The French case concerning religious symbols would seem to apply to Catholic nuns wearing black headscarves and habits in Slovenia, at least as long as the state maintains its constitutionally guaranteed respect for the separation of church and state. Instead of following the French example, however, Slovenia may follow the German case of *Fereshta Ludin*²², in which the Federal Constitutional Court—Germany's supreme court—decided that the teacher had the right to decide what she would wear when teaching (in the specific case of a Islamic headscarf), as the issue was not covered by state law. The German Constitutional Court did not want to adjudicate on religious symbols and instructed the state of Baden-Württemberg to legislate on the disputed field itself, in accordance with its constitutional authority. The German decision therefore goes against the French decision as it permits teachers to wear any clothing they like (including religious)

confiscated after they were killed or driven from the country, and many were prominent Catholics. *International Religious Freedom Report*, released by the Bureau of Democracy, Human Rights, and Labor, <http://www.state.gov/g/drl/rls/irf/2001/5735.htm>.

21. "Kaj lahko redovnica obleče za poučevanjen v (javni) šoli?" [How should nuns dress in school?], DNEVNIK, Oct. 5, 2004, at 4.

22. See more on the German case in BverwG 2 C 21.01, July 4, 2002 ('Kopftuch-Streit') and BverfG, Sept. 24, 2003, 2 BvR 1436/02, http://www.bverfg.de/entscheidungen/frames/rs20030924_2bvr143602.

when teaching in public schools. However, the democratic nature of the ruling on religious symbols is deceptive, because the constitutional court allowed individual federal states to legislate on whether and in what manner they might regulate the wearing of clothes with religious significance in public schools. On the basis of the federal constitutional court's authorization, the state of Bavaria and Baden-Württemberg have already enacted a ban on Muslim teachers wearing headscarves.²³

There are strong grounds for expecting the Slovenian Government to follow the German example in the case of religious symbols. The center right parties are giving greater emphasis to the idea that the separation of state and church should not be as strict as set out in the Slovenian constitution. They find support for this assertion in the strong historical ties to the Austro-Hungarian empire that link Slovenia to the German-speaking world. When Slovenia gained its independence, it had to look for a legal and political system to serve as a model. The creation of the constitution was very much based on the German system, while research and studies in comparative law frequently refer to the Austrian and German systems as the most suitable frame of reference in Europe for the Slovenian constitutional system. Emphasizing Slovenia's connections to the Germanic cultural sphere was already established practice in the time of the socialist republic of Yugoslavia.²⁴ The mixing of Germanic and Slovenian culture goes back to the time of the Austro-Hungarian Empire, when the population of modern day Slovenia, then known as Carniola was 12% Germanic. The south and south-eastern part of modern Austria (Carinthia, Styria, and Lower Austria) also had a Slovenian minority (Carinthia: 20%, Styria: 25% and Lower Austria: 5%).²⁵ This blending of Slovenian with Germanic culture has always led to a sense of identification in Slovenia with Austria and Germany, and lessened its identification with the other Yugoslav nations.²⁶ These

23. These are not the only states that will enshrine this discriminatory ruling in law. Straight after the Federal Constitutional Court ruling a number of Germany's federal states started to prepare legislation preventing teachers from wearing Muslim headscarves. Germany, *International Religious Freedom Report 2004*, released by the Bureau of Democracy, Human Rights, and Labor, <http://www.state.gov/g/drl/rls/irf/2004/35456.htm>.

24. 'Slovenia, the smallest and wealthiest component (of the Federation of Yugoslavia), possessed a per capita GNP similar to that of Austria. In 1992, it led the field in gaining its independence.' NORMAN DAVIES, *EUROPE, A HISTORY* 730-31 (London: Pimlico, 1997).

25. *Id.* at 1307 (Appendix III—The Dual Monarchy: The Nationalities of Austria-Hungary, 1867-1918).

26. 'The quickest way to offend a Slovene is to refer to this relatively cosy corner of the former Yugoslavia as Balkan. That pejorative term should be reserved for their lazy and uncivilised Slavic brethren to the south, they believe. Slovenia is Alpine. . . . A leader of far-right

historical links with Austria and Germany to the north contributed, along with higher GDP, to the Slovenian sense of being the “most important” Yugoslav republic.

For these historical reasons, fostered in particular by the center right parties, it is likely that if Slovenia addresses the issue of religious clothing for teachers in public schools, it will follow the German model rather than France’s secular decision.

This move away from “French secularism” in the post-socialist state is also a response to previous state restrictions on the individual’s freedom of religion, and the repressive approach to people with religious beliefs and churches as organizations.

B. A Common European Religious Policy in a Multi-Confessional Europe?

Europe today is characterized by the integrational processes of EU enlargement. One consequence is a significant level of harmonization of legal and economic matters among the European Union member states. The high point came with the creation of a single currency—the euro, now used in 12 of the member states. In addition to economic integration, the European Community, later the European Union, has increasingly experienced the integration of the media, as a consequence of the globalization of cultural processes. Harmonization in relationships between religion and politics, expressed externally through relations between church and state has, however, been relatively weak. There still exists a dividing line between western and eastern culture in Europe, and between western and eastern religions, a divide that can be traced back to the separation of the Roman Empire into east and west. The consequences of this historical upheaval, the crusades, the Reformation, fascist and Nazi anti-semitism, have left deep impressions on the continent that live on to this day.²⁷

The Council of Europe and the European Union ensure the protection to this European conglomerate of nations and religions with documents, such as the European Convention on Human Rights, and the body of EU law known as the *acquis communautaire*, and through

Slovenian National party can be right now included in his government. He would almost certainly exacerbate tensions with Croatia over simmering border disputes. He likes to refer to the Croatian peninsula of Istria as part of Slovenia. He has already caused trouble with the EU by helping to organise opposition to the construction of Slovenia’s first mosque. Alpine? Yes, on the Jörg Haider model.’ *Balkan Headache for Brussels*, FIN. TIMES, Oct. 5, 2004.

27. See more on European history in DAVIES, *supra* note 24.

institutions such as the European Court of Human Rights and the European Court of Justice²⁸. In accordance with the case law of the ECHR and Article 9 of the European Convention on religious freedom, the protection of individual conscience also implies freedom to manifest religion.²⁹ The wearing of religious symbols is thus bound up with the existence of religious convictions. So far the European Court of Human Rights (the Council of Europe court) has only adjudicated on the wearing of religious symbols in the case of *Leyla Şahin v. Turkey*³⁰. The European Court of Justice (the EU court) has not yet ruled on any cases involving the manifestation of religious beliefs through wearing religious symbols. A general position on expressing religious beliefs was addressed in the case *Prais v. Council*³¹, which saw the recognition of the right to protection of religious needs become community law and required all European offices to avoid religious conflicts. At the EU level, religious freedom thus includes the protection of the private religious sphere of individuals from public interference, regardless of faith or denomination, as well as the responsibility of the EU and its institutions to take organizational measures to provide adequate space for the exercise of religion.³²

The validity of expressing religion by wearing religious symbols or manifesting them in other ways depends on the approach individual countries take towards churches or religion in general. European countries can be categorized into three groups on the basis of the

28. 'A few trends of convergence are detectable, such as the basic recognition of the principle of religious freedom was in the laws of the community, beginning with the 1976 decision of the European Court of Justice in a case *Prais v. Council*.' M. Minkenberg, *The Policy Impact of Church-State Relations: Family Policy and Abortion in Britain, France, and Germany*, in J. Madeley & Z. Enyedi (eds.), *Church and State in Contemporary Europe*, W. EUR. POLITICS 26/1 (Jan. 2003), at 195.

29. Article 9 of the Convention provides as follows:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

30. *Leyla Şahin v. Turkey* (Application no. 44774/98), Decision on June 29, 2004.

31. *Prais v. Council (Vivien Prais v. Council of the European Communities)*, Case 130/75, Judgement of the Court (First Chamber) of 27 October 1976, European Court Reports 1976, p.01589.

32. See Minkenberg, *supra* note 28, at 195-217.

relationship between church and state. Of course, this leads one into the classic problem of classification, as different authors have used different criteria. Important factors include the extent to which one considers the separation of church and state alone, and the related question of including empirical research in the context of constitutional debate. Another factor is the issue of whether to include religious freedom in the classification. Results differ depending on the extent to which different factors are considered. We can rank countries into three groups, with the first consisting of countries that are completely secular, which means that church and state are completely separate; in the second group then is the state church type, characterized by close links between state authority and the church, while the third group is the “in-between” group, with states in which the separation of church is modified somewhat with special privileges for the dominant religion of the country.

As already stated, classification into three categories would be too simplistic and too far from the political reality if it were only to take constitutional criteria into account. Every Eastern European country with a communist regime also had a constitution declaring that human rights were protected, including the freedom of religion. Exercising the right to manifest one’s religion was therefore permitted by the constitution in communist regimes, however in daily life that right was restricted through state intervention with varying degrees of repression. The relationship between the state and the individual retains an indirect hold to this day in post-socialist or post-communist countries where part of the population is convinced that even as a “democratic” country, the state controls the individual, from participation in elections to participation in official and religious events.³³

The relationship between church and state goes deep and cannot be seen simply in terms of a legally declared state.³⁴ Despite this, empirical studies of church-state relationships are predominately legal in nature. Michael Minkenberg criticizes Gerhard Robbers’ approach for this reason, stating that it only defines the state in terms of constitutional separation. Robbers proposes the following classification: state church systems (Denmark, England, Finland, Greece, Sweden), a system of strict

33. On the lack of trust for state authorities in ex-socialist Slovenia—results of survey at www.najdi.si/ankete/ (2004) with the question: “Is Slovenia a true democracy?”—some 31% answered no, stating the communist past as a reason, while 29% said they did not know what a democracy was.

34. “[T]he constitutions of various countries, such as Germany, Colombia, Ireland, and the Islamic nations, contain an invocation of God, but it is questionable that they are all similarly authentic references.” Minkenberg, *supra* note 28, at 197.

separation (France, excluding Alsace, Ireland, the Netherlands) and a system of common tasks, also called the in-between system (Austria, Belgium, Germany, Italy, Portugal, and Spain).

Maurice Barbier uses the same concept taking French secularism as the basic criteria and separating countries into: laicist (France), quasi-laicist (Italy, Spain, Portugal), semi-laicist (Belgium, Germany, Ireland, Luxembourg, the Netherlands), or non-laicist (Denmark, England and Greece). Minkenberg considers that this kind of classification fails to distinguish between the causes and consequences of the relationship between church and state and to distinguish between the formal, legal situation and the political reality. By including factors that distinguish state openness on the issue of religion education in public schools, the free functioning of religion organizations, religious provisions for military personnel and prisoners, and the recognition of religious marriages, Francis Messner drew up the following categories: open countries, that do not discriminate against minority religious communities and sects (France excluding the Alsace³⁵, Ireland, the Netherlands), pluralist countries with a pluralism of churches and a low level of discrimination (French Alsace, Belgium, and Luxembourg), hegemonic systems with a specially privileged church and somewhat more discrimination (Austria, Germany, Italy, and Spain) and closed societies and countries with one official church (Denmark, Finland, Sweden, Greece, Portugal, and England). According to Minkenberg the “openness scale” is also problematic, as the factors used by Messner are treated as independent variables instead of dependent. Comparative analysis is also provided by classification according to deregulation or separation, which has been proposed by Mark Chaves and David E. Cann.

Chaves and Cann divide countries according to six questions on the relationship between church and state with criteria that measure the level of regulation or lack thereof in individual areas of public life, thus

35. The special arrangement in France that applies only to the Alsace-Moselle region originates in the historical agreement between the German emperor and the Pope on the inclusion of part of eastern France into Germany in 1871, so the previous French Concordat regime still applies. A particular feature of the French Concordat was that it only recognized four faiths: Catholic, Lutheran, Reformed Churches and the Jewish faith. These four (*les cultes reconnus*) had a status like a public service, and were state supervised. In 1905 when the French law on the separation of church and state was passed, the present day Alsace-Moselle region was still part of Germany, so the new French law did not apply. After the region returned to France in 1918, the local political leaders and population were in favor of maintaining the status quo. The local laws of the three eastern French départements (Haut-Rhin, Bas-Rhin, Moselle) still recognize the four faiths and provide them with state support.

avoiding the formal categories of “established religion” v. “separation of state and church”. The result of their analyses provides a classification according to the level of church regulation: deregulated countries—France, Ireland, and the Netherlands; partially deregulated—Austria, Portugal, Spain; low/medium level of regulation—Belgium, England, Germany, Italy, and Switzerland; and regulated countries—Denmark, Finland, Norway, and Sweden. Combining these results with the analyses given above, Minkenberg found that despite a few divergences, one could conclude that the spectrum of relations between church and state stretches from France on one end as the most secular state, to the Nordic countries at the other end with an official function for the church within the state, with other Western European countries ranking somewhere in between.

However, the position of Ireland, which the studies by Messner, Robbers, and Chaves and Cann rank along with France, is very different in practice. These analyses did not take into account the education system, which has a very high level of involvement by the Catholic church. In fact the Catholic church is so involved in society that there is no need for state recognition of the church, or constitutional arrangements to give it special status. For this reason, Minkenberg considers this analytical ranking to be debatable, with not only Ireland’s ranking presenting a problem, but also many others, with the exception of France and the Nordic countries. Particularly problematic is the issue of how to rank the new Eastern European democracies within these established categories, as the relationship between church and state is very much an expression or reaction to the socialist-atheist position forced on the individual by the state. After the change from a communist system, in most of these countries the church attained the same or even greater importance than it had had before the socialist period.

II. FRENCH SECULARISM

In secular countries, such as France, the relationship between church and state is understood in terms of the relationship between church organizations and the authority of the state. Secularism or *laïcité* is the foundation for any interpretation of the church’s status in France. The principles founded in the *French law on secularity* (in French: *la loi sur la laïcité*) is based on the constitutional requirement of *laïcité*, the separation of church and state. This law prohibits conspicuous religious symbols and clothing, worn by students in public schools. The law further supports the French constitutional provision of freedom of opinion, including religious opinion.

State secularism also means that the state does not recognize, finance or support any religion in any way.³⁶ The fact that the state does not recognize any faith means that France has abandoned the Concordat regime that existed in the past.³⁷ Formal differences between faiths are also not acknowledged, with all religions part of the private sphere, and not the public. However, there were some changes to this fully secular situation in the 1990s when the state started to recognize a growing role for the church in social life (primarily in welfare), including the recognition of a private confessional school system. According to some commentators, these changes may lead to a new form of secularism—‘*laïcisation de la laïcité*’.³⁸ But schools in France, which receive all their funding from public sources, must not, by law, promote any religion. They should remain equally accessible to children of any, or no, religion. For example, even though the majority of the population nominally professes Catholicism (although far fewer regularly practice Catholicism), state-funded schools have no communal prayers, religious assemblies, or Christian crosses on the walls.

It is now possible to found private religious schools in France. Within the context of the ban on religious symbols in public schools, private schools will become more and more attractive to France’s Muslim population.

The ban on the wearing of ‘conspicuous’ religious symbols in public schools was enshrined in law with the ‘*Loi encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*’³⁹, which came into effect with the new academic year in September 2004.⁴⁰ The bill has passed France’s national legislature and

36. The law on the separation of church and state passed on December 9, 1905, by the French parliament and still in force today, introduced the principle of the secular state (Art.1) and the provisions that the state would not finance, or support any religion in any other way (Art.2). *Journal Officiel de la République Française*, Trente-septième année, No. 336, Décembre 1905.

37. See discussion *supra* note 35.

38. This new form of laicism would have to overcome France’s traditionally unsympathetic anti-clericalism and the centuries long struggle between the clericalists and anti-clericalists, the “*guerre des deux Frances*”. See Minkenberg, *supra* note 28, at 204.

39. This could be translated as ‘*Law, as part of the implementation of the principle of laïcité, on wearing symbols or clothing that indicate religious adherence in publicly-operated schools, colleges (11-15 years) and lycées (16-18 years)*’.

40. The French Law on Secularity and Conspicuous Religious Symbols in Schools is an amendment to the French Code of Education banning students from wearing conspicuous religious symbols in French public primary and secondary schools. The law expands principles founded in an existing French law (known in French as *la loi sur la laïcité*, literally *the law on secularity*) based on the constitutional requirement of laïcité, the separation of church and state.

was signed into law by President Jacques Chirac on March 15, 2004 (hence its technical title as *Law 2004-228 of March 15, 2004*).

The ban refers to all religious symbols that draw attention and are conspicuous though no symbol is specifically mentioned (it is nevertheless considered by many to specifically address the wearing of headscarves by Muslim schoolgirls⁴¹). The main problem arises in the Muslim population, as Islam is the second largest faith group in France, after Catholics. By passing this law, France wanted to formally protect its strict secularism in the public education system, and in some manner, force Muslim schoolchildren to adopt European style dress. However, an enforced change of this type can be a two-edged sword. Adopting European dress contributes significantly to changing an individual's cultural patterns, which is a desirable consequence of the French state. On the other hand, enforced changes in the sensitive and personal sphere of religion will mean that state schools lose a considerable number of students. The expectation that many Muslim students will move from state to private schools is quite probable and also quite understandable from their point of view. The consequence of Muslim students moving to private educational institutions, due to state pressure, however, will contribute to greater socio-cultural stratification and intolerance between Muslims and other "European"⁴² believers. The transfer of Muslim students into private Muslim schools also raises the issue of their separation from other groups and the creation of a form of religious ghetto. State secularism can lead to problems of wider discrimination, from religious, racial and sexual to social.⁴³

It should be stated at this point with respect to the religious symbol issue, that public school students have the legal right to express their religious identity, if they do not infringe upon the principle of the state's secularism. This proviso is however almost useless, because there are no

The amendment supports the French constitutional provision of freedom of opinion, including religious opinion.

41. French law on secularity and conspicuous religious symbols in schools, http://en.wikipedia.org/wiki/French_law_on_secularity_and_conspicuous_religious_symbols_in_schools.

42. Given that Muslims are the second largest religious group in France (4 million adherents) it is only a question of time before one can no longer consider Muslims as adherents of a "non-European" religion.

43. A large majority of the French favors the ban. A January 2004 survey for Agence France-Presse showed 78% of teachers in favor. A February 2004 survey for *Le Parisien* showed 69% of the population for the ban and 29% against. For Muslims in France, the February survey showed 42% for and 53% against. Among surveyed Muslim women, 49% approved the proposed law, and 43% opposed it. http://economist.com/world/europe/displayStory.cfm?story_id=2404691.

guidelines or instructions on when and in what cases the secularism principle allows for religious expression.

Since 1980 the wearing of headscarves in public schools has been more problematic every year.⁴⁴ While most French people do not consider the religious symbols of Judaism and Catholicism (yarmulkes and crosses) to be areas of contention, the public attitude to Muslim headscarves can be characterized as intolerant. The source of this intolerance may be ascribed to the attitude that Muslim students have to some school subjects. They refused to attend biology classes (whose teaching they disagreed with) and they have refused to attend physical education classes, or instead have attended in clothing judged inappropriate for the activity. The reasons for their rejection may also be varied, for example, threats by male Muslims to their female counterparts, insisting that they wear the headscarf to express their humility. Judging the Muslim girls that wear headscarves or the French public or politicians opposing the wearing of these symbols goes two ways. The reasons why both sides act as they do are subjective, and the issue of politico-religious convictions has much more weight and meaning for some than for others.

The French public first became aware of the issue of Muslim symbols in schools with the *l'affaire du foulard islamique* in 1989.⁴⁵ The case related to two Muslim school girls who did not want to remove their headscarves (*hidjab*) during class in public school. The government asked the Conseil d'État (France's highest administrative court) to give an opinion on whether wearing symbols indicating one's identification with a religious community violated the principle of state neutrality. The opinion of the Conseil d'État was that religious symbols are not in themselves contrary to the principle of secularism. Wearing these symbols could be banned if by their nature, given the environment in which they are displayed or if they are provocative, they pressure those with different convictions or beliefs, or violate religious freedom, security, or respect for the dignity of others, or obstruct the course of instruction in school. Schools interpreted this opinion in different ways.

44. The issue has divided France, at least in some circles, and debate has raged for 15 years.

45. *The headscarf affair*. "The school headmaster Ernest Chenière, considered that the wearing of Islamic headscarves went directly against the principle of *laïcité*, a key Republican concept that insists on the separation of the state—including its schools—from religious institutions." Tony McNeill, The University of Sunderland, GB, <http://www.sunderland.ac.uk/~os0tmc/contemp1/immig3.htm>.

Some schools banned the wearing of any religious symbols in school, but the Conseil d'État annulled any such measures.

The issue of religious symbols in schools remained open, so in 1994 the Minister for Education issued a policy document intended to provide guidelines to school administrators. In response to more frequent expressions of Muslim fundamentalism, any external religious symbols that were proselytizing in nature were to be banned. The Conseil d'État said, however, that the policy document was not binding because it exceeded the goal of protecting the principle of state secularism.

The issue arose once more in 1995. Two Muslim students at a public school did not want to remove their headscarves during a physical education lesson and were punished by the school administration. A local Muslim community organized a protest in front of the school in response, which led to considerable media coverage. The students were then expelled from the school. The school administration gave three reasons for its decision: their refusal to wear appropriate clothing for sport, the participation of their fathers in the demonstration against the school's actions, and the disturbance to normal school life due to the protest on school grounds. The Conseil d'État decided in this case that the school was justified in its actions, and upheld the exclusions. The basis for the Conseil d'État decision was the concept of tolerant secularism, according to which state neutrality was not violated simply by the wearing of religious symbols in public institutions.

The French government justified the ban on wearing conspicuous religious symbols by giving reasons that supported the ban. The purpose of schools is to promote knowledge, teach critical thinking about the world, familiarize students with independence and openness to cultural differences and to promote the personal development of every individual.

III. TURKISH SECULARISM

The European Commission recently announced it was ready to hold talks with Turkey on its accession to the European Union. The issue of Turkish inclusion centers around fears that Turkey will not respect human rights to the same extent as other EU members. However, the Turkish desire to join the Union has led to the reform of its legal system. Democracy, human rights and the rule of law are the basic principles that Turkey is committing itself to respecting. An additional problem relating

to Turkish membership, is the anticipated influx of economic migrants.⁴⁶ The Turkish prime minister, Recep Tayyip Erdogan, has responded to the criticisms and comments of the European Commission by saying that Turkey had not just brought in reforms to meet EU criteria, but because it believes in the positive effects of reform. The reforms, he said, were an expression of the desire of the majority of the Turkish population for change and to move towards European legal and cultural standards. He added that the EU should state whether it wants to remain a “*Christian club rather than one of shared values*”.⁴⁷

Some EU members have openly expressed concerns about Turkey’s potential EU membership. The most common reservation given is the problem of cultural and religious diversity, which does not currently enjoy popular support in Europe, due to intolerance to Muslims. The French president, Jacques Chirac, has said that France would have a referendum on Turkey’s EU entry, and it is possible that other countries will follow suit. In recent times, France has become Europe’s leading force in resolving issues relating to Muslims and Islam. The *Law 2004-228 of March 15, 2004* that introduced the ban on wearing Muslim headscarves is of course an example of French action in this field.⁴⁸

Some EU members have found themselves in a difficult position given recent democratic changes in Turkey, because they find it difficult to continue finding reasons to oppose its membership. It is difficult to openly state that they find the Turkey unacceptable because its citizens are Muslims or because they fear the current global threat from Muslim fundamentalists. Turkey is attempting to show Europe that it is not like the rest of the Muslim world, and that it distances itself from minority Islamic extremism, which not only threatens state secularism but also other democratic values.

46.

Olli Rehn, the incoming commissioner for enlargement, said that concerns about immigration were ‘more or less justified’. Yet free movement of labor is a fundamental EU principle; and any restrictions in previous enlargement have always been temporary. The commission goes beyond this for Turkey by floating the idea of ‘permanent safeguard measures’. These would stipulate that, if Turkish immigration were deemed to be disruptive to the rest of the EU, controls on free movement could be reimposed. Officials insist that this is compatible with the EU’s fundamental principles. The Turks dispute this.

To Brussels, on a wing and a prayer, THE ECONOMIST, Oct. 9, 2004, at 27.

47. *Id.* at 27-28.

48. See sources cited *supra* note 36.

The Turkish Republic was founded on the principle that the State should be secular. The fact is that the Turkish Constitution provides for the freedom of religion, and the Government generally respects this right in practice. But passionate debate in Turkey still continues over the country's definition of "secularism" and the proper role for religion in society. Approximately 99 percent of the population is officially Muslim, but the actual percentage of Muslims is slightly lower. The Government officially recognizes only three minority religious communities—Greek Orthodox Christians, Armenian Orthodox Christians, and Jews—which is the reason it considers the rest of the population as Muslim, although other non-Muslim communities do exist.

The Government imposes some restrictions on Muslim and other religious groups and on Muslim religious expression in government offices and state-run institutions, which include schools and universities. The Turkish Government bans wearing of headscarves at universities and by civil servants in public buildings. Women who wear headscarves and persons who actively show support for those who defy the ban have been disciplined or have lost their jobs. Students who wear head coverings are not permitted to register for classes. Many secular Turkish women accuse Islamists of advocating the wearing of the headscarf as a political tool and say they fear that efforts to remove the headscarf ban will lead to pressure against women who choose not to wear a head covering. For example, Istanbul university in October 2003, prevented a visiting foreign professor from entering the campus for a conference because she was wearing a headscarf.⁴⁹

Turkey's ban on the wearing of religious clothing in public life is not a new phenomenon. Social changes in Turkey in the early twentieth century led to the "Headwear Act of November 28, 1925" (Law no. 671), which introduced the wearing of modern clothing. With this law, the legislature created a "religion-free zone", in which all citizens were treated equally regardless of religion or other personal circumstances. Some years later came the "Dress (Regulations) Act of December 3, 1934" (Law no. 2596), which banned the wearing of religious clothing in all public places not connected with prayer or other religious ceremonies.

For the same reason the state banned religious clothing of all religions in public life, including education. With the "Education

49. Also in October 2003, President Sezer excluded the covered wives of government ministers and Members of Parliament from the guest list for the traditional presidential Republic Day reception. In November 2003, a judge in Ankara ordered a defendant out of the courtroom because she was wearing a headscarf.

Services (Merger) Act of March 3, 1924” (Law no. 430), the authorities abolished religious schools and introduced a single, standard education system. The Education Act has the status of a constitutional act and has constitutional protection (Article 174 of the Constitution).

The Islamic headscarf, which expresses an individual woman’s religious identity, saw a revival in the 1980s. Some people see the headscarves as expressing the freedom to profess one’s religion, others as an Islamic symbol redolent of reactionary and undemocratic political principles and views.⁵⁰

The question of using religious symbols for political ends was considered by the Turkish Constitutional Court in two judgments concerning the dissolution of political parties (judgments of January 9, 1998 in the *Refah Partisi* case and of June 22, 2001 in the *Fazilet Partisi* case). The Court considered that the opinions expressed by the leaders of those parties, on the question whether the *Islamic headscarf should be worn in the public sector and in schools demonstrated an intention to set up a regime based on non-democratic Sharia law*.⁵¹

The first law on dress in higher-education institutions was a set of regulations that was issued in 1981. It required staff working for public organizations and institutions, and students in state institutions to wear ordinary, modern dress. The regulations specifically stated that female members of staff and students should not wear veils in educational institutions. Next year the Higher-Education Authority issued a policy document on the wearing of headscarves. The Islamic headscarf was banned.

After that time further laws and provisions concerning dress code at the universities entered into force and were later annulled by the Constitutional Court because they were contrary to the constitutional provisions.

Now, in higher-education institutions, it is contrary to the principles of secularism and equality for the neck and hair to be covered with a veil or headscarf on grounds of religious belief.

Turkey’s “headscarf policy” was also upheld by the European Court of Human Rights (ECHR) in Strasbourg, which ruled that Turkish

50. “[A] regime based on religious precepts and threatens to cause civil unrest and undermine the rights acquired by women under the republican system.” *Leyla Şahin v. Turkey* (Application no. 44774/98), Decision on June 29, 2004.

51. The same opinion on Islamic dress code can be found in the Supreme Administrative Court judgment (December 13, 1984), noting: “Beyond being a mere innocent practice, wearing the headscarf is in the process of becoming the symbol of a vision that is contrary to the freedoms of women and the fundamental principles of the Republic.”

universities have the right to ban Muslim headscarves. The Court notes that, in a democratic society the State was entitled to place restrictions on the wearing of the Islamic headscarf if it was incompatible with the pursued aim of protecting the rights and freedoms of others, public order and public safety. The Court has also stated that the principle of secularism in Turkey is undoubtedly one of the fundamental principles of the State, which are in harmony with the rule of law and respect for human rights. *“In a country such as Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practice that religion or on those who belong to another religion may be justified under Article 9, §2 of the Convention.”*⁵²

In that context, secular universities may regulate manifestation of religious symbols by imposing restrictions as to the place and manner of such manifestation with the aim of ensuring peaceful co-existence between students of various faiths. The Court also said there was no uniform European conception of requirements on “the protection of the rights of others” and “public order”. The Muslim headscarf has taken on political significance in Turkey in recent years and became a sign of affiliation to Islamic fundamentalism.

Besides the principle of secularism, gender equality was also recognized by the European Court as one of the key principles underlying the Convention and a goal to be achieved by member states of the Council of Europe.

The ECHR therefore judged that the state was justified in defining cases in which religious symbols could not be worn in public life. Islamic extremism poses a threat, not only to Turkey, but to Europe as a whole, which means the Court’s judgment is a very important one. In a country with a majority Muslim population, the threat of Islamism is even greater. Wearing religious symbols and clothing may only be a symbol of an individual’s religious convictions, but can also be an expression of political ambitions and desires. Turkey has decided it wants to join the European Union, and has demonstrated its democratic credentials by maintaining its policy of regulating civil and equal expression in public life. Religious life belongs to the private sphere, which the state is not involved in.

52. *Leyla Şahin v. Turkey* (Application no. 44774/98), Decision on June 29, 2004.

IV. GERMANY'S 'IN BETWEEN' MODEL

The term "positive neutrality" best describes the attitude of the German state to religions. This approach means that the state is not completely neutral when dealing with religious communities, as it does offer them certain privileges. The state justifies these privileges on the basis of the positive role that faith has in the public life of society.

The term "religious tolerance" is a relatively recent term in Germany. In the period between 1555, when the Peace of Augsburg was signed, until 1806, when Napoleon occupied the German states, the *cuius regio, eius religio* principle (who holds the region, decides the religion) was the rule. The situation began to change in the nineteenth century with Bismarck's '*Kulturkampf*' against the Catholic church. Despite this, until the adoption of the Weimar constitution in 1919, church and state worked closely together, which led to widespread religious discrimination against anyone who was not a member of a state church. The official religion of most German states was Lutheranism, while Roman Catholics, despite their high numbers (a third of the population) had a weaker position in the state. The Jews had the worst lot of all, practically denied employment in the civil service or the army.⁵³ Today, the Evangelical church, which includes the Lutheran, Uniate, and Reformed Protestant churches, has 27 million members, constituting 33 percent of the population. Evangelical church statistics suggest, however, that just four percent of the members attend weekly religious services. The Catholic church has a membership of 27.2 million, or 33.4 percent of the population. According to the Church's statistics, 17.5 percent of the members actively participate in weekly services. According to government estimates, there are approximately 2.8 to 3.2 million Muslims living in the country (which is approximately 3.4 percent to 3.9 percent of the population).

In Germany, the separation between church and state is less strictly defined than it is in France or the United States. Article 4 of the German constitution sets out the principle of religious and ideological freedom and unrestricted expression of religious beliefs.⁵⁴ But the churches are

53. For more on German history see D.P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 444-45 (2d ed. 1997).

54. AXEL TSCHENTSCHER, THE BASIC LAW (BRUNDGESETZ) 19 (Würzburg: Jurisprudential Verlag, 2002-2003). Article 4 (Faith, Religion, Conscience, Creed):

- (1) Freedom of creed, of conscience, and freedom to profess a religious or non-religious faith are inviolable.
- (2) The undisturbed practice of religion is guaranteed.

financed by state-administered taxes, and religious instruction takes place in most German public schools.⁵⁵

Nevertheless, the Constitutional Court has placed limits on the use of religious symbols. In a landmark 1995 case, the court forbade the hanging of a crucifix in a public classroom. But that ruling, experts point out, is related just to religious symbols on public buildings, not to personal attire. Defenders of both decisions said it is right to distinguish between the authorities hanging a cross in a public building and a woman wearing a headscarf as an expression of personal religious conviction. Justifying this with the reasoning that public buildings do not have the right to religious expression, whereas individuals do is not convincing. A classroom is not a place that may or may not have religious rights, but is rather a space in relation to the people that gather there. What is of the essence, then, is the rights of the individual, irrespective of whether the issue is a room or objects that individuals wear.

Germany's highest court ruled that a Muslim teacher cannot be forbidden to wear a headscarf in a public school. One of the most contentious decisions delivered in September 2003 by the Federal Administrative Court as well as by the Federal Constitutional Court in the field of religion, ended a legal battle involving an Afghan-born woman, *Fereshta Ludin*, who was barred from teaching at a school in Stuttgart because she refused to shed her scarf.⁵⁶ The court ruled that the state of Baden-Württemberg had no grounds to ban Fereshta Ludin from wearing a headscarf in school. In ruling for Ms. Ludin, the court said only that there was no law prohibiting her from wearing a scarf. But at the same time the panel of eight judges pointed out that the state of Baden-Württemberg was free to decide whether to pass such a law. The Bavarian constitution also says that the state schools should reflect Christian principles. Five states have since that said they will legislate to ban Islamic headscarves while continuing to allow yarmulkes (Jewish

(3) No one may be compelled against his conscience to render war service involving the use of arms. Details are regulated by a federal statute.

55. 'Today, elementary and secondary schools are of three kinds-confessional, interdenominational (*Gemeinschaftsschulen*), and secular (*bekennnisfrei*)—but all are public schools fully financed by the state. The interdenominational school, the standard form that most states have chosen to adopt, is a Christian-oriented school designed to serve students of all denominations. ... Secular schools follow a wholly nonreligious curriculum and are the preferred form in northern cities such as Bremen and Berlin. But even these schools often have religion classes, although attendance is voluntary and they are taught by persons who are not regular members of the faculty.' KOMMERS, *supra* note 53, at 470-71.

56. BverwG 2 C 21.01, July 4, 2002 ('Kopftuch-Streit') and BverfG, September 24, 2003, 2 BvR 1436/02, http://www.bverfg.de/entscheidungen/frames/rs20030924_2bvr143602.

skull caps) and Christian crucifixes.⁵⁷ The Bavarian act against Muslim scarves is a provocation to discriminate against Muslim religious symbols alone.

The problem is that the last ruling in a case addressing Muslim scarves may do little to resolve what has become an anguished debate in France, Germany, and other European countries over how much freedom Muslim minorities should have to express their religious identity in schools and other public institutions. Both sides of the political spectrum have argued that the headscarf is an instrument to suppress women. They warned that a favorable ruling would allow a small minority in Germany to create a sort of parallel society, with Islamic law and restrictive rights. In comparison with secular Turkey, which bans headscarves from universities, schools and the civil service and where two-thirds of Germany's Muslims have their roots, Germany cannot be labeled as a secular country.

Christian Starck, a professor of law at the University of Göttingen, noted that the explanation given in the court's ruling on Muslim scarves is inconclusive and is in contradiction with the crucifix ruling.

The federal constitutional court has drawn a line between state and religious symbols in previous cases, ruling in 1995 that the Bavarian government could not require schools to hang crucifixes in classrooms. The federal constitutional court's decision in the "*Crucifix in the classroom*" (*I and II*) cases received a number of contradictory responses.⁵⁸ The court in this case adjudicated on whether symbols that historically and culturally derive from Christianity are today only religious symbols, or if such symbols have taken on a wider significance that is cultural and moral in nature. The *Bavarian Elementary School Ordinance* contained a provision that every public elementary school classroom should have a crucifix on the wall (a cross with a representation of the body of Christ). The parents of children who belonged to the non-Christian group called "anthroposophy", which

57. Several German states, including Bavaria, Lower Saxony and Hesse, announced they would enact such laws. Critics say the bills will probably be struck down by the constitutional court for being discriminatory. 'For many people the scarf is an expression of fundamentalist principles. The yarmulke is not,' says Karl Feller, deputy Bavarian minister for religious affairs. See http://www.hrwf.net/html/germany_2003.html.

58. *Classroom Crucifix II Case* (1995) 93 BverfGE I; see also KOMMERS, *supra* note 53, at 472-84. (The Chancellor Helmut Kohl said the constitutional court judgment was incomprehensible. *Id.* at 482.) See also description of the case in German Federal Constitutional Court, Karlsruhe, *Affixation of a Cross or Crucifix in the Classrooms of a State Compulsory School that is not a Denominational School infringes Fundamental Rights*, 17, No. 11-12, HUMAN RIGHTS L.J. 458-68 (1996).

according to Rudolf Steiner is on “naturalistic quasi-religious teachings”,⁵⁹ said that the crucifix in the classroom represented a religious pressure on their children, so they asked the school to remove it. The compromise for both sides was to replace the crucifix with the representation of Christ with a simple cross. The school authorities did not want to lose the cross from the classrooms and based their argument on the freedom of religious expression of the other schoolchildren, who are predominantly catholic in Bavaria.

As the first paragraph of Article 4 of the German Constitution guarantees the freedom of thought and religion, individuals may decide on how to express their religion themselves. It is not a matter for the state to decide whether that person’s conviction is the same or different to the convictions of others, but a matter for each individual. The state does not involve itself in an individual’s decision by prescribing or banning specific convictions. The provision of Article 4 also relates to religious symbols that express (religious) convictions, including the cross as a Christian symbol.

The Bavarian constitutional court rejected the appeal by the elementary schoolchildren’s parents as unfounded. Their case was then rejected by the Federal Administrative Court, so in 1991 they sought a temporary injunction to the Federal Constitutional Court (case *Crucifix in the classroom I*, 85 BverfGE 94) calling for the removal of crosses from public school classrooms. The Federal Constitutional Court rejected the request for a temporary injunction as unfounded, however it did adjudicate on the case four years later in the *Crucifix in the classroom II*. The decision of the constitutional court makes clear that the provisions of the *Bavarian Elementary School Ordinance* were not constitutional. The cross being a Christian symbol, the plaintiff’s freedom of thought, conscience and religion as guaranteed by the German constitution, as the cross, being a Christian symbol, constituted interference in the education and convictions of children not raised as Christians, and their parents. In this context the state is obliged to guarantee the individual not just the prevention of interference with the expression of their own convictions, but also the possibility of *personal “realization”* in the ideological and religious sense.⁶⁰

The constitution prohibits the creation of an official state church and the grant of special privileges to members of groups with specific

59. KOMMERS, *supra* note 53, at 472.

60. *Id.* at 473.

beliefs or convictions, regardless of numbers or social support for a specific religious community. Although some religions may have a much larger membership or may be more influential, this does not have any effect on its status with regard to the state.⁶¹ In addition to the violation of Article 4 of the constitution, the Federal Constitutional Court also found there had been a violation of the second paragraph of Article 6 of the constitution, which guarantees parents the right to freely raise their children according to their own ideological and religious convictions.⁶² This means that parents have the right to protect their children from influences they consider wrong or harmful, as in the case in question. The *Bavarian Elementary School Ordinance* violated the constitution by making it compulsory to hang crucifix with an effigy of Christ (and not just a cross). Court interpretations of the cross with an effigy differ, with the Bavarian administrative court distinguishing between a cross with an effigy of Christ and a simple cross. The Federal Constitutional Court position was that both were religious symbols, and that despite the fact the Christianity had historical and cultural roots in German tradition, one expression of which is the cross, the symbol was not just cultural or historical in nature.⁶³ A symbol of this type of course has an effect on schoolchildren. The constitutional court also found that whether or not the cross had a direct effect on the actual teaching of individual subjects, it affected children in another way. Teaching is a process that not only includes memorizing specific content and developing cultural values, but also affects children's emotional capacity and development. The objective of the educational process is the full mental and spiritual or emotional development of schoolchildren and the creation of social awareness and conduct. In this context the cross has a specific influence that cannot be reduced to that of a symbol of tradition or culture.⁶⁴ On the issue of comparative exposure to Christian symbols,

61. '[T]he state is obligated to treat various religious and ideological communities with an even hand.' *Id.* at 474.

62. See TSCHENTSCHER, *supra* note 54.

63. "[T]raditions must be distinguished from the particular tenets of the Christian religion, and especially from a particular Christian faith together with its ritual and symbolic representations . . . the state may legitimately recognize Christianity's imprint on culture and education over the course of Western history, but not the particular tenets of the Christian religion." KOMMERS, *supra* note 53, at 475.

64. "Taken together with universal compulsory schooling, crosses in schoolrooms mean that pupils are, during teaching, under State auspices and with no possibility of escape, confronted with the symbol and compelled to learn 'under the cross'." German Federal Constitutional Court, Karlsruhe, 'Order of the First Senate of May 16, 1995—1 BvR 1087/91', 17, No. 11-12, HUMAN RIGHTS L.J., at 463.

the court found that an individual exposed to the symbol in public spaces, including courts, was nevertheless significantly less exposed than those in schools, where teaching takes place on a daily basis. Stating that the cross is a symbol accepted by most schoolchildren does not justify the imposition on the freedom of conviction for other children (and their parents) who do not identify with the symbol or accept it. Positive religious freedom is the right of all children, and not just the majority. In accordance with these principles and the provisions of Article 4 of the constitution, the participation of children in common prayer, religious education, and other religious ceremonies and manifestations is voluntary. Voluntary participation in these activities is in accordance with the principle of equality, which does not hold for hanging a cross on classroom walls. The situation is different because it is *easier in practice to avoid than a symbol* that is fixed to a wall in a specific location and which cannot be avoided.

Constitutionally, the federal states have a significant level of autonomy with regard to elementary education, however the Federal Constitutional Court decided that the Bavarian legislation exceeded the discretionary limit that the federal constitution permits for individual states.⁶⁵ Exposure to classroom crosses exceeds the boundaries of religious tolerance and is incompatible with the pluralism of conviction and religion guaranteed by the German constitution.

The German decisions on cases involving religious symbols are diametrically opposed and protect different legal arrangements. In the earlier decision on religious symbols in classrooms the Federal Constitutional Court based its justification of the ban on such symbols on the separation of church and state due to the guaranteeing of equality of religion and conviction. In the most recent case of the Muslim headscarf, the same court, for the technical reason that there was no legislation on wearing religious symbols, permitted the wearing of Muslim headscarves in public schools. Comparing the two decisions reveals the indecision on the part of the court with regard to wearing Muslim religious symbols. Despite the lack of federal or state legislation that could be applied to public education on a discretionary basis, the

65. The establishment, organization, and control of public elementary schools falls within the competence of the individual federal states. Article 135 of the constitution of the Free State of Bavaria stipulates that the state shall establish public schools to provide compulsory elementary education for pupils in accordance with the principles of the Christian faith. The area is further regulated by laws. The explanations of the second paragraph of Article 135 of the State constitution makes clear that the principles of the Christian faith should be understood in the sense of the values and ethical norms that are common to the whole Christian world.

Federal Constitutional Court could have decided that there had been a violation in the *Fereshta Ludin* case of the constitutional principle of the separation of church and state, basing its ruling on the “Crosses in the Classroom” case. This would have ensured consistency in constitutional court decisions on religious symbols.

It may also be added that the constitutional court acted in a ‘cowardly’ manner, as it simply returned the decision on banning Muslim symbols to individual federal states. It is clear that in the current political situation, the states are ‘tempted’ to ban anything relating to Muslims and Islam.

The *Fereshta Ludin* case will be very important with regard to similar cases in the future, in which the Muslim headscarf of a teacher will be replaced by the dress of Catholic nuns.⁶⁶

Will the court dare to decide that the state should ban Catholic nuns from “wear[ing] the clothes they traditionally wear as a sign of their affiliation to the Catholic Church or her particular order?” Will the court dare to suggest that the religious clothing of nuns is unsuitable attire for German school classrooms because of its religious symbolism? As yet, we do not know the answer to this question, but we can say that German society views the Catholic church positively, particularly in comparison to Islam.

V. CONCLUSION

Recent events relating to the wearing religious symbols in educational institutions have revealed a lack of unity among European states in addressing these issues. In fact, the European Union member states have differing policies on religious symbols in schools. Although almost every country in Europe has signed the European Convention on Human Rights, which states in Article 9 that “everybody has the right to freedom of thought, conscience and religion”, including both private and *public expressions of faith* or belief, religious symbols have been understood in different ways, depending in part on the different levels of separation of church and state. The states that are party to the European Convention therefore have discretionary rights within the bounds of law to determine the legitimacy of restrictions on their citizens’ right to religious expression.

66. See Lasia Bloss, *European Law of Religion—organizational and institutional analysis of national systems and their implications for the future European Integration Process*, Jean Monnet Working Paper 13/03 (2003).

The twenty-first century is being marked by a reawakening of the role of religion in different regions of the world. The response to terrorism has seen the role of religion significantly increase in importance within the United States.⁶⁷ The breakdown of the socialist and communist regimes in Eastern Europe has seen a religious “revival” in its new democracies, with churches there becoming far stronger than there were before communism. The role of religion in public life is also growing in importance in Middle Eastern states, Central Asia, and the Caucasus, Latin America, the Middle East, Africa, China, and South East Asia.

In contrast to these countries, in the “Western world” (with the exception of the United States) there has been a fall in the importance of religion in relation to the state over recent decades.⁶⁸ Yet since 1962, when the US Supreme Court banned compulsory prayer in schools, there has been a significant shift towards increasing the role of religion in American public life. In 1995, the Clinton administration even issued instructions that schools could not prohibit their students from praying or having conversations about religion in school. As Clinton said, the US constitution does not demand that children leave their religion at the school door. Two years later the administration determined, in its rules on work in federal institutions, that people in charge of supervising work in such institutions should respect employees’ right to express their religion. This means that Christians can have a Bible at their desk, and Muslims may wear a headscarf.⁶⁹ This more positive attitude to religious symbols has also been expressed in the Supreme Court deciding to review the constitutionality of displaying the Ten Commandments on government land and buildings. In 1980 the court reversed a Kentucky state law that every school classroom should have the Ten Commandments on the wall. The court will now adjudicate on the display of the Ten Commandments in Kentucky state courts. The court will hear this case together with another from Texas, where a citizen requested the removal of a monument with the Ten Commandments on it from the grounds of the State Legislature. The Supreme Court’s task is to interpret the Constitution, so its judgment will affect the future

67. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 479-92 (2002).

68. SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY 356 (2004).

69. *Id.* at 347-48.

application of the principle of separation of church and state in the United States.⁷⁰

In most of the world the twenty-first century has ushered in a “new age of religion”. The secular, Western state model has been challenged and in many places replaced. In Russia, the Leninist secularism and anti-religious state model has been replaced by a Russian model of an Orthodox state, which considers religion an element of culture and spirituality. Ben-Gurion’s idea of a secular Jewish social democratic state has been weakened by the growth of Orthodox Jewish groups. Elections in the Muslim world are increasingly being won by Islamist parties that are strengthening their role and importance at the start of the new millennium.⁷¹

In Turkey, despite Ataturk’s vision of a secular western state, Islamist political movements have been growing in strength. The Turkish prime minister, Recep Tayyip Erdogan, as a member of a “religiously defined political party which won an election and formed a government in 2002”, is attempting to combine personal Islamic religious views with Western principles of secularism and democracy. The *Leyla Şahin* case and the wearing of Islamic symbols in public life (at university) is by no means an isolated case of the growing emphasis on Islam in public life in Turkey. The desire to join the European Union on one side is matched by the emphasis on Islamic privacy on the other.

In the “pre-Turkey European Union” the only strictly secular state is France. In every other member state, the church has either a significant role within the state, or despite the constitutional separation of church from state, it is nevertheless permitted or even offered special consideration given the importance of its role in society. Today the church’s role in Europe has, in addition to its religious connotations, taken on an intermediary role between the Christian and Islam worlds. This positive intermediary element is only really found in relation to the Islamic world, while religion has not brought Western European countries closer together any more than it did before September 11.

In most European countries, the problematic religious symbols are generally Islamic. Christian symbols are only banned in France because of the discrimination that would have occurred had only Islamic headscarves been banned. Germany has applied a unique approach to the issue of Islamic symbols. Germany’s supreme court allowed

70. CNN.com, *Supreme Court to Consider Ten Commandments Displays*, Oct. 12, 2004, <http://www.cnn.com/2004/LAW/10/12/10.commandments.ap/index.html>.

71. HUNTINGTON, *supra* note 68, at 355-57.

individual federal states to pass legislation regulating the wearing of symbols in public schools which has served to confuse the issue. No one can accuse Germany of banning Islamic headscarves. Bans of this type will have to apply to all religious communities, which should be treated equally regardless of the number of adherents. At this point, the federal states will have to address the clothes of Catholic priests and nuns teaching Catholic catechism in public schools. The issue arises then of how to legitimize a ban on Islamic dress, while not banning the dress of Catholic priests and nuns. It is a case in which politicians will look to the law for a solution.

In the *Leyla Şahin* case the European Court of Human Rights simply confirmed the discretionary powers of individual members of the Council of Europe to decide on external religion symbols within their own social communities. However, the ECHR fully supported Turkey's secular position, due to the link between Islamic religious symbols in public life and the indirect threat of Islamic fundamentalism.

In today's Europe, the wearing of religious symbols has regained an importance it had in the past. Religious symbols unite and divide individuals and entire social groups.

European history has been marked by bloody, religious wars stretching over the last 1000 years. The Treaty of Westphalia in the seventeenth century signaled the intent of European nations to live in peaceful co-existence and reduce the role of religion in public life. The Age of Enlightenment of the following century was characterized by the separation of church and state, and was followed by an era of rationalism and pragmatism in the nineteenth century in which science superseded the role of religion. In the twentieth century the issue of religious symbols was not contentious because individual social communities were not as open as today, and there was less social and physical mobility, which reduced interaction between religions. Problems only began to appear when different religious and other convictions began to confront each other. The decision to increase or reduce secularism was a matter for political debate in most democratic countries.

In Eastern European countries the enforced secularism that followed the fall of communism has led to a rebirth of religion, given that it was only possible to express such beliefs behind closed church doors in communist times. This helps to make the increased identification with religion in Eastern European countries more understandable.

The fact that today's Europe does not have a uniform position on the role of Christian churches in public life, does not mean that they do not have a common attitude towards Islamic religious groups. Like its US

counterpart, European Christianity is united against Islam. The attitude of European states to Muslims is very intolerant. The attitude towards the wearing of Islamic symbols does not depend on whether or not a country is officially secular. Finding grounds for banning the wearing of such symbols is easier in secular states, which base the ban on the separation of religion and state, however, even countries with an “in between” regime manage to justify prohibitions, such as Germany where the bans are not found at the federal level, but instead are left to the competence of individual federal states.