



Dupont, P. L. (2018). Perpetuating Anti-Muslim Discrimination through the Interpretation of Religious Equality in the European Court of Human Rights. *Journal of Muslims in Europe*, 7(1), 27-46.
<https://doi.org/10.1163/22117954-12341343>

Peer reviewed version

Link to published version (if available):
[10.1163/22117954-12341343](https://doi.org/10.1163/22117954-12341343)

[Link to publication record in Explore Bristol Research](#)
PDF-document

This is the author accepted manuscript (AAM). The final published version (version of record) is available online via Brill at <http://booksandjournals.brillonline.com/content/journals/10.1163/22117954-12341343> . Please refer to any applicable terms of use of the publisher.

University of Bristol - Explore Bristol Research

General rights

This document is made available in accordance with publisher policies. Please cite only the published version using the reference above. Full terms of use are available:
<http://www.bristol.ac.uk/red/research-policy/pure/user-guides/ebr-terms/>

Perpetuating Anti-Muslim Discrimination through the Interpretation of Religious Equality in the European Court of Human Rights (ACCEPTED MANUSCRIPT)

Pier-Luc Dupont

Full reference: Dupont, P. L. (2018). Perpetuating Anti-Muslim Discrimination through the Interpretation of Religious Equality in the European Court of Human Rights.

Journal of Muslims in Europe, 7(1), 27-46.

Abstract

Faced with widespread prejudice and discrimination, European Muslims are increasingly resorting to the European Court of Human Rights as a last-ditch strategy to transform state policies toward minority faiths. While the Court has a mandate to protect religious freedom and equality, the conservative and sometimes biased way in which it has interpreted these concepts has enabled the persistence of stark asymmetries in the legal and social status of different religions. Based on an analysis of relevant cases, this article seeks to highlight the judicial processes that currently sustain Muslim subordination and pinpoint specific reforms that could reverse the trend.

Keywords

Human rights, anti-discrimination, religious freedom, Islam, secularism

Introduction

Despite the prohibition of religious discrimination enshrined in two European Union directives covering the fields of employment, hate crime and hate speech,¹ sociological studies show that Muslims living in majority Christian European countries still face multiple forms of unfavourable treatment. In a large-scale survey conducted by the European Union Agency for Fundamental Rights, 11% of Muslim respondents reported having suffered faith-based attacks, threats or harassment during the previous year.² Another study, based on secondary sources, identified hundreds of acts of vandalism on Muslim mosques, graves, butcheries and other property, as well as discriminatory employment practices, physical assaults, verbal abuse and hostile tracts, websites and letters.³ Consistent with these findings, recent Muslim immigrants have been found to experience greater difficulty than Christian ones in entering the British, Dutch and German labour markets.⁴ While Muslims were already viewed more negatively than most other minorities in the late 1990s, islamophobia has been periodically reinforced in the post-9/11 era by a series of highly mediatised terrorist attacks, urban riots and international controversies on the limits of free speech and religious criticism.⁵ Reflecting and feeding these tensions, political discourses regularly portray Islam as a

¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

² Fundamental Rights Agency, *EU-MIDS Data in Focus Report 2: Muslims* (2009), p. 12.

³ European Monitoring Centre on Racism and Xenophobia, *Muslims in the European Union: Discrimination and Islamophobia* (2006).

⁴ Koenig, Matthias, Maliepaard, Mieke & Güveli, Ayse, "Religion and new immigrants' labor market entry in Western Europe", *Ethnicities* 16 (2016), pp. 213-235.

⁵ Strabac, Zan & Listhaug, Ola, "Anti-Muslim Prejudice in Europe: A Multilevel Analysis of Survey Data from 30 countries", *Social Science Research*, 37 (2008), pp. 268-286; Bleich, Eric, "Where do Muslims stand on ethno-racial hierarchies in Britain and France? Evidence from public opinion surveys, 1988-2008", *Patterns of Prejudice*, 43 (2009) pp. 379-400; Spruyt, Bram & Elchardus, Mark, "Are anti-Muslim feelings more widespread than anti-foreigner feelings? Evidence from two split-sample experiments", *Ethnicities* 12 (2012), pp. 800-820; Savelkoul, Michael, Scheepers, Peer, Van der Veld, William & Hagendoorn, Louk, "Comparing levels of anti-Muslim attitudes across Western countries", *Quality & Quantity* 46 (2012), pp. 1617-1624. For evidence against the unique stigmatisation of Muslim immigrants, see Strabac, Zan, Aalberg, Toril & Valenta, Marko, "Attitudes towards Muslim immigrants: Evidence from survey experiments across four countries", *Journal of Ethnic and Migration Studies* 40 (2014), pp. 100-118.

threat for Western civilisation and values⁶, a rhetoric that has boosted the popularity of far-right parties throughout Europe.⁷ To reassure their voters, centrist governments have undertaken to tighten cultural requirements in citizenship procedures, restrict family reunion, curb mosque construction, monitor imams and step up searches and detentions of suspected terrorists.⁸ Paradoxically, such measures may increase long-term insecurity by further alienating their implicit or explicit targets.⁹

In the midst of this hostile climate, Muslims have increasingly sought to avail themselves of the protection offered by international human rights law,¹⁰ including the European Convention on Human Rights (ECHR), whose Articles 9 and 14 respectively enshrine their right to freedom of religion and freedom from discrimination in the enjoyment of all rights.¹¹ A number of recent trends in the jurisprudence of the

⁶ Ekman, Mattias, "Online islamophobia and the politics of fear", *Ethnic and Racial Studies* 38 (2015), pp. 1986-2002; Alexander, Jeffrey, "Struggling over the mode of incorporation: Backlash against multiculturalism in Europe", *Ethnic and Racial Studies* 1-26; Cesari, Jocelyne, *Why the West Fears Islam: An Exploration of Muslims in Liberal Democracies* (New York: Palgrave MacMillan, 2013); Modood, Tariq & Triandafyllidou, Anna, *Multiculturalism, Muslims and citizenship: A European approach* (London: Routledge, 2006).

⁷ Hafez, Farid, "Shifting borders: Islamophobia as common ground for building pan-European right-wing unity", *Patterns of Prejudice* 48 (2014), pp. 479-499; Allen, Christopher, *Islamophobia* (Farnham: Ashgate, 2010) pp. 109 ff; Aalberg, Toril et. al., *Populist political communication in Europe* (London: Routledge, 2017); Kutay, Acar, "Dominant pluralism and discursive strategies of contemporary racism against Muslim minorities in Europe", *Journal of Muslim Minority Affairs* 35 (2015), pp. 1-16.

⁸ Fekete, Liz, *A Suitable Enemy: Racism, Migration and Islamophobia in Europe* (London: Pluto Press, 2009), pp. 43-76; Erik Bleich, "State responses to 'Muslim' violence: A comparison of six Western European countries", *Journal of Ethnic and Migration Studies* 35 (2009), pp. 361-379; Burchardt, Marian & Michalowski, Ines (eds.), *After integration: Islam, conviviality and contentious politics in Europe* (Springer, 2015).

⁹ Fleischmann, Fenella, Phalet, Karen & Klein, Olivier, "Religious identification and politicization in the face of discrimination: Support for political Islam and political action among the Turkish and Moroccan second generation in Europe", *British Journal of Social Psychology* 50 (2011), pp. 628-648; Kunst, Jonas, Tajamal, Hajra, Sam, David & Ulleberg, Pal, "Coping with Islamophobia: The effects of religious stigma on Muslim minorities' identity formation", *International Journal of Intercultural Relations* 36 (2012), pp. 518-532; Saffron Karlsen and James Nazroo, "Influences on forms of national identity and feeling 'at home' among Muslim groups in Britain, Germany and Spain", *Ethnicities*, 13 (2013) pp. 689-708; Yasmin Hussain and Paul Bagguley, "Funny looks: British Pakistanis' experiences after 7 July 2005", *Ethnic and Racial Studies*, 36 (2013), pp. 28-46.

¹⁰ Edmunds, June, "The 'new' barbarians: governmentality, securitization and Islam in Western Europe", *Contemporary Islam*, 6 (2012), pp. 67-84.

¹¹ Article 9: "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." Article 14: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

European Court of Human Rights (ECtHR) suggest that this strategy might come to bear fruits. Regarding Article 14, the requirement that a discriminatory act simultaneously affect another Convention right in order to trigger judicial review has been relaxed, relieving the non-discrimination provision of its redundant character. At the same time, a more context-sensitive approach to the prohibited grounds of discrimination has allowed the Court to exercise stricter scrutiny when state action exacerbates the subordination of a symbolically and materially disadvantaged social category. This has allowed general rules to be characterised as indirect discrimination.¹² In situations of inter-religious tension, the Court has held that states should not attempt to erase pluralism but to foster mutual respect.¹³ Moreover, it has summoned them to strive toward religious neutrality, possibly implying a duty of equidistance from majority and minority faiths.¹⁴

Notwithstanding these promising developments, there also remain signs that the Court is failing to tackle, and perhaps entrenching, anti-Muslim biases. In particular, its decisions have been criticised for drawing a sharp distinction between the absolute right to hold a religious belief and the much more qualified right to manifest it,¹⁵ for accepting the notion that Islamic veils threaten public order, conviviality and gender

¹² Fredman, Sandra, “Emerging from the shadows: Substantive equality and Article 14 of the European Convention of Human Rights”, *Human Rights Law Review* 16 (2016), pp. 273-301; Anardóttir, Oddny Mjöll, “The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights”, *Human Rights Law Review* (2014), pp. 1-24; Danisi, Carmelo, “How far can the European Court of Human Rights go in the fight against discrimination? Defining new standards in its nondiscrimination jurisprudence”, *International Journal of Constitutional Law* 9 (2011), pp. 793-807; O’Connell, Rory, “Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR”, *Legal Studies* 29 (2009), pp. 211-229.

¹³ Leigh, Ian, “New Trends in Religious Liberty and the European Court of Human Rights”, *Ecclesiastical Law Journal* 12 (2010), pp. 266-279.

¹⁴ Leigh, Ian & Ahdar, Rex, “Post-Secularism and the European Court of Human Rights: Or How God Never Really Went Away”, *The Modern Law Review* 75 (2012), pp. 1064-1098; Leigh, Ian, *New Trends in Religious Liberty*.

¹⁵ Demir Gürsel, Esra, “The Distinction Between the Freedom of Religion and the Right to Manifest Religion: A Legal Medium to Regulate Subjectivities”, *Social & Legal Studies* 22 (2013), pp. 377-393; Bratza, Nicolas, “The ‘Precious Asset’: Freedom of Religion Under the European Convention on Human Rights”, *Ecclesiastical Law Journal* 14 (2012), pp. 256-261.

equality¹⁶ and for simultaneously allowing the establishment of dominant religions¹⁷ and the strict regulation of minority faiths.¹⁸ In turn, many of these trends seem rooted in a conservative approach to the regulation of state-religion relations, a potential minefield for the Court's legitimacy.¹⁹ Taking stock of such shortcomings, some scholars have concluded that judicial litigation may be counter-productive and advocated other types of mobilisation.²⁰

This article seeks to build on and systematise such insights in order to distinguish the specific standards that have curtailed the Court's ability to counter discrimination against Muslims and signal concrete ways of overcoming them. By exploring the interplay between judicial decisions, public policies and social attitudes, it inscribes itself within a dynamic stream of research examining the institutional factors

¹⁶ Bleiberg, Benjamin D., "Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in Leyla Sahin v Turkey", *Cornell Law Review* 91 (2005), pp. 164-169; Solanes Corella, Angeles, "Conflictos derivados del uso del velo integral en Europa: Prohibiciones y gestión de la vida en común", in Solanes Corella, Ángeles (ed.), *Diversidad cultural y conflictos en la Unión Europea. Implicaciones jurídico-políticas* (Valencia: Tirant lo Blanch, 2015); Bosset, Pierre, "Mainstreaming religious diversity in a secular and egalitarian state: The road(s) not taken in Leyla Sahin v. Turkey", in Eva Brems (ed.), *Diversity and European human rights: Rewriting judgments of the ECHR* (Cambridge: Cambridge University Press, 2013).

¹⁷ Kyritsis, Dimitrios & Stavros Tsakyrakis, "Neutrality in the classroom", *International Journal of Constitutional Law* 11 (2013), pp. 200-217; Henrard, Kristin, "A Critical Appraisal of the Margin of Appreciation Left to States Pertaining to Church-State Relations", in *A Test of Faith? Religious Diversity and Accommodation in the European Workplace*, Katayoun Alidadi, Marie-Claire Foblets & Jogchum Vrielink (eds.) (Aldershot: Ashgate, 2012), pp. 59-86; Evans, Caroline & Chris Thomas, "Church-State Relations in the European Court of Human Rights", *Brigham Young University Law Review* 3 (2006), pp. 53-62.

¹⁸ Cebada Romero, Alicia, "The European Court of Human Rights and Religion: Between Christian Neutrality and the Fear of Islam", *The New Zealand Journal of Public and International Law* 11 (2013), pp. 75-102; Danchin, Peter G., "Islam in the secular nomos of the European Court of Human Rights", *Michigan Journal of International Law* 32 (2011), pp. 663-747; Bleiberg, Benjamin D., "Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in Leyla Sahin v Turkey", *Cornell Law Review* 91 (2005), pp. 151-156.

¹⁹ Ronchi, Paolo, "Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in Lautsi v Italy", *Ecclesiastical Law Journal* 13 (2011), pp. 287-297; Mancini, Susanna, "The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty", *European Constitutional Law Review* 6 (2010), pp. 6-27; Itzcovitch, Giulio, "One, None and One Hundred Thousand Margins of Appreciation: The Lautsi Case", *Human Rights Law Review* 13 (2013), pp. 287-308.

²⁰ June Edmunds, "The limits of post-national citizenship: European Muslims, human rights and the hijab", *Ethnic and Racial Studies* 35 (2012), pp. 1181-1199; Neus Torbisco Casals, 'Identity conflicts, human rights and the crisis of multiculturalism in Europe: From politics to the courts', *GRITIM-UPF Working Paper Series* 21 (2014), pp. 1-52.

behind the construction of Muslim identities.²¹ Three aspects of the Court's case law will be discussed in turn: the endorsement of discriminatory policies toward non-Christians; the validation of discourses that securitise Islam by opposing it to human rights, democracy and gender equality; and the legitimisation of an exclusive secularism that forces the concealment of Muslim and other minority identities, thus hindering their normalisation. In the final section, these patterns will be used to identify legal reforms that could enhance the Court's future contribution to the emancipation of European Muslims.

The endorsement of institutional discrimination

Despite the relative independence of political and religious authorities that characterises contemporary European states, the predominance of their Christian heritage remains clearly visible in a number of constitutions, education and health systems, social services, fiscal arrangements, official symbols, place names, holidays, buildings, protocols and historical sites, cultural institutions and so on.²² This asymmetry places a special burden on religious minorities to adapt their customs to laws and regulations designed to serve the needs of a Christian population.²³ Perhaps more importantly, it also has the symbolic effect of inscribing Christianity as an implicit norm of belonging to the political community.²⁴ According to social psychological research, national identities provide significant normative references on which individuals draw in order to

²¹ Bowen, John, Bertossi, Christophe, Duyvendak, Jan Willem and Krook, Mona Lena, (eds.), *European states and their Muslim citizens: The impact of institutions on perceptions and boundaries* (New York: Cambridge, 2014); Anna Triandafyllidou (ed.), *Muslims in 21st Century Europe: Structural and cultural perspectives* (London: Routledge, 2010).

²² Schanda, Balász (ed.), *The mutual roles of religion and state in Europe* (Trier: Institute for European Constitutional Law, 2014).

²³ Foblets, Marie-Claire & Alidadi, Katayoun, "The RELIGARE report: Religion in the context of the European Union: Engaging the interplay between religious diversity and secular models" in Foblets, Marie-Claire, Alidadi, Katayoun, Nielsen, Jorgen & Yanasmayan, Zeynep (eds.), *Belief, law and politics: What future for a secular Europe?* (Farnham: Ashgate, 2014), pp. 11-54.

²⁴ For a theoretical discussion on the intertwining of national and religious identities, see Brubaker, Rogers, "Religion and nationalism: four approaches", *Nations and Nationalism* 18 (2012), pp. 2-20.

evaluate themselves and others. Because of this, nationally prototypical traits are usually perceived more favourably than atypical ones.²⁵ If this is correct, Muslims are likely to remain stigmatised as long as the national culture is conceived as closely linked to the Christian tradition. Consistent with these predictions, a recent Dutch study has found that opposition to Muslim immigrants' expressive rights was higher among respondents who perceived Christianity as an important part of their historical heritage.²⁶

Entrusted with a mandate to uphold religious equality, human rights bodies can guide states through the on-going process of adapting their model of religious governance in order to accommodate Muslims and other minorities.²⁷ However, two interpretive standards developed by the ECtHR have often led it to relinquish this role. On the one hand, the Court usually grants states a "margin of appreciation" (or discretion) when determining the content of fundamental rights, a margin that widens in proportion to the heterogeneity of existing policies.²⁸ This doctrine, which has been formally incorporated in a 2013 amendment to the Convention,²⁹ results in heightened deference to political decisions and reduced protection of individual claimants. On the other hand, and despite recent progress, there remains a tendency to interpret Article 14 as a mere reiteration of rights' universal character. This unwillingness to recognise the specificity of identity-based collective harms leads to the frequent rejection of discrimination claims on the grounds that Article 14 only comes into play when some

²⁵ Wenzel, Michael, Amélie Mummendey & Sven Waldzus, "Superordinate identities and intergroup conflict: The ingroup projection model", *European Review of Social Psychology* 18 (2007), pp. 331-372.

²⁶ Smeekes, Anouk and Verkuyten, Maykel, "When national culture is disrupted: Cultural continuity and resistance to Muslim immigrants", *Group Processes & Intergroup Relations* 17 (2014), pp. 45-66.

²⁷ Laurence, Jonathan, *The emancipation of Europe's Muslim: The state's role in minority integration* (Princeton, Princeton University Press, 2012).

²⁸ Letsas, George, "Two Concepts of the Margin of Appreciation", *Oxford Journal of Legal Studies* 26 (2006), pp. 705-732; Kratochvíl, Jan, "The Inflation of the Margin of Appreciation by the European Court of Human Rights", *Netherlands Quarterly of Human Rights* 29 (2011), pp. 324-357.

²⁹ Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms (2013).

other (substantive) right has been violated – in which case it is also dismissed as redundant.

The way in which these standards have enabled the endorsement of institutional discrimination against non-Christians can be seen in decisions on the regulation of blasphemy and the teaching of religion in public schools. In 1991, following the publication of Salman Rushdie's *Satanic Verses*, the Court was called upon to rule on the admissibility of a claim against the United Kingdom.³⁰ The British Muslim litigant had seen his blasphemy suit rejected by domestic courts on the grounds that blasphemy laws only protected Christian beliefs. Against the objection that the limitation was anomalous and unjust, British courts argued that it was up to the legislature rather than the judiciary to modify unequivocal norms. In Strasbourg, the claimant accused the United Kingdom of denying him equal protection of the right to religious freedom, relying on ECHR Articles 9 and 14. Circumventing the discriminatory nature of British blasphemy laws, the Court ruled that the right to religious freedom did not include the protection of religious feelings. Absent a substantive violation, Article 14 did not apply.

This state of affairs was confirmed five years later in *Wingrove v United Kingdom*,³¹ which showed that the blasphemy offence was not on the verge of being abolished as suggested in the previous case.³² Invoking freedom of expression, a British movie director contested the censure of a short film on a nun's erotic fantasy. Among other arguments, the litigant maintained that the ban was based on a law that discriminated against non-Christian faiths and thus could not pursue a legitimate aim. Despite recognising the discrimination, the Court ruled it was beyond its mandate to

³⁰ *Abdal Choudhury v. United Kingdom*, App. No. 17439/90, Eur. Com. H.R. (1991).

³¹ *Wingrove v. United Kingdom*, App. No. 17419/90, Eur. Ct. H.R. (1996).

³² The ECtHR also endorsed blasphemy laws in *Otto-Preminger-Institut v. Austria*, App. No. 13470/87, Eur. Ct. H.R. (1994), and *I.A. v. Turkey*, App. No. 42571/98, Eur. Ct. H.R. (2005).

carry out an abstract assessment of a statute's compatibility with the Convention and upheld the ban.

Unlike blasphemy laws, whose enforcement has become relatively exceptional in Europe, state-sponsored confessional instruction remains widespread. While international law allows it as long as it includes an opt-out provision for students or parents who make the request, the practical difficulties involved in the implementation of such exemptions cast doubts on the possibility of making confessional education in public schools truly non-discriminatory.³³ An opportunity of normative guidance in this field was provided by the case of *Folgerø and others v Norway*,³⁴ pertaining to a compulsory subject on Christianity, religion and philosophy in primary and secondary education. Official guidelines described its aim as the acquisition of “thorough” knowledge on the Bible, Christianity and the Evangelical Lutheran faith, as well as “general” knowledge on other religions and philosophies. Three out of five modules focused on Christianity, whereas the fourth encompassed several other large religions (Islam, Judaism, Hinduism, Buddhism, together with the “secular orientation”) and the fifth dealt with ethical and philosophical awareness.³⁵ Parents could ask for their children to be exempted from specific activities that implied a personal adherence to the Christian faith, such as learning and reciting prayers, creeds and religious commandments, singing hymns, attending rituals, visiting churches and performing biblical plays. However, total exemption from the subject had to be justified and granted on an individual basis, for the state could not recognise a “right to ignorance”.

³³ Temperman, Jeroen, “State Neutrality in Public School Education: An Analysis of the Interplay Between the Neutrality Principle, the Right to Adequate Education, Children’s Right to Freedom of Religion or Belief, Parental Liberties, and the Position of Teachers”, *Human Rights Quarterly* 32 (2010), pp. 879-881.

³⁴ *Folgerø and Others v. Norway*, App. No. 15472/02, Eur. Ct. H.R. (2007).

³⁵ *Id.* ¶ 48-49.

After unsuccessfully applying for such an exemption, five non-religious parents brought a complaint for the violation of their rights to private and family life (Article 8 ECHR), religious freedom, non-discrimination and the education of children according to their parents' convictions (Article 2 of ECHR additional protocol). In particular, they submitted that the predominance of Christian contents and the impossibility of drawing a clear line between indoctrination and the transmission of objective knowledge meant that partial exemptions exposed students to stigmatisation and value conflicts. Moreover, non-Christian families were imposed a unique obligation to request and justify exemptions, a time consuming procedure that presupposed in-depth knowledge of the curriculum.

The Court ruled in favour of the claimants, but without resorting to Article 14 and through a highly casuistic reasoning that left the legitimacy of compulsory religious subjects in primary and secondary schools unquestioned. On the one hand, it recognised that the quantitative and qualitative imbalance between Christian and non-Christian contents could hardly be reconciled with the objective of promoting inter-faith understanding, respect and dialogue.³⁶ On the other hand, it cautiously concluded that the exemption procedure did not offer sufficient guarantees that parents' right to educate their children according to their beliefs would be respected in practice. Along the way, it stressed that the heavy predominance of Christian contents (which reached a ratio of one to twelve) did not infringe the principles of pluralism and objectivity, considering the cultural importance of Christianity in Norway and the broad margin of appreciation states enjoyed in curricular matters.³⁷

A similar approach was used in *Lautsi and others v Italy*, which also addressed the Christian bias of public schools. Like *Folgerø*, *Lautsi* arose from a complaint by

³⁶ *Id.* ¶ 90-95.

³⁷ *Id.* ¶ 89.

non-religious parents, but the contested policy consisted in a century-old prescription to display a cross in all public classrooms. At trial, the Second Section of the Court found a violation of Article 2 Protocol no. 1 in conjunction with Article 9, arguing that the cross violated children’s “negative” freedom of religion (namely, freedom from exposure to religion) and could cause emotional disturbance.³⁸ Following its usual practice, however, it did not consider it necessary to assess the case from a non-discrimination perspective. The highly controversial decision was appealed by the Italian government, supported by Armenia, Bulgaria, Cyprus, Russia, Greece, Lithuania, Malta, Monaco, Romania and San Marino. Based on a detailed review of European policies regarding religious symbols, the Grand Chamber overturned the ruling on the grounds that the lack of consensus in this area made it necessary to grant states a wide margin of appreciation.³⁹ Moreover, the cross was characterised as a “passive” symbol that differed from “active” forms of indoctrination.⁴⁰ Article 14 was once more set aside since there was no violation of a substantive right.

Apart from the Court’s radical turnaround, reinforced by the near-unanimity of both decisions, one of *Lautsi*’s most interesting features is the way in which it revealed the thin line judges tread when coming to grips with rights-impinging but deeply rooted traditions. The frailty of their political support was bluntly underscored in a submission by 33 members of the European Parliament stating that the Court lacked constitutional legitimacy and should avoid sending a “radical ideological message”.⁴¹ By implicitly calling judges’ credibility into question and threatening non-compliance with their decisions, such statements are likely to hinder the development of transformative jurisprudence in the area of religious equality.

³⁸ *Lautsi v. Italy*, App. No. 30814/06, Eur. Ct. H.R. (2009).

³⁹ *Lautsi and Others v. Italy*, App. No. 30814/06, Eur. Ct. H.R. (2011) ¶ 70.

⁴⁰ *Id.* ¶ 72.

⁴¹ *Id.* ¶ 56.

The securitisation of Islam

According to recent surveys, one of the main drivers of negative attitudes toward Islam is a widespread belief in its radical incompatibility with fundamental rights⁴² and the associated perception that it poses a threat to cherished ways of life and values.⁴³ To the extent that judicial bodies are endowed with the authority for defining human rights and that their opinions are widely read and cited among legislators, journalists and other opinion-makers,⁴⁴ the ECtHR's opinion on their relationship with Islamic precepts can be expected to exert significant influence on public perceptions. For this reason, it has been suggested that the Court should systematically identify and counter the stereotypical justifications put forward by states in order to circumvent their Convention obligations, rejecting those that lack sufficient factual basis.⁴⁵ Instead of this, Strasbourg judges have often incorporated them into their own reasoning, indirectly ratifying their validity. The paradoxical result has been to invoke the putative chasm between Islam and human rights in order to restrict the human rights of Muslims.

These problems have arisen in a series of complaints against Turkey, where elected representatives have long been subjected to the strict supervision of a national-secularist alliance of military, judicial and bureaucratic elites. Apart from full-blown coups, these have repeatedly been involved in the dissolution of political parties that opposed their conception of the Republic.⁴⁶ In three consecutive sentences of the late

⁴² Elchardus, Mark & Bram Spruyt, "Universalism and anti-Muslim sentiment", *International Journal of Intercultural Relations* 38 (2014), pp. 75-85; Imhoff, Roland & Julia Recker, "Differentiating Islamophobia: Introducing a New Scale to Measure Islamoprejudice and Secular Islam Critique", *Political Psychology* 33 (2012), pp. 811-824.

⁴³ Sniderman, Paul & Hagendoorn, Louk, *When ways of life collide: Multiculturalism and its discontents in the Netherlands* (Princeton: Princeton University Press 2007).

⁴⁴ Van Dijk, Teun, *Elite discourse and racism* (Newbury Park: Sage Publications, 1993).

⁴⁵ Timmer, Alexandra, "Toward an Anti-Stereotyping Approach for the European Court of Human Rights", *Human Rights Law Review* 11 (2011), pp. 707-738.

⁴⁶ Yavuz, Hakan, *Secularism and Muslim Democracy in Turkey* (New York: Cambridge University Press, 2009); Grigoriadis, Ioannis, "Islam and democratization in Turkey: secularism and trust in a divided

1990s, however, the ECtHR was unconvinced by their characterisation of Kurdish nationalism as a security threat⁴⁷ and found political bans to be in violation of the right to freedom of assembly and association (Article 11 ECHR).⁴⁸ The situation changed in 2001, when it was called upon to rule on the dissolution of the Welfare Party (Refah). At the time of the facts, Refah held a third of parliamentary seats and had formed a governing coalition with centre-right forces.⁴⁹ Unlike its predecessors, it had not been suppressed for its Kurdish allegiances but for carrying out “anti-secularist” activities. In particular, its president had been accused of supporting a lift of veil bans in universities, and some leaders had publicly advocated the islamisation of Turkish law.⁵⁰

In Strasbourg, the Turkish government argued that secularism was a necessary precondition for the consolidation of liberal democracy in a post-theocratic state that faced the persisting threat of Islamist reactionaries. In its view, the rigorous defence of secularism explained why Turkey was the only Muslim society whose political system was based on the “Western model”.⁵¹ Abusive invocation of religious ideas by political representatives could endanger democracy, for political Islam had never displayed much tolerance toward its own believers. Its totalitarian tendencies, strategically concealed by its supporters until their seized power, transpired in their repeated efforts to bend state and community activities to religious precepts. In order to neutralise this threat, it was

society”, *Democratization* 16 (2009), pp. 1194-1213; Varol, Ozan O., “The Turkish “model” of civil-military relations”, *International Journal of Constitutional Law* 11 (2013), pp. 727-750; Harris, George S., “Military Coups and Turkish Democracy, 1960-1980”, *Turkish Studies* 12 (2011), pp. 203-213.

⁴⁷ Bayir, Deriya, “Representation of the Kurds by the Turkish Judiciary”, *Human Rights Quarterly* 35 (2013).

⁴⁸ *United Communist Party and Others v. Turkey*, App. No. 133/1996/752/951, Eur. Ct. H.R. (1998); *Socialist Party and Others v. Turkey*, App. No. 20/1997/804/1007, Eur. Ct. H.R. (1998); *Freedom and Democracy Party (ÖZDEP) and Others v. Turkey*, App. No. 23885/94, Eur. Ct. H.R. (1999).

⁴⁹ *Refah Partisi and Others v. Turkey*, App. Nos 41340/98, 41343/98, 41344/98, Eur. Ct. H.R. (2001) *Id.* ¶ 56.

⁵⁰ *Id.* ¶ 22, 25-26.

⁵¹ *Id.* ¶ 61.

necessary for the Turkish state to espouse a “militant” democratic system that allowed the repression of undemocratic political forces.⁵²

Reiterating and arguably radicalising the claims of the Turkish government and Constitutional Court, the ECtHR asserted that “sharia, which faithfully reflects the dogmas and divine rules laid out by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it”. According to the Court, it was difficult for a party to declare its respect for democracy and human rights while supporting sharia, which intervened “in all spheres of private and public life” and clearly departed from Convention values.⁵³ The Court concluded that notwithstanding the importance of democratic pluralism, championed in earlier cases of party dissolution, “a state may reasonably forestall the execution of such a policy, which is incompatible with the Convention’s provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country’s democratic regime”.⁵⁴ The verdict was upheld two years later by a unanimous Grand Chamber, which textually reproduced the Third Section’s opinion on sharia.⁵⁵

While theological debates are beyond the remit of judicial bodies, the depiction of sharia as unified, invariable and antithetical to democracy and human rights does not seem to resist minimal scrutiny. Apart from ignoring the considerable variety of legal and political arrangements in predominantly Muslim countries⁵⁶ and the hermeneutical innovations of contemporary theologians,⁵⁷ it carelessly disregards the participation of

⁵² *Id.* ¶ 62.

⁵³ *Id.* ¶ 72.

⁵⁴ *Id.* ¶ 81.

⁵⁵ *Refah Partisi and Others v. Turkey*, App. Nos. 41340/98, 41342/98, 41343/98, 41344/98, Eur. Ct. H.R. (2003) ¶ 123.

⁵⁶ Otto, Jan Michiel (ed.), *Sharia incorporated: a comparative overview of the legal systems of twelve Muslim countries in past and present* (Leiden: Leiden University Press, 2010).

⁵⁷ Fadel, Mohammad, “Muslim Reformists, Female Citizenship, and the Public Accommodation of Islam in Liberal Democracy”, *Politics and Religion* 5 (2012), pp. 2-35.

millions of Turkish Muslims in democratic processes and rights advocacy.⁵⁸ Ironically, it also plays into the hands of religious extremists, who have the most to gain from the ideological opposition of Islam and democracy.

Immediately after the second *Refah* judgement, the Court was offered a new opportunity to assess Turkish arguments for restricting the rights of practising Muslims. Leyla Sahin, then a student of medicine at Istanbul University,⁵⁹ claimed that the prohibition on wearing her veil to class limited her right to manifest her religion in a way that could not be justified by public order, secularism or the rights of others.⁶⁰ For one thing, she had no intention to question constitutional principles, including secularism, by using the veil. The garment could neither be construed as a form of ostentation, protest, provocation or proselytism, nor cause any disruption or threat to public order in higher-education institutions. In addition, the role of public authorities in contexts of religious tension was not to eliminate diversity but to foster tolerance. In its response, the Turkish government reaffirmed the difficulty of reconciling Islam and democracy and, consequently, the importance of protecting Turkish secularism.

Not only did the Court's Fourth Section categorically reject the claimant's interpretation of the veil but it also drew on earlier case law in order to expand, like in *Refah*, the defendant's arguments. Citing *Dahlab v Switzerland*, it characterised the veil as a "powerful external symbol" with proselytising effects, imposed on women by Koranic precepts and difficult to reconcile with gender equality.⁶¹ Relying on *Refah*, it went on to assert that in pious Turkey, the prevention of fundamentalist pressures on students who did not practice the majority religion could justify limitations on religious freedom. In particular, rites and symbols could be regulated in order to ensure peaceful

⁵⁸ Sarkissian, Ani & Ilgü Özler, "Democratization and the politicization of religious civil society in Turkey", *Democratization* (2012), pp. 1-22.

⁵⁹ At the time of writing, Leyla Sahin was a depute of the ruling AKP party in the Turkish Parliament.

⁶⁰ Leyla Sahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R. (2004).

⁶¹ Dahlab v. Switzerland, App. No. 42393/98, Eur. Ct. H.R. (2001) ¶ 98.

co-existence and maintain public order.⁶² Due to the threat of “extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts”, universities could legitimately consider the veil contrary to the values of pluralism, respect for the rights of others and gender equality.⁶³ Therefore, Article 9 had not been violated.

Despite the unanimous decision, Leyla Sahin appealed to the Court’s Grand Chamber in an attempt to debunk the Fourth Section’s stereotypical premises: the antagonism between Islam and democracy, the proselytising function of the veil, its necessarily imposed character and its incompatibility with gender equality.⁶⁴ The operation failed: after carefully registering these objections, the Grand Chamber largely confined itself to ratifying the previous sentence. However, all was not in vain. In a thoroughly argued dissenting opinion, judge Tulkens criticised the majority for unconditionally siding with the government’s account and, in particular, for misrepresenting the relationship between the veil, secularism and gender equality. Recalling that only proven facts could justify interference with a Convention right, she defended the need to draw a clear distinction between students who wore the veil and Islamists who sought to impose its use. Not all practising Muslims were extremists, and there was no indication that Leyla Sahin was one. As to the meaning of the veil, it was likely to vary from one person to the next. The applicant had declared she wore it on her own free will; in the absence of any contrasting evidence, the Court could not impose its own understanding of the situation.⁶⁵

⁶² *Id.* ¶ 99.

⁶³ *Id.* ¶ 109-110.

⁶⁴ *Leyla Sahin v. Turkey*, App. No. 44774/98, Eur. Ct. H.R. (2005).

⁶⁵ For similar criticisms of Court stereotyping, see Vakulenko, Anastasia, “Islamic Headscarves and the European Convention on Human Rights: An Intersectional Perspective”, *Social & Legal Studies* 16 (2007), pp. 183-199; Evans, Carolyn, “The ‘Islam Scarf’ in the European Court of Human Rights”, *The Melbourne Journal of International Law* 7 (2006), pp. 699-726; and Nathwani, Niraj, “Islamic Headscarves and Human Rights: A Critical Analysis of the relevant case law of the European Court of Human Rights”, *Netherlands Quarterly of Human Rights* 25 (2007), pp. 221-254.

The negative effects attributed to the veil in *Leyla Sahin* appear especially irrational in light of the second *Lautsi* judgement, where the Christian cross was finally allowed on the walls of all Italian classrooms. In the latter case, the Court also stressed the importance of religious neutrality, but it did not broach the possibility of any incompatibility between Christian precepts and democratic principles. On the contrary, it gave the benefit of doubt to the Italian government's thesis that "beyond its religious meaning, the crucifix symbolises the principles and values which formed the foundation of democracy and Western civilisation".⁶⁶ The Court also underscored there was no evidence of the symbol's negative repercussions on students. It is doubtful whether such empirical prudence would have prevailed if the cross had been replaced by a copy of the Koran.

The concealment of Muslim identities

Since *Leyla Sahin*, Strasbourg's endorsement of veil bans has not only taken place in the context of a predominantly Muslim country like Turkey but also in majority Christian France, where the display of "conspicuous" signs of religious affiliation in public schools was outlawed in 2004.⁶⁷ According to a Ministry of Education memorandum,⁶⁸ the ban aimed to foster the principles of secularism, individual liberty and gender equality that underpinned schools' mission. In a reasoning that harked back to Strasbourg case law, the document explained that the law would protect the system from "communitarian demands" and shield pupils from "the pressures that could result from the conspicuous manifestation of religious affiliations". After mentioning the

⁶⁶ *Lautsi and Others v. Italy*, App. No. 30814/06, Eur. Ct. H.R. (2011) ¶ 66.

⁶⁷ Law no 2004-228, of 15 March 2004, regulating, according to the principle of secularism, the wearing of signs or pieces of clothing manifesting a religious affiliation in public schools.

⁶⁸ Memorandum of 18 May 2004, on the implementation of Law no 2004-228 of 15 March 2004, regulating, according to the principle of secularism, the wearing of symbols or garments manifesting a religious affiliation in public schools.

importance of eliminating all forms of discrimination, it went on to specify that the ban was limited to symbols that would lead to the immediate recognition of a faith, such as the veil, the kippa or a “manifestly oversized” cross. In apparent contradiction with the letter and spirit of religious freedom, it insisted that the religious significance of a garment could not be invoked in order to obtain an exemption from general dress codes. At the same time, it recalled that education professionals, “whatever their function and status, are bound by a strict duty of neutrality that impedes the use of any sign of religious affiliation, however discreet”.

The ECtHR resolved the first actions against the statute in 2009, in six simultaneous and nearly identical decisions.⁶⁹ The outcome was foreshadowed the previous year when it upheld the expulsion of two Muslim schoolgirls for refusing to take off their veil during physical education classes. The facts had taken place before the law on secularism was adopted, but the Court accepted *en masse* all the justifications put forward by educational authorities: the obligation for students to abide by health, safety and assiduity standards, their refusal to unveil when asked to, the unacceptability of the proposed alternative (replacing the veil with a hat), the principle of secularism, the prevention of peer pressure and the protection of public order.⁷⁰ The novelty of the 2009 decisions, apart from the fact that two of them related to Sikh turbans, was that the contested prohibition applied to all classes taught in primary and secondary public schools. Because of this, the French government’s defence had to revolve exclusively around secularism and public order.

⁶⁹ Jasvir Singh v. France, App. No. 25463/08, Eur. Ct. H.R. (2009); Ranjit Singh v. France, App. No. 27561/08, Eur. Ct. H.R. (2009); Tuba Aktas v. France, App. No. 43563/08, Eur. Ct. H.R. (2009); Hatice Bayrak v. France, App. No. 14308/08, Eur. Ct. H.R. (2009); Mahmoud Sadek Gamaleddyn v. France, App. No. 18527/08, Eur. Ct. H.R. (2009); Sara Ghazal v. France, App. No. 29134/08, Eur. Ct. H.R. (2009).

⁷⁰ Dogru v. France, App. No. 27058/05, Eur. Ct. H.R. (2008); Kervanci v. France, App. No. 31645/04, Eur. Ct. H.R. (2008).

The Court's response was unequivocal. In all cases, it unanimously ruled out the admissibility of the claims. Even if the ban's sole objective was to uphold secularism, this aim was compatible with Convention values. Moreover, expulsion was not a disproportionate sanction for non-compliance, since students could pursue their schooling in a private establishment, from home or by correspondence. As to the substitution of standard veils and turbans with more discreet variants, it was up to states to determine whether it resolved the problem of ostentation or merely amounted to an attempt to circumvent the rules.

Throughout its case law on the regulation of religious symbols, the ECtHR has adhered to an increasingly restrictive interpretation of the right to manifest religious beliefs. In *Dahlab*, the prohibition it endorsed only affected teachers; in *Leyla Sahin*, it was seen as stemming from a specifically Turkish threat of radical Islamism; in *Dogru* and *Kervanci*, it was linked to safety concerns in physical education. In the 2009 cases, however, the Court established that the mere invocation of secularism would suffice to justify interference. It also proved unwilling to require factual evidence of the "pressures" or "tensions" caused by such manifestations. Consciously or not, it thus paved the way for what could become a major long-term cause of islamophobia: the invisibility of Muslim identities.

As discussed above, Islam is widely perceived as extraneous to European and national identities and values. The result is that while religious people tend to reject the headscarf as an encroachment on Christian traditions, liberals oppose it as a symbol of authoritarianism and patriarchy.⁷¹ However, there are at least two ways in which minority religious symbols could foster more harmonious inter-faith relations. The first is by substituting monolithic national identities with more complex ones that would

⁷¹ Helbling, Marc, "Opposing Muslims and the Muslim Headscarf in Western Europe", *European Sociological Review* 30 (2014), pp. 242-257

include multiple prototypes or subgroups.⁷² The second is by multiplying the attitudinal benefits of personalised interactions between Muslims and the rest of the population. During the last decades, prejudice research has not only confirmed the trust-building properties of cooperative contact⁷³ but also the conditions under which it must take place for its impact to be maximised.⁷⁴ One of these consists in increasing the salience of the stigmatised trait (in this case, religious affiliation) so as to elicit the perception that the individual being dealt with is representative of her social category. Failing this, any attitudinal improvement will likely remain limited to this single person, leaving the collective stereotype intact.⁷⁵

Because of the crucial role played by educational institutions in youths' identity construction and socialisation,⁷⁶ Strasbourg's reluctance to counteract their forced homogenisation can be characterised as a missed opportunity for the early inculcation of inter-religious understanding. For all the claims of secularism, European states' support for the activities of Christian organisations remains a universal fact.⁷⁷ Even if it were somehow withdrawn, the ubiquitous imprint of Christianity on the continent's cultural heritage would still make it impossible to balance the visibility of the different religions practised by its population. In such a context, redressing the symbolic status of Islam

⁷² Wenzel, Michael, Amélie Mummendey & Sven Waldzus, "Superordinate identities and intergroup conflict: The ingroup projection model", *European Review of Social Psychology* 18 (2007), pp. 331-372; Pehrson, Samuel, Vignoles, Vivian & Brown, Rupert, "National identification and anti-immigrant prejudice: Individual and contextual effects of national definitions", *Social Psychology Quarterly* 72 (2009), pp. 24-38.

⁷³ Pettigrew, Thomas F. & Linda R. Tropp, "A Meta-Analytic Test of Intergroup Contact Theory", *Journal of Personality and Social Psychology* 90 (2006).

⁷⁴ Pettigrew, Thomas F., "Intergroup contact theory", *Annual Review of Psychology* 49 (1998), pp. 65-85; Pettigrew, Thomas F. & Linda R. Tropp, "How does intergroup contact reduce prejudice? Meta-analytic tests of three mediators", *European Journal of Social Psychology* 38 (2008), pp. 751-783.

⁷⁵ Brown, Rupert & Miles Hewstone, "An integrative theory of intergroup contact", *Advances in Experimental Social Psychology* 37 (2005), pp. 255-343.

⁷⁶ Dupont, Pier-Luc, "Theorising the (de)construction of ethnic stigma in compulsory education", *Centre on Migration, Policy and Society Working Paper* 132 (2016), pp. 1-32.

⁷⁷ Messner, Francis, *Public funding of religions in Europe* (Ashgate 2015).

and other minority religions would involve encouraging, rather than impeding, their adherents to leave their own mark on the European public space.⁷⁸

Conclusion

The foregoing discussion has attempted to identify the ways in which the ECtHR has been contributing, directly and indirectly, to the discrimination of Muslims in Europe. Given the significant influence of its case law on domestic courts and the cross-national challenge posed by the educational, economic and political inclusion of immigrants from majority Muslim countries, the implications of this analysis arguably go beyond academic concerns. However, its conclusions can also shed light on the fundamental dilemmas that tend to crop up when human rights bodies are asked to uphold equality in diverse societies. By signalling the blind spots of judicial reasoning, socio-legal analyses can simultaneously support the enrichment of jurisprudence, the consolidation of legal institutions and the effective targeting of strategic litigation.

First, the ECtHR has been extremely reluctant to invoke the prohibition of discrimination in order to sanction the less favourable treatment of non-Christians in state law and policy. Insofar as the problem lies in the restrictive wording of Article 14, a possible solution would be states' adherence to Protocol 12 ECHR, in force since 2005, which extends non-discrimination requirements to all measures taken by public authorities. The main obstacle to this course of action seems to be a lack of political will: fifteen years after its redaction, the Protocol has yet to be ratified by most Western European states. Another cause of Court restraint is that religious governance has generally been seen as falling within states' margin of appreciation, hampering the development of minimal European standards. Admitting that the margin of appreciation

⁷⁸ Galeotti, Anna Elisabetta, *Tolerance as recognition* (Cambridge: Cambridge University Press, 2002); Laborde, Cécile, *Critical Republicanism: The hijab controversy and political philosophy* (Oxford: Oxford University Press, 2010).

doctrine has a legitimate role to play in the activity of an international court, the serious issues at stake in the configuration of state-religion relations seem to warrant a significant narrowing of its scope. Without such a shift, the Court may inadvertently prop up the legitimacy of unjust institutions rather than promote their long-term transformation. Since it tends to grant states greater discretion in areas where policies diverge widely, the future results of domestic litigation and political mobilisation is likely produce important knock-on effects on its jurisprudence.

Secondly, the Court's propensity to indulge in stereotypical reasoning has lent credibility to political and social discourses that stigmatise Islam by opposing it to human rights, democracy and gender equality. By definition, stereotypes are easily mistaken for obvious truths. Recommending that judges stop resorting to them may therefore be futile. This being said, various measures could be adopted to elicit a more critical stance toward sweeping statements on disadvantaged social categories. One of them is to provide guidance on the main targets of prejudice and underscore their special relevance for anti-discrimination provisions. In this respect, the current list of grounds offered in Article 14 could be completed with obviously missing ones such as sexual orientation, sexual identity, disability and age. Additionally, the ECHR preamble could emphasise the values of equality and respect for diversity that underpin the recognition of all fundamental rights. Finally, the Court's rules of procedure could include a section on the treatment of religious and other differences. In line with the UNESCO Universal Declaration on Cultural Diversity, guidelines could characterise cultural diversity as a positive asset to be fostered and shared. In order to maximise their impact on the work of the Court, they could be taken into consideration in judge selection and training.

Finally, and despite its apparent benignity, the concealment of Muslim identities may very well turn out to be the most damaging side-effect of Strasbourg jurisprudence on religious freedom. By allowing far-reaching limitations on individuals' right to manifest their faith, the Court has contributed to the erection of a thick wall between European identities and Islam, indirectly perpetuating social disrespect and mistrust. Among the multiple arguments mobilised in order to justify these restrictions, the defence of secularism has taken on an increasingly determining and autonomous character. This is somewhat puzzling, given the Court's endorsement of a wide range of policies supporting majority religions. Be that as it may, the discriminatory consequences of an interpretation of secularism that forces Muslims into public invisibility could be invoked to reject its legitimacy. Stricter scrutiny could also be applied to other reasons for restricting the display of religious symbols, obliging them to pass the test of rationality as well as seriousness.