

The European Court on Human Rights between fundamentalist and liberal secularism

Ingvill Thorson Plesner, Norwegian Centre for Human Rights¹

The European Court on Human Rights (ECtHR) has dealt with the so-called “head scarf issue” in some recent judgments and decisions, including the *Dahlab* and the *Sahin* cases, where the state parties prohibited respectively a Swiss public school teacher and a Turkish university student to wear head scarves. The issue also played a role in the *Refah* case which dealt primarily with the ban of the major political party in Turkey. In all these cases the regard to the states’ “margin of appreciation” was emphasized by the Court, and the ban on respectively head scarves and a political party was accepted. A wide margin of appreciation is however problematic in matters where the individual freedom of conscience is at stake. Further, despite the contextual argumentation, the Court made some general statements on principles like “secularism”², “neutrality” and “tolerance” that might have severe implications for the right to freedom of religion or belief also in other countries under the jurisdiction of the Court.

Secularism vs. religious expressions in the public sphere?

The approach of the ECtHR in the above mentioned cases exhibit an understanding of the role of religious manifestations in the public realm that resembles what we might call “secular fundamentalism”³ or “fundamentalist secularism”. In other cases the Court’s approach is in compliance with a “liberal secularism”. These two main forms of secularism also could be used – as ideal types – to describe policies and tendencies in

¹ The paper is based on approaches and findings of my PhD thesis (“*Freedom of religion or belief: A quest for state neutrality?*”). I owe great thanks to *Tore Lindholm* and *Andreas Føllesdal* for useful responses to a first draft of this paper.

² “laïcité” in the French version of the Courts’ decisions

³ See use of the term in other contexts, including *Toron* in *Lindholm, Durham and Tahzib-Lie* (eds.) 2004.

various European countries⁴. Certainly, in practice the premises of each of the two main forms of secularism are compatible with quite different legal systems.

Both liberal and fundamentalist notions of secularism takes as a point of departure a basic distinction between the competence of religion and the competence of the political powers and institutions, so that neither is unduly dominated or controlled by the other. This distinction builds upon differentiation between the public and the private sphere, and between the role of the state and the role of religion or belief. Both the liberal and the fundamentalist notions of secularism imply that “religion is a private issue”, but in two very different ways.

The liberal notion of secularism defines religion as a private issue in the sense that it is neither a public responsibility nor right to enforce a religious (or non-religious) doctrine or practice on its citizens, because religion and belief is a matter of personal conscience and identity. It also implies that the state should not take a stand on the truth claims of various doctrines, nor discriminate persons or groups on the basis of their religion or belief. Further, liberal secularism implies that religious groups could not as such have power over political institutions or decision-making in a way that restricts the rights of others to freedom of religion or belief and to participation in public life.

These principles of liberal secularism have all been underlined by the Court in a number of decision on the right to freedom of religion or belief (article 9 of the ECHR), sometimes read together with the protection against discrimination based on e.g. religion or belief (article 14). Although this liberal secularism presuppose a certain separation of the competence of the public authorities and the competence of religious institutions, the separation does not exclude religious manifestations in the public realm. Neither of the above mentioned principles of liberal secularism prohibit individual manifestations of religion or belief in the public sphere or even inside public institutions. On the contrary,

⁴ See corresponding definitions of secular fundamentalism and liberal secularism based on the French discourse on “laïcité” in *Plesner, Ingvill T.*, 2004: “La laïcité; ouverte ou stricte?”. See also *Bauberot 2004* on the historical foundations of the various conceptions of “laïcité” in the French context.

the Court has underlined the fact that article 9, first paragraph, guarantees “the freedom, either individually or in community with others and *in public* or private, *to manifest*”⁵ ones religion or belief. This right could, according to article 9, second paragraph, only be restricted if the manifestations are a) “prohibited by law”, and b) seen as “necessary in a democratic society” c) in order to protect “public safety, order, health, or morals or the fundamental rights and freedoms of others”. According to liberal secularism, any restriction to the right to manifest ones religion or belief in the public sphere hence has to meet with the strict criteria of the article 9, second paragraph. Restrictions on certain forms of expression of religion in specific, individual cases complying with the criteria of article 9,2 and compatible with the principles of liberal secularism should however be distinguished from the general restriction on religious expression in the public realm that fundamentalist secularism prescribes.

What we here call fundamentalist secularism assumes that religion is a private issue in the sense that religious manifestations should be kept within the realm of private areas, like private homes and the places of worship of the faith communities. The freedom to manifest religious belief is hence highly restricted in the public sphere, and especially within public institutions. This applies both for state representatives and for private individuals when they enter the public institutions. The public /private distinction is here taken to imply that an individual’s belief or conviction does not have any place in the public realm. One’s religious identity is hence something that should be left behind, hidden or at least not clearly manifested when entering the public domain and especially public institutions. The “fundamentalist” aspect of this approach lies in the fact that it imposes a secularist way of life on all individuals when they enter the public domain, also on those whose religious identity calls for certain manifestations like wearing a particular jewel, clothing or other symbols. Making this notion of secularism a superior principle with which the state policies and definition of rights should be in compliance, may undermine human rights and hence conflict with the dual purpose that secularism is – or should be – aiming to secure in the first place; the equal freedom and rights of all

⁵ author’s emphasis

inhabitants to live according to their conceptions of “the good”, and peaceful coexistence in a plural society.

In its judgments on cases involving article 9, the Court has in large been faithful to the principles of liberal secularism, all though it has not until recently explicitly used the term “secularism” to characterize the implications of article 9. When it first did mention “the principle of secularism”, one should therefore assume that the Court was referring to the liberal notion of the term. At a first glance that is also what the Court does, since it mentions the principle in relation with other core liberal principles and traditions:

“...the Convention institutions have expressed the view that the principle of **secularism** is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy”⁶

The context in which the term “secularism” is being used by the Court does, however, rather point in the direction of fundamentalist secularism. The quotation is taken from a case concerning the ban on a political party in Turkey; the *Refah* party. The party was at the time of the ban in government, was the largest political party in Turkey, and had been democratically elected. One of the main arguments of Turkey in the case before the ECtHR was that the *Refah* party had a policy which was threatening the principle of “secularism” (French version: “laïcité”, Turkish version: “laik”)⁷ enshrined by the Turkish Constitution. As one of its point in its list of arguments for this, Turkey referred to the fact that representatives of the *Refah* party had argued for allowing women to wear head scarves when entering public institutions like schools and universities or in other ways taking part in public life⁸. In Turkey the ban on head scarves has been a major controversial and divisive issue during the last decades. The government that banned the *Refah* party also banned the wearing of head scarves in public institutions like universities. Such a political will to generally prohibit private individuals’ expressions of

⁶ *Refah Partisi (The Welfare Party) and others vs. Turkey*, Grand Chamber Judgment, Strasbourg, February 13, 2003

⁷ see Özlem and Lindholm in Lindholm, *Durham et.al. (eds) 2004*

⁸ *Ibid*

religious identity when entering public institutions, is following the rational of fundamentalist secularism.

Representatives of the *Refah* party had also argued for a policy of state acceptance of various religious groups governing themselves according to their internal norms and practices in matters of family life, for instance. These suggestions Turkey found to be undermining the principle of secularism as it opened for a “plurality of legal systems”⁹.

While also the liberal notion of secularism puts limits to the freedom of individuals and groups in matters of faith, it does not by necessity exclude state “delegation” of competence to religious groups or acceptance of religious groups’ competence in certain legal matters. Most Western countries have long traditions for respecting the self-governance of religious groups in certain matters of faith and doctrine, and the liberal notion of secularism has developed in these legal and social contexts. For instance, Catholic, Protestant and Jewish traditions regarding marriage and divorce have been respected by most Western legal systems, all though of course there are limits to this freedom set by the regards following from article 9.2. Religious traditions have even influenced the secular legislation in these fields¹⁰. In numerous countries, churches and other faith communities can get exemptions from the general non-discrimination legislation regarding their employment policies, for certain positions in the faith community and in institutions run by the faith community, like schools, hospitals etc¹¹. No countries do, for instance, prohibit the Catholic Church to exclude from its clergy married men, women, gays and lesbians.

The practice and argumentation of Turkey in the *Refah* case hence does not only conflict with the liberal tradition regarding individual manifestations of religious identity in the public sphere, but also with the liberal tradition of respecting a certain legal autonomy for religious groups, - a principle that had otherwise been supported by the Court. There are

⁹ Ibid

¹⁰ Witte 2000; Robbers 2001

¹¹ Robbers 2001; Torf (ed) 2002

hence good reasons to conclude that the dominant Turkish notion of secularism is expressing what we have named secular fundamentalism.

When the ECtHR uses the term “secularism” in a case dealing with these Turkish conceptions of secularism¹² it should hence explicitly have stated that its use of the term is not similar to – or not even in compliance with – the Turkish use of the term. By not doing so in relation to its highly general statement on the principle of secularism, the Court not only seems to accept the Turkish, fundamentalist approach to secularism in the *Refah* case, but also leaves the impression that this is a notion of secularism that is most in compliance with the principles of the Convention. This way, the Court gives a signal to other state parties that the Turkish approach to secularism gives good guidance also for their legal systems. And even more seriously; the Court signals that it might use this fundamentalist understanding of secularism in its own rulings in cases involving other state parties.

Of course, it could be that the Court has not thought of these possible interpretations of its statement on the principle of secularism in the context of the Turkish *Refah* case. If that is so, the Court should at the first possible occasion clarify this to prevent an unfortunate and potentially damaging misreading of its statement and hence forstall a highly problematic reading of article 9 in general and of its implications for the public / private distinction in particular.

The Court does not use the term “secularism” explicitly in its own argumentation in the two cases on the head scarf issue, the *Dahlab* and the *Sahin* cases. However, it refers to the Swiss and Turkish notions of the term (“laïcité” in the French translation of the decisions) which the two states interpret to demand – or at least open for – a ban on head scarves respectively for teachers in public primary schools (*Dahlab vs. Switzerland*) and for students at public universities (*Sahin vs. Turkey*). The Court concludes in both cases that it has found sufficient reasons to grant a wide “margin of appreciation” of the state

¹² laik (“laik-hood”), see Özlem 2004; Lindholm 2004

parties in such matters. This supports the impression that the Court at least accepts fundamentalist secularism as one legitimate state approach to religion. This impression is strengthened by the fact that the Court's arguments for why the restrictions are "necessary" are rather unconvincing.

In the *Sahin* case, one of Turkey's main arguments was that women who were wearing the head scarf, or politicians appealing for this liberty – was undermining, or likely to undermine in the future, the 'public order' of the country. The vagueness on how this kind of expression would constitute a threat to 'public order' underlines that Turkey fails to meet the criteria of article 9.2 in trying to legitimize this general restriction. Turkey could not refer to any concrete public order threats that had been manifested so far in relation with *Leyla Sahin* or other female students' wearing the head scarf. It is hard to see why and how letting women choose whether or not to wear head scarves would constitute a general threat to the public order or safety in Turkey. Still, the ECtHR found that the restriction meets the strict criteria of article 9.2.

In the *Dahlab* case the ECtHR accepted Switzerland's arguments that the teacher's head scarf might both disturb the 'public order' or 'religious harmony' of the school, and also influence the pupils in a way that constituted a threat to their – and their parent's – rights according to the ECHR First Additional protocol, article 2. This was accepted although there had been no complaints from any child or parent or from Ms *Dahlab*'s teacher colleagues to her behaviour during the 4 years she had worked there as a teacher, carrying the scarf. No disturbance of the order at the school caused by Ms. *Dahlab*'s head scarf had been registered.

The lack of emphasis on individual behaviour or characteristics making the prohibitions reasonable in these two cases in practice implies that the Court accepts a general ban on certain expressions of religious self-identification inside these public institutions. This supports the impression that state regulations and practices on line with fundamentalist secularism are accepted by the Strasbourg Court, although the Court clearly aims to justify the practices by reference to article 9, 2 criteria.

Also other parts of the Courts' reasoning in these cases could be questioned from the perspective of liberal secularism, which is a notion that implies a wide toleration for various conceptions of "the good" and calls for non-discrimination.

Tolerance or intolerance?

The Court has referred to the principle of tolerance in a number of cases, often in relation with the principle of "neutrality":

"The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and **tolerance** in a democratic society."¹³

The literal sense of the word "tolerance" means "to endure" (Latin: "tolerare"). Locke, Voltaire and other leading liberal philosophers have used the term as a reference to the virtue of managing to accept the fact that people have different conceptions of "the good" and live their lives accordingly, and that it is their right to do so¹⁴. This also seems to be the understanding of tolerance expressed by the Court in a number of previous cases since its first case on article 9 in 1993. In the *Dahlab* case, the Court does however argue that wearing a head scarf is contrary to the principle of "tolerance", and uses this as an additional argument for accepting the ban. This is a highly problematic position of various reasons.

For the first, banning the head scarf could hardly be seen as an expression of the will to tolerate other persons' conceptions of the good and their way of life. A tolerant approach would rather be to accept this practice, all though the Court and the state party of Switzerland did not approve of it. By accepting expressions of various identities among the teachers, the public school would express its own tolerance for plurality and by that

¹³ *Refah Partisi and others vs. Turkey* 2003 (Grand Chamber), referring to several other judgments where the same statement is made

¹⁴ Letter on Toleration; Treaties on Tolerance

also give the pupils a better chance to develop tolerance for difference, like the UN Convention on the Rights of the Child calls for¹⁵.

Secondly, the Court's interpretation of what an individual's (religious) clothing signifies on the basis of the Court's own culturally biased and rather negative associations with the scarf is highly problematic, especially when it is in conflict with the explicit interpretations of the person wearing it. Moreover, by interpreting the head scarf as a sign of intolerance, the Court not only is in danger of stigmatizing the complainant herself as intolerant, but also numerous other women wearing the scarf. Although some of these might wear it for reasons that the Court would describe as intolerant, no empirical data show that this is the case for all or most women who wear head scarves. It is hence likely to assume that numerous Muslim women are unjustly affected unjustly by the assumptions and statements of the prejudiced Court¹⁶.

Similarly, in the *Sahin* case, the complainant told the Court that her wearing the head scarf was not an expression of opposition to the principle of "secularism" enshrined by the Turkish Constitution. Still, the Court chose to see the head scarf as such a threat, like the state of Turkey had argued for in their proceedings. The Court hence contributes to stigmatising the religious practice of women wearing head scarf as incompatible with the principle of secularism, like it stigmatised the same practice as "intolerant" in the *Dahlab* case. Scholarly unjustified assumptions about the Muslim faith are also expressed in the *Refah* judgment¹⁷.

¹⁵ (CRC article 29) In its critique of the attempts of certain German states (Bundesländer) to prohibit Muslim public school teachers from wearing head scarves, the UN Committee on the Rights of the Child expressed this point in the following way: "The Committee (...) is concerned at laws currently under discussion in some *Länder* aiming at banning school teachers wearing headscarves in public schools because it does not contribute to the child's understanding of the right to freedom of religion and to the development of an attitude of tolerance, as promoted in the aims of education under article 29 of the Convention" (CRC/C/15/Add.226, 30.01.2004)

¹⁶ The German Constitutional Court referred to some of the numerous possible interpretations or meanings of the head scarf in their decision in 2003 on the public school teacher Fereshda Ludin's right to wear a head scarf, including emancipation, sexual self-determination and/or cultural self-identification (Robbers 2005)

¹⁷ In *Refah* the Court claimed for instance that Islam is a "static" religion whose belief is not compatible with democratic traditions and human rights. Extensive doctrinal, academic and political work clearly proves this to be wrong as a general statement, all though certain Muslim traditions and groups oppose to

The *Dahlab* decision and the *Sahin* judgment hence include statements and conclusions that do not seem very helpful in combating discrimination based on religion or belief. Rather they could be misused to the opposite, namely to stigmatise those women who are wearing a head scarf. Hence it is also a question if, or to what extent, these cases demonstrate the “neutrality” that the Court has proclaimed as an ideal.

What neutrality?

As we have already noted, the Court has addressed the relationship between neutrality and tolerance, underlining that neutrality is meant to serve among other things the fostering of tolerance:

“The Court has frequently emphasised the State’s role as the **neutral** and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society.”¹⁸

“Neutral” according to this statement could be taken to mean “impartial”. The wording “neutral *and*¹⁹ impartial” is however also likely to imply that neutrality is a requirement that comes *in addition to* impartiality. If we chose the latter interpretation, the Court does not specify what is meant by the term neutrality in this context at all. In either case, the content and implications of the statement on neutrality is not quite clear although it is expressing a rather strong emphasis on the quest for state “neutrality” with regard to freedom of religion or belief.

If we look at how neutrality is defined by the Oxford English dictionary, it could refer to for instance “indifference” or “impartiality”. Both these understandings have in common that they call for equality in the sense of not taking a stand between conflicting doctrines or parties. Impartiality at least is compatible with the principle of non-discrimination of

the values and principles of democracy and human rights. It also seems to believe that Muslims are more likely than other religious groups to lie about their true intentions. See *Moe, Christian: “Refah Revisited: Strasbourg’s Construction of Islam”* (Paper presented at the conference “Emerging Legal Issues for Islam in Europe”, Central European University, Budapest, 3-4 June 2005); Lindholm; An’naim; et. al.

¹⁸ *Refah Partisi vs. Turkey* (Grand Chamber), referring to several other judgments where the same statement is made;

¹⁹ author’s emphasis

article 14 and more generally with the principle of equality before the law. All though there are several other possible interpretations of the principle of neutrality²⁰, for instance “non-interference” or “non-identification”, we shall here take it to imply (at least) non-discrimination since this is a principle well established by ECtHR case law which state parties are obliged to respect, according to article 14. Article 14 calls for equal protection of the rights set forth in the Convention, e.g. the right to freedom of religion or belief. For this analysis we shall hence interpret the Courts use of the term “neutrality” as a call for *equal protection* of this right.

Traditionally the Court has only interpreted article 14 to give a protection against direct discrimination. Direct discrimination according to the article 14 of the ECHR occurs when states treat differently persons in analogous situations without providing an objective and reasonable justification. In the case of *Thlimmenos vs. Greece*, the Court extended the notion of discrimination to include what might be called “indirect discrimination”:

“The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”²¹

Also the EU operates with a definition of direct and indirect discrimination, but defines these notions slightly different than the ECtHR does in *Thlimmenos*. According to the EU Council directives on non-discrimination, “direct discrimination” occurs when one person is treated less favourable than another person who is in a comparable situation, while “indirect discrimination” occurs when an “apparently neutral provision, criterion or practice” would put persons at a particular disadvantage compared to other persons²².

²⁰ see Durham & Daniel 1999; Little in Witte and van der Vyver 1996 ; Plesner 2003

²¹ *Thlimmenos vs. Greece* 2001

²² EU Council Directive 2000/78/EC

Distinction could be made between a) neutrality of aims or intentions, b) formal neutrality and c) neutrality of effect or consequence²³. If neutrality is taken to imply non-discrimination (equal protection of rights), we hence should ask whether a) an aim of the policy or legal provision is to discriminate on the basis of religion or belief, b) if the policy or legal provision openly (“on its face”) discriminates on the basis of religion or belief, and c) if the policy or legal provision has discriminatory effects, that is if certain persons or groups rights to freedom of religion or belief are more restricted than others as a consequence of the law or policy. If we follow the reasoning of respectively direct and indirect discrimination, both formal neutrality and neutrality of effect are requested. In relation to both principles, discrimination could only be accepted if there is, following the reasoning of the Court, “an objective and reasonable justification” for it.

From the perspective of non-discrimination (or equal protection of rights) one could question both the arguments and conclusions of the Court in the *Dahlab* and *Sahin* cases, and to a certain extent also in the *Refah* case.

Common to the Swiss and Turkish state approaches to the public / private distinction in general and to the definition of the permissible place for individual religious manifestations in particular, is that they seem to be directed at, and hence also affect, first and foremost manifestations of Islamic beliefs and identity. Both the argumentation and the conclusions of the state parties in the *Dahlab* decision and the *Sahin* judgment underlines that it is the head scarf worn by Muslim women that the state parties want to prohibit. In the *Dahlab* case it is even explicitly said that the prohibition would not affect more “discrete” religious symbols, like necklaces and other jewelry. Hence the most common symbol for many Christian teachers and pupils, namely the little cross carried as a necklace, would not be affected. The decisions hence seem to imply indirect discrimination.

²³ Rawls 2001

Here we see a parallel to the cases and debates on the “head scarf issue” in other European countries, such as Germany²⁴ and France. In France, a new law of March 15th 2004 prohibits the wearing of “conspicuous” religious clothing or signs²⁵. The law particularly mentions that such manifest expression of religious identity includes the so-called “Islamic head scarf”, while “discrete” signs are accepted²⁶. The law hence is interpreted not to prohibit the common Christian symbol, the little cross around the neck. In order to comply – at least on the face – with the prohibition against discrimination, the law does, however, also ban “big crosses”, and the Jewish *kippa* (head sculp). While numerous cases concerning the “Islamic head scarf” arose in the French public school in the years preceding the new law²⁷, no cases concerning pupils wearing big or small crosses or the Jewish *kippa* had been registered. It could therefore seem like the wording of the circular – prohibiting also “big crosses” and the Jewish *kippa* – was aiming to make the law appear more “neutral” on its face, hiding the real intentions of prohibiting especially the Islamic head scarf which could hardly be seen as a “neutral” intention²⁸. If we look at the actual consequences of the law, e.g. the number of pupils now expelled from the public school because they do not comply with the law, it has affected a few Sikh and Jewish boys, and a number of Muslim girls, but no Christians²⁹.

The French law could be seen as apparently is neutral on its face, and hence in compliance with the quest for formal neutrality, since it does not explicitly single out certain religious traditions that are favored or disfavored. On the other hand, the new law could be seen to imply direct discrimination since it explicitly singles out those who are

²⁴ Baden-Wurtemberg and some other German states / Länder (see Robbers 2004)

²⁵ *LOI n° 2004-228 du 15 mars 2004 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*

²⁶ This is underlined in the article 2.1 of the Directive that the Educational Authorities have made in relation with the new law: “Les signes et tenues qui sont interdits sont ceux dont le port conduit à se faire immédiatement reconnaître par son appartenance religieuse tels que le voile islamique, quel que soit le nom qu'on lui donne, la kippa ou une croix de dimension manifestement excessive. La loi est rédigée de manière à pouvoir s'appliquer à toutes les religions et de manière à répondre à l'apparition de nouveaux signes, voire à d'éventuelles tentatives de contournement de la loi. La loi ne remet pas en cause le droit des élèves de porter des signes religieux discrets.”

²⁷ See for instance jurisprudence from the Conseil d'Etat dealing with the complaints on these cases

²⁸ see Gunn 2004 on the political procedure and arguments in 2003 and 2004 leading up to the new law, where it is clear that the political intentions originally were to restrict the wearing of “Muslim head scarves”, French: “foulard”

²⁹ Le Monde

wearing religious garb that are more visible since they are of a certain size or degree of ‘ostentation’. Hence it restricts the rights of persons who by their conviction is required to wear ‘visible’ or ‘ostentatious’ garb, while those whose religious (or non-religious) conviction is only requiring a more ‘discrete’ sign or no sign at all are not affected³⁰. It may thus be argued that the law should be seen as a case of direct discrimination. At any rate it could be seen as implying indirect discrimination. The law is by its effects not “neutral” since it in practice poses restrictions on particular religious groups (Muslim girls and some Sikh and Jewish boys) and not on others who make up the majority of pupils (e.g. Christians carrying little crosses and all those who do not feel obliged to wear any religious signs). The French law hence meets the criteria of indirect discrimination, since it establishes an apparently neutral provision, criterion or practice which clearly put certain persons at a particular disadvantage compared to other persons³¹. It is hard to see what could be a general “objective and reasonable justification” for this unequal protection of Muslim girls’ and Sikh boys’ the equal right to freedom of religion or belief and of the equal right to free public primary and secondary education.

If the law only opened for prohibitions – given “objective and reasonable justifications” – in individual cases where the visual appearance went together with a behavior that clearly undermined the order of the school or infringed with the rights and freedoms of others, it would not necessarily have implied discrimination. Such an opening for prohibitions in individual cases, which was the law and practice in France from 1989 until 2004 when the general ban came, could hence not be seen as expression of fundamentalist secularism.

³⁰The difficulties of the French educational authorities in interpreting the law and regulation, for instance to determine if the turban of the Sikh was to be seen as ‘ostentatious’ or not, and if the ‘bandanas’ should be banned on line with more covering head scarves demonstrate the practical difficulties with drawing the fine lines between various individual expressions of self-identification that the distinction between ‘discrete’ and ‘ostentatious’ calls for. These difficulties and the problems with drawing such a line between accepted and non-accepted religious expression from a human rights perspective, might make it worthwhile for the French authorities as well as the Strasbourg Court to reconsider the use of these distinctions.

³¹ cf. the EU council directive

As in the *Dahlab*, *Sahin* and *Refah* case, the French legal and political rhetoric that is used to legitimize the new law refers mainly to the principle of “secularism” (“laïcité”). The French discourse on this principle shows that there are two main positions that are based on either the notion of “strict” or of “open” “laïcité”³². Both positions are characterized by the quest for non-dominance of religion on the state but also in the public sphere and in civil society in general. The notion of open “laïcité” focuses on banning state identification with religion in order to secure the equal right to freedom of conscience and religion of all citizens, calling for instance for state officials to appear and act religiously “neutral”³³. The strict approach to “laïcité” interprets this to call for a much stronger degree of privatization of religious expression, restricting for instance the freedom of religious manifestations also for citizens who enter public institutions³⁴. These positions resemble the positions that we have here called “fundamentalist secularism” and “liberal secularism”. The leading political parties have by the new law chosen a line that interprets laïcité to call for restrictions on expressions on individual religious identity inside public institutions also when this is done by private individuals, like pupils of primary schools. The critics of the law have argued that while such restrictions might be necessary in certain individual cases (cf. the rules on this in France until 2004), a general ban is unnecessary and unfortunate both from the perspective of human rights and social integration³⁵. The girls that are expelled from school because they refuse to show their hair are not those who are less in need of a thorough public education in order to get the same chances as others to take part in the French society.

Based on the case law of the ECtHR, one might wonder what the result would be if the new French law and its application to, for instance, Muslim girls was brought before the Court. The notion of indirect discrimination in the *Thlimmenos* judgment gives reasons to assume that the Court would find article 9 read together with article 14 to be violated. In that case also the equal right to free public education following from the First Additional Protocol, article 2, to the ECHR would give support to the complaint of the girl and her

³² Bauberot 2004; Plesner 2004

³³ Ibid

³⁴ Ibid

³⁵ Gunn 2004; Garay 2004

parents. The questionable reasoning and conclusions and the counterproductive effects of the *Sahin, Dahlab and Refah* cases in relation to state parties' attempts to restrict the right to freedom of religion or belief by reference to the principle of "secularism" does, however, makes it likely that the opposite might happen. The Court's recent jurisprudence related to the notion of secularism and the 'Islamic head scarf' gives a reason to worry that it is on the move from the principles of liberal secularism towards a fundamentalist approach to secularism, corresponding to the French "laïcité stricte". This tendency, if not reversed, may weaken the legitimacy of the Court and, more importantly, the basic rights the Court is mandated to protect.

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