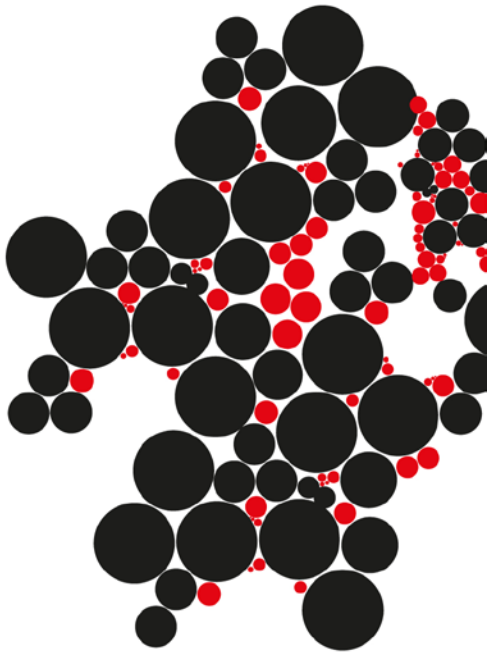


BACHELOR THESIS



BETWEEN NEUTRALITY AND
ACCOMMODATION:
DUTCH AND EUROPEAN
JURISPRUDENCE ON THE
ISLAMIC HEADSCARF IN
EDUCATION

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BETWEEN NEUTRALITY AND ACCOMMODATION: DUTCH AND EUROPEAN JURISPRUDENCE ON THE ISLAMIC HEADSCARF IN EDUCATION

Martin Spelt¹

Abstract

In a number of cases the European Court of Human Rights has considered Turkish and French bans on the wearing of the Islamic headscarf in education. In each of these cases it concluded that these bans interfered with freedom of religion, but that these interferences were justified for upholding secularism. In the Netherlands such issues were generally settled before the Dutch Equal Treatment Commission. This Commission has consistently struck down headscarf bans in public schools and sometimes in private schools, because they were contrary to the principle of equal treatment. This thesis argues that this difference follows from a difference between French and Turkish secularist models of religions-state relations and a Dutch accommodative model. It concludes that the Dutch approach is just as compatible with the jurisprudence of the European Court of Human Rights as the Turkish and French approaches, as this Court takes a pluralist approach to the protection of religious freedom, providing states with a wide margin of appreciation on such issues concerning the relations between religions and states.

1. INTRODUCTION

This thesis aims to contribute to the European debate on religion in the public sphere by considering the issue of the wearing of Islamic headscarves in education, whether by teachers or by students, from a legal perspective. It thus presents the research that has been conducted in the context of my bachelor assignment, with the view of answering the research question to which extent similar principles have been applied in Dutch and European² jurisprudence on Islamic headscarves in education. The main conclusion presented is that there is a great difference between Dutch and European jurisprudence on the Islamic headscarf in education, and that this difference is in line with the difference between the Dutch accommodative tradition and the Turkish and French secularist traditions.

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² 'European' here refers to the level of the Council of Europe and the European Court of Human Rights. Both these institutions will be introduced in section 2.1.

1.1 METHODS

In order to answer the research question of this work, both the legal frameworks and the bodies of jurisprudence on the Dutch and European levels have been studied. On the European level this concerned the legal framework provided by the European Convention on Human Rights (ECvHR or the ‘Convention’) and the jurisprudence of the European Court of Human Rights (ECtHR or the ‘European Court’). On the Dutch level this concerned the legal framework provided by the General Equal Treatment Act (Dutch: *Algemene Wet Gelijke Behandeling*; AWGB) as well as the jurisprudence of the Dutch courts and, more extensively, the Equal Treatment Commission (Dutch: *Commissie Gelijke Behandeling*; CGB).

On the European level attention is limited to the landmark case of *Leyla Şahin v. Turkey*³, decided by the Grand Chamber in 2005, and the cases decided since. On the Dutch level the time frame is extended to 1999, as in that year the CGB decided on cases regarding measures against the wearing of Islamic headscarves in public schools with a line of reasoning it still follows in more recent cases.

On both levels this research is in principle limited to cases concerning the wearing of the Islamic headscarf and thus excludes cases concerning the wearing of face-coverings veils, such as niqabs and burcas. This choice was made as in cases concerning the latter type of dress arguments such as an obstruction of communication have been used in a way that is not relevant for cases concerning headscarves⁴. This work does not specifically discuss a distinction between teachers and students, as this distinction is not of relevance for comparing the Dutch and European levels.⁵

1.2 OUTLINE

The remainder of this thesis will discuss the legal frameworks used on both levels (section 2), the jurisprudence of the European Court, the Dutch courts and the Dutch Equal Treatment Commission (section 3) and the differing national traditions of relations between religions and the state (section 4). Lastly the main question will be answered and some pointers for further research will be given (section 5).

³ *Leyla Şahin v. Turkey* (44774/98). 10 November 2005; Grand Chamber Judgment. Also 29 June 2004; Chamber Judgment. This case and all other ECtHR cases discussed are available via <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>.

⁴ As in CGB decision 2003-40 (ban on the wearing of niqabs by a vocational education institute). Available from <http://cgb.nl/oordelen/oordeel/219410>.

⁵ As within both levels the outcomes for cases concerning students and teachers have been the same.

2. LEGAL FRAMEWORKS

This section will discuss the legal frameworks used on the European and Dutch levels for deciding cases concerning the Islamic headscarf in education, both in order to briefly compare these frameworks in section 2.3 and as background information for the discussion of the jurisprudence in section 3. This section will thus be limited to the legal frameworks and will not yet discuss their application to cases concerning the Islamic headscarf in education.

2.1 EUROPEAN LEVEL

2.1.1 *Introduction*

In the aftermath of the Second World War, a number of international human rights provisions were agreed upon, most notably the Universal Declaration of Human Rights and the European Convention on Human Rights (Walter, 2007: 1). The ECvHR, signed in 1950, was the first major venture of a body that had been established in 1949, the Council of Europe (Stone Sweet and Keller, 2008: 5). Since then a large number of treaties has been compiled within the Council of Europe, yet the ECvHR remains the most important one (Walter, 2007: 2). At the time of its creation the signatories of the ECvHR disagreed on the creation of a supranational authority for ensuring compliance with the ECvHR. Submitting to this authority, the European Court of Human Rights, was thus left voluntarily (Stone Sweet and Keller, 2008: 5). Also, at the time, the member states did not want to grant individuals the rights to complain directly to the Court and thus a European Commission for Human Rights (the ‘Commission’) was created to decide whether complaints from individuals would be brought before court or not (Walter, 2007: 3). This Commission was abolished in 1998 and currently it is mandatory for signatory states to accept both the jurisdiction of the Court and the right of individuals to apply to the Court (Stone Sweet and Keller, 2008: 6).

Over time a number of protocols have been adopted, supplementing the ECvHR. Most of these protocols concern specific rights that were not present in the original Convention. Protocols 9, 11 and 14, however, changed procedures, with the 9th protocol granting individuals the possibility to submit cases to the Court themselves, the 11th protocol abolishing the Commission and the 14th protocol changing admissibility procedures to help the Court in dealing with an increased workload (Walter, 2007: 4-5).

2.1.2 *The position of the Court*

A number of authors have elaborately discussed whether or not the Convention is constitutionalising and whether or not the ECtHR ought to be considered, for example, a “transnational constitutional court” (Stone Sweet, 2009: 14) or “the Supreme Court of Europe” (Goldhaber, 2009: 1). Discussing this in detail here clearly goes beyond the purposes of this thesis and thus I will limit myself to introducing the issue.

Stone Sweet argues that the Convention has gained a constitutional character as it has been “steadily incorporated into national law” (2009: 8), albeit in a pluralist manner. The extent to which the Convention has received a constitutional, or quasi-constitutional, meaning differs per member state. Stone Sweet, however, having considered the situation in a significant number of member states, concludes that “virtually all of the Contracting Parties have now incorporated the Convention” (p. 10). This, combined with the ECtHR’s position “to receive virtually every major constitutional controversy involving rights” (p. 7) leads Stone Sweet to conclude that the ECtHR does indeed have a constitutional character, in the sense that its “authority, jurisprudence, lawmaking capacities, and impact on legal and political systems deserves to be compared to that of even the most powerful national constitutional courts” (p. 14). Sadurski (2009: 452) also argues that the ECtHR has a “truly constitutional dimension”. He defends this claim amongst others by pointing towards pilot judgments⁶ and to “partnerships” between national constitutional courts and the ECtHR, in the sense that national courts follow ECtHR case law “in order to compel the legislatures and the administrations of their States to adopt more rights-protective policies” (p. 452).

Others have disagreed on those claims that the Convention and the Court have gained a constitutional character. Krisch (2008: 215) boldly states that this constitutionalisation thesis “has come to appear more as a story of hope than a reflection of reality”. Arguing that national courts continue to insist on their own supremacy and that questions of ultimate authority remain undecided, he speaks of a pluralist European human rights regime, rejecting constitutionalist claims (p. 215-216). He concludes that this flexible relation between the ECtHR and domestic legal systems has advantages and that a pluralist order “might well be more appropriate” than “postnational constitutionalism” (p. 216).

In the legal order of the Netherlands, the member state I will deal with specifically in this thesis, the Convention has a strong position. Traditionally the Netherlands has a strongly monist system and the Dutch constitution provides that international treaties have a supreme position in the Dutch legal order (de Wet, 2008: 235). National courts are

⁶ Sadurski (2009: 402) defines pilot judgments as “*Court’s judgments finding systemic and widespread violations, and ordering the State to undertake wide-reaching steps to redress the breach*”. For a more detailed discussion, see the original article.

allowed to review legislation against international treaties such as the Convention, but not against the human rights provisions provided in the Dutch constitution (de Wet, 2008: 240). Stone Sweet (2009: 6) has argued that this has given the Convention the position of a “*de facto* charter of rights” in the Netherlands.

Some have also accused the ECtHR of going beyond what was originally intended by the member states, as discussed by Nicol (2005). For example Wicks⁷ states the United Kingdom government of the time “regarded the Convention as aimed at preventing a totalitarian take-over and not at preventing human rights abuses within a democracy”. Nicol (2005, p. 170) admits that indeed some of the negotiators had this view, but also concludes that a group of negotiators had “the more ambitious goal of a cross-frontier Bill of Rights”. Thus, Nicol concludes, the argument that the Court would better take a more limited role, because that was originally intended, falls away. This discussion of the disagreement at the time the ECvHR was first framed shows, again in the words of Nicol (p. 171), “the deeply controversial and contestable nature of rights”.

2.1.3 Freedom of religion under the Convention

In the Convention freedom of religion, together with freedom of thought and conscience, is protected by Article 9. This article states:

Article 9

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

A key characteristic of this article is the distinction between what is usually called the *forum internum* and the *forum externum* of religious freedom. *Forum internum* refers to the internal dimension of religion or belief, whereas *forum externum* refers to its external dimension. The first dimension is absolute: no limitations at all to choosing or changing religion or belief are allowed by the Convention (Rorive, 2009: 2673-2674). The latter dimension, concerning the manifestation of religion or belief can however be subjected to limitations, if certain requirements are fulfilled.

⁷ Wicks, E. (2000). “The United Kingdom Government’s Perceptions of the European Convention on Human Rights at the Time of Entry” in *Public Law*. 2000: 438-455. Cited from Nicol (2005), p. 152.

Article 9 is structured in such a way that the freedom of thought, conscience and religion is set out in paragraph one, after which the second paragraph sets out which limitations to the manifestation of religion or belief are allowed. Article 8 on the right to respect for private and family life, article 10 on freedom of expression and article 11 on freedom of assembly and association share this structure. In each of these articles, the first paragraph sets out a general freedom after which the second paragraph allows for some limitations. Beyond this article 15 describes a general exception, as it allows for derogations to some of the rights protected throughout the Convention “in time of war or other public emergency threatening the life of the nation”.

In the present thesis only the limitations to freedom of religion, as allowed in paragraph two of article 9, are relevant. However, since article 8, 10 and 11 are structured in the same way as article 9, the Court has dealt with limitations to these articles in the same way. In all of these articles, some limitations are allowed if these limitations are ‘prescribed by law’, ‘in the interest of’ a legitimate aim described in the article and ‘necessary in a democratic society’ to achieve that aim. Thus, when considering whether a limitation to a right or freedom from articles 8-11 is allowed, the Court takes a three-step approach, considering the three requirements to such limitations, as set out in the Convention, one by one (Ovey and White, 2006: 222).

The Court has applied the requirement for a legal base in a broad sense, accepting national law as interpreted by national courts. It does not specifically require statutory law, but also accepts other legal bases (*ibid.*, pp. 223-224). Regarding the requirement for a legitimate aim, the Court only accepts those legitimate aims that are specifically mentioned in the relevant Convention article. It generally accepts claims by states on the aims of a measure (Evans, 2001: 147-148). On the requirement that a limitation is necessary in a democratic society, the Court has set out the following key points in the *Silver v. the United Kingdom* case, as quoted from and order by Ovey and White (2006: 232):

- (a) “the adjective ‘necessary’ is not synonymous with ‘indispensable’, neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘reasonable’ or ‘desirable’;
- (b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention;
- (c) the phrase ‘necessary in a democratic society’ means that, to be compatible with the Convention, the interference must, *inter alia*, correspond to a ‘pressing social need’ and be ‘proportionate to the legitimate aim pursued’;
- (d) those paragraphs of Articles of the Convention which provide for an exception to a rights guaranteed are to be narrowly construed.”

For a more detailed discussions of the three requirements see Evans (2001) or Ovey and White (2006).

2.1.4 The margin of appreciation

One doctrine of the Court that deserves special attention here is what is known as the margin of appreciation doctrine. The margin of appreciation, from the French *marge d'appréciation*, “generally refers to the amount of discretion the Court gives national authorities in fulfilling their obligations under the Convention” (Brauch, 2005: 115). According to Shany (2005: 909-910) the margin of appreciation doctrine essentially concerns both “judicial deference” and “normative flexibility”. The first of these terms refers to the view that international courts should to some extent respect discretion of national bodies and exercise judicial restraint. The latter term refers to the view that the norms subject to this doctrine are to some extent flexible and “preserve a significant ‘zone of legality’ within which states are free to operate” (ibid.: 910). Yet the Court has famously stated in *Handyside v. the United Kingdom*, and many times since, that the “domestic margin of appreciation goes hand in hand with a European supervision” (§ 49). Thus the margin of appreciation gives states some, but not indefinite discretion (Evans, 2001: 143). The margin of appreciation doctrine was not originally provided for by the Convention, but has been developed by the Court over time. For a description of its development, see, for example, Brauch (2005).

2.2 DUTCH LEVEL

2.2.1 Introduction

In the Netherlands a law regarding equal treatment between men and women had been adopted in 1980 (Asscher-Vonk, 1999: 13). Soon after that proposals emerged for broader discrimination prohibitions and in 1983 a general prohibition on discrimination was added to the Dutch Constitution (ibid.: 15). This provision, now the first article of the Dutch constitution, states:

“Article 1

All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted.”⁸

⁸ Article 1 of the Constitution of the Kingdom of the Netherlands. An English translation published by the Dutch government is available from <http://www.rijksoverheid.nl/onderwerpen/grondwet-en-statuut/documenten-en-publicaties/brochures/2008/10/20/the-constitution-of-the-kingdom-of-the-netherlands-2008.html>.

Over time a number of proposals for a law working out this prohibition on discrimination were discussed and in 1994 the *Algemene Wet Gelijke Behandeling* (General Equal Treatment Act; AWGB)⁹ was adopted (ibid.: 15-16). The current version of the AWGB has only been changed slightly since the original version of 1994¹⁰, mainly for the implementation of the European Union directives 2000/43/EC (Racial Equality Directive)¹¹ and 2000/78/EC (Employment Equality Directive)¹². The AWGB substantiates the general constitutional prohibition on discrimination for a number of grounds: religion, belief, political preference, race, gender, nationality, hetero- or homosexual orientation or marital status (article 1, paragraph 1b AWGB).

The AWGB thus includes the ground that is most relevant for this paper, religion. It also includes belief as a separate ground, but throughout the Act belief is treated in the same way as religion (e.g. article 5, paragraph 2a and article 7, paragraph 2). The AWGB is applicable to occupation and employment (article 5, paragraph 1) as well as, in most cases, to the provision of goods and services (article 7, paragraph 1). The provision of goods and services by educational institutions is explicitly included in the scope of the AWGB (article 7, paragraph 1, sub c)¹³.

Whereas the first chapter of the AWGB sets out provisions of equal treatment law, the second chapter establishes the Equal Treatment Commission. This Commission can decide on complaints regarding discrimination as prohibited by the law (article 12 AWGB). It does not have sole jurisdiction in the field of equal treatment, but it has been established as a more easily accessible alternative to the regular courts (Loenen, 2006: 46-47). Beyond that it has also been argued that an independent Commission would ensure a streamlined interpretation of the law and that such a Commission would have the specific expertise needed for dealing with such a fundamental issue as equal treatment (van Vleuten and Willems, 1999: 244-246).

Decisions by the CGB are non-binding, but in practice they are usually followed. Loenen in 2006 (pp. 46-47) concluded, following an evaluation report by the CGB, that regular judges also generally treat CGB decisions as authoritative. Van Vleuten and Willems, however, in 1999 came to a contrary conclusion, after a detailed discussion of the times regular judges had considered CGB decisions. They concluded that CGB decisions could not be trusted as authoritative and that judges had often not even reasoned why they did not follow CGB decisions in their judgments (pp. 282-283). It goes beyond the purposes of this thesis to discuss the precise weight of Commission decisions in more detail. It is

⁹ The AWGB can be accessed through <http://wetten.overheid.nl/BWBR0006502>. An English translation is provided on http://cgb.nl/english/legislation/equal_treatment_act.

¹⁰ An overview of changes to the AWGB is provided on the website of the Government of the Netherlands; <http://wetten.overheid.nl/BWBR0006502>.

¹¹ Council Directive 2000/43/EC, *Official Journal of the European Union* L 180

¹² Council Directive 2000/78/EC, *Official Journal of the European Union* L 303

¹³ For more details on the scope of the AWGB, see Cremers-Hartman (1999).

however useful to keep this contestable character of CGB decisions in mind. Specifically with regard to Islamic headscarves in education, a recent decision by the Commission, on a headscarf ban in a private school¹⁴, was not followed by the courts (CGB, 2011), as will be discussed later.

2.2.2 *The prohibition on differentiation*

Essential in the provisions of the AWGB is its prohibition to differentiate between persons on a number of grounds. Such differentiation is prohibited unless a specific exception provided in the AWGB applies. The provisions for these exceptions differ significantly between direct and indirect differentiation. In this section I firstly discuss the term differentiation. Secondly I discuss the difference between direct and indirect differentiation. Lastly I discuss the relevant exceptions.

I am using the term ‘differentiation’ as an English translation of the Dutch term “*onderscheid*” used in the AWGB. The wording in the AWGB slightly differs from the terms used in the European Union Employment Equality Directive (Directive 2000/78/EC), which uses “discrimination” in the English version and “*discriminatie*” in the Dutch version. In that context it must be noted that whereas in English the term “discrimination” can also be used in the rather neutral sense of differentiation, in Dutch the term “*discriminatie*” has an outright negative connotation (Wentholt, 1999: 90)¹⁵. The difference in meaning of the terms “*discriminatie*” and “*onderscheid*” is discussed at significant length by Holtmaat (2006). He concludes that though the terms can be distinguished clearly on the basis of a number of factors, the usage of either term does not necessarily make a difference in the practice of legal review (pp. 111-112).

The difference between direct and indirect differentiation is provided in the first article of the AWGB. Here direct differentiation is described as differentiation between persons on the basis of one of the grounds specified (article 1, paragraph 1, sub b). Indirect differentiation is described as differentiation on other grounds than those specified, but leading to direct differentiation (article 1, paragraph 1, sub c). The explanatory memorandum of the government of the time states that this means that there is indirect differentiation if differentiation on another ground than the grounds specified leads to a disadvantage that applies mainly to persons belonging to a specific group protected in the Act (*Memoire van toelichting*, cf. ten Bosch-Gerritsen, 2011). Wentholt (1999: 93) points out that this only concerns effects that actually occur, not all effects that could occur. For a

¹⁴ CGB decision 2011-2, paragraph 3.22 (ban on all head coverings, including religious ones, by a Catholic secondary school). Available from <http://cgb.nl/oordelen/oordeel/221530>.

¹⁵ This negative connotation of the term “*discriminatie*” was also stated as a reason for continuing the usage of the term “*onderscheid*” in the AWGB by the explanatory memorandum (*Memoire van Toelichting*) of the act implementing the EU equal treatment directives (Gerards and Heringa, 2003: 13).

further discussion of the difference between direct and indirect differentiation, see Gerards and Heringa (2003: 15-16).

The prohibition on differentiation has a closed character in the sense that it is prohibited unless an exception is provided in the AWGB to allow it. For indirect differentiation a rather general exception exists, allowing indirect differentiation that is objectively justified. Beyond that for both direct and indirect differentiation a number of more specific exceptions apply. For the cases that will be studied in this work, the special exception for realizing special founding principles and the more general exception for objectively justified indirect differentiation are relevant. Those exceptions will be discussed in sections 2.2.3 and 2.2.4 below respectively.

2.2.3 Exception for realizing special founding principles

The Netherlands has a dual educational system, consisting of both public education (*‘openbaar onderwijs’*) and state-funded private education (*‘bijzonder onderwijs’*, literally ‘special education’, hereinafter ‘private education’) (Zoontjens, 2003: 1). In practice about two-thirds of Dutch primary and secondary schools are private schools, whilst only one-third is public (ibid.: 2). Often private schools are founded on the basis of a religious conviction, but not always (Rijksoverheid, n.d.). Public schools are denominationally neutral and, in principle, required to accept any student. Private schools are allowed to refuse students that do not share its religion. In practice most private schools too are religiously mixed, except for a number of orthodox Christian schools and Islamic schools (Leeman, 2008: 53)

As discussed above, the prohibition on direct differentiation has a closed character, and direct differentiation is only allowed if a specific exception is provided for it in the law. Amongst those exceptions are the exceptions for private schools realizing special founding principles. Mainly these exceptions are applied to religious schools trying to uphold their religious characters. In principles they could however apply to any kind of special founding principle, whether religious or not. These exceptions apply to both direct and indirect differentiation.

The AWGB’s prohibition on differentiation in the sphere of employment is provided in article 5, paragraph 1, after which a number of exceptions are provided in paragraphs 2-6. Paragraph 2, sub c, provides for an exception regarding employment at private schools. It states that the prohibition provided in article 5, paragraph 1 will not affect:

“the freedom of an institute of private (*bijzonder*, lit.: ‘special’) education to set requirements on the occupancy of a post, which, having regard to the goal of the institute, are necessary to realise its founding principle; such requirements may not lead to differentiation on the sole grounds of political preference, race, gender, nationality, hetero- or homosexual orientation or marital status.” (article 5, paragraph 2, sub c)

Likewise, the AWGB’s prohibition on differentiation in, amongst others, the provision of education, is provided in article 7, paragraph 1, after which a number of exceptions are provided in paragraphs 2 and 3. Paragraph 2 provides for an exception regarding education at private schools. It states that the prohibition in article 7, paragraph 1, sub c (concerning education) will not affect:

“the freedom of an institute of private education to, at admission and with regard to participation in education, set requirements, which, having regard to the goal of the institute, are necessary to realise its founding principle; such requirements may not lead to differentiation on the sole grounds of political preference, race, gender, nationality, hetero- or homosexual orientation or marital status.” (article 7, paragraph 2)

The AWGB thus allows private schools to differentiate between persons (including both direct and indirect differentiation) on the basis of religion or belief, when the schools fulfil the further requirements set out in the exceptions. The exceptions apply to both the admission and participation of pupils and the employment of teaching personnel. Thus private schools can, in principle, refuse to admit students on the basis of their religion. If they choose to admit all students, they can still differentiate on the ground of religion with regard to the participation in education.

Still the exception provided sets out some requirements to its application. Applying those requirements the CGB has taken the approach of firstly considering whether the school at hand has a founding principle laid down in its articles of association that could justify differentiation for realizing that founding principle. Next to that the CGB applies the requirements of this exception in three steps, requiring that

- (a) the school consistently applies its founding principle,
- (b) the measure concerned is necessary for realizing this founding principle and
- (c) the measure does not lead to differentiation on sole grounds of political preference, race, gender, nationality, hetero- or homosexual orientation, or marital status¹⁶.

¹⁶ Supra note 14.

2.2.4 Exception for objectively justified indirect differentiation

Next to specific exceptions, such as the one discussed above, a more general exception is also provided in the AWGB, but only for indirect differentiation. This exception provides that, under certain conditions, indirect differentiation is allowed if it is objectively justified.

The criteria that are now used to determine whether indirect differentiation is to be considered objectively justified within the meaning of the AWGB were first developed by the European Court of Justice (ECJ) with regard to gender equality (Gerards and Heringa, 2003: 141). Asscher-Vonk and Hendriks (2005: 124-125) point out that Dutch jurisprudence has always followed ECJ jurisprudence in this regard, as was also expected by Parliament when discussing the AWGB. When the AWGB was first adopted the criteria for objective justification were not included in the AWGB, as this would give more space to the developing jurisprudence (ibid.). As such the original AWGB only stated that indirect differentiation would be allowed if it was objectively justified, not stating criteria for objective justification. Only after this was required by the European Union Employment Equality and Racial Equality Directives¹⁷, criteria for objective justification were included in the AWGB. The AWGB now states, in line with the European Union directives, that indirect differentiation is allowed if it is “objectively justified by a legitimate aim” and if the measures for attaining that aim are “suitable and necessary”¹⁸. Thus the criteria that were already in use were added to the provision (Piso, 2003: note 7).

A number of authors have studied the approach of the CGB in determining whether indirect differentiation is objectively justified; see Gerards and Heringa (2003), Piso (2003), Gerards (2003) and Asscher-Vonk and Hendriks (2005). They have modelled the approach of the CGB slightly differently, as the CGB has not always consistently applied the same criteria (see Gerards and Heringa, 2003: 144 and Piso, 2003: 518). Gerards (2003) explains this by stating that the CGB has changed its model for determining objective justification in 2002. Below I will first discuss the approach applied in considering whether the aim is legitimate and secondly the approach applied in considering whether the measure to achieve that aim is suitable and necessary.

Firstly, when determining whether the aim of a measure is legitimate, the central criteria are whether the aim does not have an inherent discriminatory character and whether the aim is sufficiently weighty. Gerards (2003: 79) points out that another criterion, whether the aim fulfilled a real need of the organization, was applied instead of the criterion whether the aim was sufficiently weighty before 2002. It is unclear however whether this

¹⁷ Supra notes 11 and 12.

¹⁸ Supra note 9

criterion was fully abandoned (Gerards and Heringa, 2003: 146-147; also see Asscher-Vonk and Hendriks, 2005: 126). Some have described the requirement of legitimacy as a separate criterion (Gerards, 2003: 84), whereas others have described the criteria of non-discrimination and sufficient weight as determining whether or not an aim is legitimate (Asscher-Vonk and Hendriks, 2005: 126). As such legitimacy would not be a separate criterion, but non-discrimination and sufficient importance would be specifications of legitimacy. For Gerards (2003) the criterion of legitimacy means that the aim is not contrary to any other legal provisions. Asscher-Vonk and Hendriks (2005) also recognize the criterion that a measure is not contrary to law. Beyond these criteria the CGB has also sometimes applied a test whether the aim is sufficiently formal and specific (Gerards and Heringa, 2003: 149-150).

Secondly the CGB determines whether the measure concerned is suitable for achieving its aim. For this the central principle is that the differentiation concerned must in fact contribute to its aim (Gerards, 2003: 87). If the measure is considered suitable, then the CGB goes on to consider whether it is necessary. Gerards (2003: 87-88) discusses the development of this requirement of necessity and states that the CGB has specified the requirement of necessity through the requirements of subsidiarity and proportionality. The requirement of subsidiarity means that the aim could not be achieved through another means with less severe consequences (*ibid.*: 89). This requirement of subsidiarity is not always applied. Sometimes the general requirement of necessity is applied in itself instead. Then the CGB considers whether the aim could also have been reached without differentiating, but does not specifically compare the measure with alternative measures (*ibid.*: 88). The requirement of proportionality means that there has to be a proportional relation between the interests infringed and the aim of the measure (Gerards and Heringa, 2003: 154).

Altogether, the requirements that have to be fulfilled before a differentiation will be considered objectively justified, can be summarized as follows.

- Legitimate aim
 - The aim must have no inherent discriminatory character
 - The aim must be sufficiently weighty
 - The aim must be sufficiently formal and specific (*not consistently applied*)
- Suitable for achieving that aim
 - The differentiation must in fact contribute to its aim
- Necessary for achieving that aim
 - Subsidiarity: The aim could not be achieved through a measure with less severe consequences (*not consistently applied*)
 - Proportionality: There must be a proportional relation between the interests infringed and the aim of the measure

2.3 PRELIMINARY COMPARISON

Even though their levels of operation are widely different, the roles of the institutions on both levels are of an isomorphic nature in the sense that they both scrutinize decisions by lower level bodies. The European Court of Human Rights scrutinizes national decisions, whilst in the cases discussed in this work, the CGB and the Dutch courts scrutinized decisions by local schools.

In fulfilling these roles the institutions use widely differing legal bases or departure points. The ECvHR and the AWGB differ widely by their nature, the first being an international human rights treaty and the latter an Act of the Dutch Parliament specifically concerned with equal treatment. As such the departure point for the ECtHR is freedom of religion, whilst the departure point for the CGB as well as the Dutch courts is equal treatment (Nieuwenhuis, 2004).

Also two different binary categorizations are used. On the level of the ECvHR, measures that interfere with the *forum internum* of freedom of religion are absolutely prohibited, whilst measures interfering with the *forum externum* are at times allowed. On the level of the AWGB, measures that directly differentiate on the ground of religion are only allowed in very specific cases, whilst for measures that differentiate indirectly a more general exception for objectively justified differentiation exists. Both levels share that they have a clause requiring the justification of measures that are not absolutely prohibited, though these clauses are worked out differently.

3. JURISPRUDENCE

3.1 EUROPEAN LEVEL

3.1.1 Overview

For my discussion of ECtHR case law on the Islamic headscarf I have chosen to focus on cases from 2005 onwards. The cases on the wearing of Islamic headscarves in education decided by the Court from 2005 onwards are the case of *Leyla Şahin v. Turkey*¹⁹, decided in 2005, the cases of *Dogru v. France* and *Kervanci v. France*²⁰ (hereinafter: *Dogru v. France*), decided in 2008, and the cases of *Aktas v. France*, *Bayrak v. France*, *Gamaleddyn v. France* and

¹⁹ Supra note 3

²⁰ *Dogru v. France* (27058/05) and *Kervanci c. la France* (31645/04). 4 December 2008; Judgments. Except for the applicants they concerned, the judgments in these cases were identical.

*Ghazal v. France*²¹ (hereinafter: *Aktas v. France*), decided in 2009. All these cases concern the wearing of Islamic headscarves by students.

The case of *Leyla Şahin v. Turkey*, decided by the Grand Chamber of the Court in 2005, after a Chamber judgment in 2004, concerned measures taken against Ms. Şahin for not complying with the rule prohibiting the wearing of Islamic headscarves at the University of Istanbul. This rule was based in the case law of the Turkish Constitutional Court, which considered the wearing of Islamic headscarves in universities contrary to the constitutionally protected principle of secularism. The ECtHR concluded that this ban did not breach article 9 ECvHR.

In the case of *Dogru v. France*, decided in 2008, the pupil concerned was expelled because she had failed to participate in sports classes (§ 8). She did not participate in these classes because, for reasons of health and safety, she was only allowed to participate if she took off her headscarf, which she refused (§ 7). Though the Court also discussed secularism in this case it concluded that the ban was not breaching article 9 ECvHR because it was a reasonable conclusion that the wearing of Islamic headscarves was incompatible with sports classes for reasons of safety.

The case of *Aktas v. France* then concerned a headscarf ban rooted in a general legislative ban on the wearing of headscarves in French public schools. The Court concluded that this ban was allowed for the preservation of the principle of secularism.

In each of these cases the applicants argued that measures against them breached article 9 of the Convention. In testing whether such measures breaks article 9, the Court considers

- (a) whether the belief system concerned is to be considered a religion or belief within the meaning of article 9 of the Convention (Danchin and Forman, 2002);
- (b) whether the measure amounted to an interference with freedom of religion;
- (c) whether the measure was not allowed by the requirements to limitations, as set out in paragraph 2 of article 9.

It was not doubted whether Islam is a religion protected under the article 9. Thus, point (a) has not been an issue in the cases concerned in this thesis. Both points (b) and (c) have however been discussed by the Court in cases dealing with Islamic headscarves in education. Therefore the remainder of this chapter will discuss how the Court has dealt

²¹ *Aktas c. la France* (43563/08), *Bayrak c. la France* (14308/08), *Gamaleddyn c. la France* (18527/08) and *Ghazal c. la France* (29134/08). 30 June 2009; Admissibility decisions. The circumstance of these cases were highly similar and the considerations and decisions of the Court regarding the claimed breach of article 9 were identical. Unfortunately the text of these cases is available in French only.

with both point (b) and point (c). Section 3.1.2 will discuss how the Court has dealt with determining whether measures against the wearing of Islamic headscarves in the context of education amount to interferences with freedom of religion. As will become clear, the Court has always been willing to conclude or assume this. In section 3.1.3 we come to the heart of the ECtHR cases on the Islamic headscarf. This section will discuss how the Court has dealt with the question whether or not the measures fulfil the requirements of article 9.

3.1.2 Whether headscarf bans limit freedom of religion

Since 2005 the Court has always concluded or assumed that headscarf bans were limitations to freedom of religion when it was confronted with this question. Its reasoning behind this was set out in *Leyla Şahin v. Turkey* and confirmed in other cases since.

In *Leyla Şahin v. Turkey* the applicant argued that she was obeying a religious precept by wearing a headscarf. For the Court that was sufficient reason to assume that this act, wearing a headscarf, “may be regarded as motivated or inspired by a religion or belief”. The Court specifically stated that the wearing of a headscarf would not necessarily always be seen as fulfilling a religious duty, but that this was so in the present case. Thus the Court assumed that measures against wearing a headscarf “constituted an interference with the applicant’s right to manifest her religion”. (*Leyla Şahin v. Turkey*, §§ 76-78)

In the other cases since *Leyla Şahin v. Turkey*, the Court also considered the wearing of headscarves as being motivated or inspired by religion or belief. In *Dogru v. France* (§ 47) and *Aktas v. France* (p. 7) the Court referred to *Leyla Şahin v. Turkey* in stating that wearing a headscarf “may be regarded as motivated or inspired by a religion or belief”. On that basis the European Court concluded that the bans in both cases constituted restrictions on freedom of religion (*Dogru v. France*, § 48; *Aktas v. France*, p. 7). This was not challenged by the French government (*ibid.*).

Before 2005 the Court did not use the reasoning now set out in *Şahin* for similar cases. The European Commission on Human Rights had sometimes instead used what is called a ‘contracting out’ approach to freedom of religion (Evans, 2001: 127-132). This meant that, in a 1993 case on a ban on wearing headscarves on identity pictures for a Turkish university, the Commission concluded that this ban did not constitute a limitation to religious freedom²² (Rorive, 2009: 2678). Likewise, the Court had in 1996 ruled that neutral rules did not interfere with religious freedom, solely because these rules had a neutral character (i.e. because they did not specifically target religion)²³ (Martínez-Torrón and Navarro-Valls, 1998: 317-318). Also in the case of *Leyla Şahin v. Turkey* the Court

²² *Karaduman v. Turkey* (16278/90) and *Bulut c. la Turquie* (18783/91). 3 May 1993; Admissibility decisions.

²³ *Ejstration v. Greece* (24095/94) and *Valsamis v. Greece* (21787/93). 27 November 1996; Judgments.

stated that article 9 “does not protect every act motivated or inspired by a religion or belief” (§ 105). The Court did not specify when such an act is protected by article 9 and when it is not.

As the Court has, however, since 2005, consistently concluded that measures against the act of wearing an Islamic headscarf are limitations to religious freedom as meant in article 9, focusing more on different approaches it took before 2005 is not necessary here. Instead the heart of the cases concerned is found in the Court’s arguments in determining whether these limitations fulfil the requirements set out in article 9. The central question in those cases was not whether headscarf bans limited religious freedom, but whether these limitations were allowed. This will be discussed in the following section.

3.1.3 Whether headscarf bans fulfil the requirements to limitations

In all of the cases studied, *Leyla Şahin v. Turkey*, *Dogru v. France* and *Aktas v. France*, the Court concluded that the measures against the Islamic headscarf did not breach article 9 ECvHR. As was described in the previous section, the Court did consider that the bans concerned limited freedom of religion. In each of the cases, however, the Court concluded that the bans were prescribed by law, in the interest of a legitimate aim and necessary in a democratic society for achieving that aim.

In the cases of *Leyla Şahin v. Turkey* and *Dogru v. France*, the applicants argued that the measures concerned were not prescribed by law. In both cases, however, the Court argued that the bans were based in jurisprudence of the national courts and were thus to be considered prescribed by law (*Leyla Şahin v. Turkey*, §§ 88, 98; *Dogru v. France*, §§ 56-58). By 2004, well before the judgment in the *Dogru* case was delivered, but after the events of the case took place, the French legislature had adopted a general ban²⁴ on the wearing of religious signs (*Dogru v. France*, §§ 30-31, 50; *Aktas v. France*, page 7). The case of *Aktas v. France* concerned the consequences of this ban. As this ban was provided by statutory law, the legal base was not in question for the Court (p. 7).

In all of the cases studied whether or not the measures concerned pursued a legitimate aim provided in the ECvHR was not questioned by the Court. In each of these cases the Court held that the measures concerned primarily or mainly “pursued the legitimate aims of protecting the rights and freedom of others and of protecting public order” (*Leyla Şahin v. Turkey*, § 99; *Dogru v. France*, § 60; *Aktas v. France*, page 7).

²⁴ Law 2004-228 of 15 March 2004 (*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*). Available in French from <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000417977>.

After having concluded that the measures were prescribed by law and in the interest of a legitimate aim, the Court went on to consider whether the measures concerned were necessary in a democratic society. As discussed above, in section 2.4.3, the Court has stated that a measure, in order for it to be necessary in a democratic society, needs to “correspond to ‘a pressing social need’ and be ‘proportionate to the legitimate aim pursued’” (*Silver v. United Kingdom*, cf. Ovey and White, 2006: 232, see section 2.4.3). In the cases concerned the Court did not use this same wording, but it did apply a twofold test with the same structure. For determining whether measures against headscarves were necessary in a democratic society, the Court tested whether they were justified in principle and whether they were proportionate to the aim pursued.

In each of the cases the discussion of whether the measures were proportionate was limited to discussing whether the measures taken to ensure compliance with the headscarf ban were proportionate. For the proportionality requirement it was not discussed whether the headscarf bans were themselves proportionate to the aim concerned (see Gibson, 2007: 610). In each of the cases the Court concluded that the measures were proportionate, mainly referring to a discretion of educational institutes to decide how they enforce their internal rules (*Leyla Şahin v. Turkey*, paragraph 121; *Dogru v. France*, paragraph 75; *Aktas v. France*, pages 9-10).

The heart of the cases studied is found, however, in the discussion by the Court of whether the measures enforcing the headscarf bans, and with that the headscarf bans themselves, were justified in principle. I will discuss this case by case in the following paragraphs.

Leyla Şahin v. Turkey

The measures concerned in *Leyla Şahin v. Turkey* (decided in 2005 [Grand Chamber], concerning events that took place in 1998 and 1999) followed upon an elaborate political and legal debate in Turkish society, that had started in the 1980’s (*Leyla Şahin v. Turkey*, §§ 30-41). This debate was settled by a decision of the Turkish Constitutional Court that the wearing of Islamic headscarves in schools and universities was contrary to the Constitution (§ 41). In this judgment the Constitutional Court argued that allowing Islamic headscarves and veils to be worn in universities would be contrary to secularism and equality (§§ 41, 112).

When considering the justification of this ban in the case of *Leyla Şahin*, the ECtHR accepts the notion of secularism as explained by the Turkish courts, stating that it is consistent with the values underpinning the Convention (§ 114). Next to that the European Court confirms the importance of gender equality as a value underpinning the Convention (§ 115). In that regard the Court refers to its statement in the case of *Dahlab*, which was decided in 2001 and concerned a Swiss primary school teacher who was not

allowed to wear a headscarf. There the Court had stated that wearing an Islamic headscarf was “hard to reconcile” with the gender equality, as well as tolerance and respect for others (*Şahin*, § 111). The European Court accepts the Constitutional Court’s reasoning that the wearing of Islamic headscarves would have an impact on those who choose not to wear it, considering that wearing it would be “presented or perceived as a compulsory religious duty” (ibid.). The Constitutional Court had argued that this presentation of the Islamic headscarf “would result in discrimination between practising Muslims, non-practising Muslims and non-believers” as it would result in those who refuse to wear the headscarf “being regarded as opposed to religion or as non-religious” (§ 39). Beyond that the European Court argued that the prohibition to wear the headscarf could be seen as taking a stance against extremist political movements (§ 115). Following these arguments the European Court accepted the desire of Turkish authorities to uphold the principle of secularism, in the interests of “pluralism, respect for the rights of others, and in particular, equality before the law of men and women”, and thus to ban the wearing of headscarves in universities (§ 116). Even though gender equality was mentioned “in particular”, the judgment does not explain the relation between the ban and gender equality, as noted by judge Tulkens in her dissenting opinion (§ 11)²⁵.

Dogru v. France

In France the debate on the wearing of Islamic headscarves in schools started in 1989. Later that year the French *Conseil d’Etat* stated in an advisory opinion that the wearing of religious signs would not in itself be incompatible with the principle of secularism (which, like in Turkey, has constitutional status in France). Under certain circumstances, however, students would not be allowed to wear religious signs, most notably for reasons of health and safety or when these signs “might constitute a form of pressure, provocation, proselytism or propaganda” (*Dogru v. France*, § 26). Since then the *Conseil d’Etat* had ruled several times on whether internal school rules followed these principles (§ 29).

In the case of *Dogru v. France* (decided in 2008, concerning events that took place in 1999) the Court concluded that the French conclusion that the wearing of a headscarf would be incompatible with sports classes for reasons of health or safety was not unreasonable (§ 73). The Court did not discuss why exactly the wearing of an Islamic headscarf would be incompatible with those classes, but accepted this claim by the French government. The Court did discuss the French notion of secularism and the role of secularism in its own case law (§§ 65-72), given that the French government had argued that the decision to expel the pupil was mainly based on the principles of secularism and gender equality (§ 37). However, when the Court concluded that the ban of the Islamic headscarf during sports classes was reasonable for reasons of health or safety, it did not state how this decision related to secularism or gender equality (§ 73).

²⁵ The dissenting opinion of judge Tulkens is attached to the *Leyla Şahin v. Turkey* Grand Chamber judgment; supra note 3.

Aktas v. France

In 2004 a general ban on the wearing of Islamic headscarves in schools, but not in universities, had been adopted by the French legislator (*Aktas v. France*, pp. 3-5). The cases *Aktas v. France* and others concerned this ban. In these cases the Court accepted that the general headscarf ban was motivated solely by the preservation of the constitutional principle of secularism (“*a été motivée uniquement par la sauvegarde du principe constitutionnel de laïcité*”; p. 9). Relying on its case law in the cases of *Şahin* and *Dogru*, and stating that this principle of secularism was consistent with the values underlying the Convention, the Court concluded that the headscarf ban was justified in principle (pp. 9-10). As discussed above, in the case of *Şahin* the discussion of secularism was accompanied by arguments of gender equality and the protection of rights of others. These arguments had a less significant place in the *Aktas*, but were not fully abandoned. The Court in this regard referred to its discussion of the French notion of secularism in paragraphs 68-72 of *Dogru*. Here it had argued that the French secular model appears to have answered the task of a state to ensure that “the manifestation by pupils of their religious beliefs on school premises did not take on the nature of an ostentatious act that would constitute a source of pressure and exclusion”.

To sum up the case law presented above, both in the case of *Leyla Şahin v. Turkey* and in the case of *Aktas v. France*, the Court finally considered the measures targeting headscarves justified because they were reasonably necessary for protecting secularism. In doing so the Court accepted the Turkish and French choices for strict notions of secularism. Although in *Dogru v. France* the notion of secularism was discussed in a similar way, in this case reasons of safety finally justified the bans on headscarves during sports classes.

3.1.4 The significance of the headscarf

Many authors have criticized the reasoning of the European Court presented above. Particularly they have commented on the way the Court has interpreted the significance and the meaning of the headscarf. The Court’s arguments were called, amongst others, “imbalanced” (Gibson, 2007), based on “stereotypes” (Evans, 2006) and “not convincing” (Rorive, 2009: 2682).

These commentators have argued, after the case of *Şahin*, that the Court too easily accepted the view of the Turkish courts on the significance of the Islamic headscarf. Gibson (2007: 602) criticizes the Court for not subjecting this view on the headscarf to any critical analysis. Evans (2006, § V) argues that the Court relied solely on stereotypes when assessing the meaning of the headscarf. The argument that the wearing of Islamic headscarves would be contrary to gender equality was used without considering diverse

views on whether or not the headscarf would indeed be contrary to gender equality. As Gibson (2007: 603) points out “it is simplistic to assume that all women who choose to wear [an Islamic headscarf] do so without having exercised free choice, or in order to influence other women to do the same”. Rorive (2009: 2683-2684) points out that current sociological studies have highlighted ambiguous and plural meanings of the headscarf, and criticizes the Court for not considering these. Judge Tulkens also pointed to a variety of meanings of the headscarf in her dissenting opinion, stating that “there are those who maintain that, in certain cases, [wearing the Islamic headscarf] can even be a means of emancipating women” (§ 11). It is problematic, according to Gibson (2007: 602, 605) not so much that the Court adopted the Turkish courts’ view on the headscarf, but that it did so without even *considering* alternative views on the Islamic headscarf.

Indeed, no evidence was presented in the case of *Şahin* that her wearing of the Islamic headscarf would either be contrary to gender equality or promoting extremist movements. The Court did consider that in Turkey “certain fundamentalist religious movements” exist (§ 115). However, as Altiparmak and Karahanoğullari (2006: 279-280) point out the Court fails to distinguish between those movements and women who wear a headscarf. Any evidence that the applicant sought to influence others by wearing the headscarf lacked (Gibson, 2007: 608). As Judge Tulkens puts it in her dissenting opinion, “[n]ot all women who wear the headscarf are fundamentalists and there is nothing to suggest that the applicant held fundamentalist views” (§ 10).

As I pointed out in section 3.3 above, in the cases of *Dogru* and *Aktas* the Court relied less on the arguments of gender equality and the right of others and more on secularism in and of itself. Yet, also in these cases one argument was that the wearing of religious symbols could “constitute a source of pressure and exclusion” (*Dogru*, § 71). Like in *Şahin* a discussion of whether in these cases the wearing of a headscarf would indeed result in pressure and exclusion lacked.

3.1.5 Secularism and the margin of appreciation

As discussed in section 3.1.3, the desire to uphold secularism (in its strict sense, so understood in the Turkish and French traditions) has been of prime importance in the Court’s reasoning in the cases presented. The Court has traditionally had the view that states are to be given a broad margin of appreciation where issues of relations between religion and the state are at stake (Evans, 2001: 143). It seems that this broad margin of appreciation in these issue has led the Court to accept the upholding of strict secularism as the central argument in the cases at hand. As often before, the Court stated in the cases of *Şahin* (§ 109), *Dogru* (§ 63) and *Aktas* (p. 8) that:

“Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance.”

On the issue of religious symbols in education, the Court comparatively analysed the law across European states (*Şahin*, §§ 55-65), and concluded that there was much diversity in approaches to this issue (*Şahin*, § 109; *Dogru*, § 63). For this reason states were granted a particularly broad margin of appreciation with regard to regulating religious dress (*ibid.*). The Court did state that this margin of appreciation would go hand in hand with European supervision (*Şahin*, § 110). It exercised this supervision through the discussion on whether headscarf bans were justified in principle, which I presented in section 3.3.3 above. Yet, as becomes clear from a wide range of criticism, of which I presented part in section 3.4, this supervision remained limited. Though many have criticised this limited nature of the Court’s supervision in these cases, it seems to me that the Court has consciously chosen to limit its supervisory role, having regard to the wide margin of appreciation. The Court’s caution in this regard is understandable, seeing that, as Brems (2006: 128) puts it, the Court “does not want to impose on the 45 member states of the Council of Europe a uniform model for regulating the relationship between Church and State”.

The Netherlands, however, does not adhere to the same notion of strict secularism as Turkey and France do. Thus it is relevant to see whether the Court has applied the same caution in cases where the state at hand does not use the same strict notion of secularism used in the Turkish and French traditions. Illustrative in this regard is the recently decided case of *Lautsi and others v. Italy*²⁶. This case concerned the compulsory display of crucifixes in Italian state schools. The Italian courts had concluded that the display of crucifixes was not against the principle of secularism (*Lautsi and others v. Italy [GC]*, §§ 15-16), a principle which the Italian courts clearly ascribed a less strict meaning to than the Turkish Constitutional Court. Before the ECtHR the applicants argued that Italy had breached article 2 of protocol 1 ECvHR and article 9 ECvHR because of the displayed crucifixes. Article 2 of protocol 1 provides the right to education and states that “the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”.

The Chamber agreed with the applicants. It considered that “the compulsory display of a symbol of a particular faith [...] restricts the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe” (*Lautsi and others v. Italy [C]*, § 57). It concluded that this practice was “incompatible with the State's duty to respect neutrality in the exercise of public authority,

²⁶ *Lautsi and Others v. Italy* (30814/06). 18 March 2011; Grand Chamber Judgment.

particularly in the field of education” (ibid.)²⁷. The Grand Chamber, however, disagreed with this Chamber ruling and concluded that the display of crucifixes was allowed within Italy’s margin of appreciation (*Lautsi and others v. Italy* [GC], § 69). It stated that the Court had to respect the choices of the state with regard to the place of religion, as long as this did not lead to indoctrination (§ 70). Arguing that in the present case Italy had acted within this limit, the Grand Chamber of the Court concluded that Italy had breached neither article 2 of protocol 1 ECvHR nor article 9 ECvHR. According to Malcolm Evans (2011) the most important point in this judgment was that the state does not have to make the public realm a “religiously neutral space” in order to fulfil its duty of neutrality and impartiality. Judge Power, concurring, went even further, stating that a “truly pluralist education involves exposure to a variety of different ideas including those which are different from one's own”²⁸.

Bringing together this approach in *Lautsi* with the approach in *Şabin, Dogru* and *Aktas*, it can be concluded that the Court has been willing to provide a broad margin of appreciation in issues of relations between religion and the state, both when the state at hand uses a strict notion of secularism and when it does not.

3.1.6 Conclusion

To sum up those cases in which the European Court of Human Rights has dealt with questions concerning the wearing of Islamic headscarves in education, the Court has since 2005 consistently concluded that bans on the wearing of Islamic headscarves constitute an interference with freedom of religion. It has however also concluded that such bans were allowed in the cases concerned, on the basis of the requirements to limitations set out in article 9 ECvHR.

In the conclusions of the Court that headscarf bans were allowed, upholding national notions of secularism was central. In all three cases studied in detail, *Leyla Şabin v. Turkey*, *Dogru v. France* and *Aktas v. France*, the defendant states were applying a strict understanding of secularism to justify the headscarf bans. Though the Court’s acceptance of the ban in *Dogru v. France* was based in reasons of health or safety, in *Leyla Şabin v. Turkey* and *Aktas v. France* upholding secularism was accepted as the ‘sole motivation’ (*Aktas*, p. 9) or the ‘paramount consideration’ (*Şabin*, § 116) underlying the bans.

In those cases the Court concluded that the desire to ban Islamic headscarves from education could be ‘considered necessary in a democratic society’. As pointed out in section 3.4 the Court’s analysis of the arguments by the defendant states was of a limited

²⁷ For a commentary on this approach by the Chamber (before the Grand Chamber judgment had been delivered), see Mancini (2010).

²⁸ The concurring opinion of Judge Power is attached to the *Lautsi and others v. Italy* Grand Chamber judgment; supra note 26.

nature. It is likely however that the Court has consciously limited itself to discussing whether the arguments brought forward by the defendant states were reasonable. The Court has chosen to provide a wide margin of appreciation “where questions concerning the relationship between State and religions are at stake” (*Şahin*, § 109; *Doğru*, § 63; *Aktas*, p. 8). In the cases studied this wide margin of appreciation has been applied to accept the Turkish and French strict notions of secularism. With this the supervisory role of the ECtHR was limited to establishing whether the measures resulting from this were somewhat reasonably justified. In *Aktas* the arguments justifying the ban were thinnest, but the ban was considered justified anyway, given that the French secular model would answer the desire that the display of religious symbols would not “constitute a source of pressure and exclusion”.

Given that the Court has so easily accepted strict secularism as central in justifying the headscarf bans, one could expect that the Court is promoting the Turkish and French notions of strict secularism. I believe that that would not be the appropriate conclusion. Considering the case of *Lautsi v. Italy* clarifies that the Court does not impose an own notion of secularism, but is willing to accept national models of relations between the State and religions. Still preserving some limited supervision the Court accepts national choices on this relation, both when they concern strict secularism and when they do not. In the cases concerned on headscarf bans the national choice was one of strict secularism and the Court accepted the bans as being reasonably justified on that basis.

By following this approach the Court has chosen what might be called a pluralist regime of religious freedom protection. The Court accepts diversity across the member states of the Council of Europe on the place of religion in the public sphere. The Court still retains some supervision considering national measures in the light of the choices made nationally in this regard. In this sense I can only agree with what Brems (2006: 129) concluded after the case of *Şahin* (before the Court had decided on the cases of *Doğru*, *Aktas* and *Lautsi*): “For now the conclusion must be that in Europe, the approach to cultural diversity (in education as elsewhere) is itself subject to cultural diversity”.

Loenen (2008: 320) has displayed her doubts on this approach, arguing that it “could mean that the European Court allows freedom of religion to mean something fundamentally different between European countries”. However, even though the supervision of the Court seems surprisingly limited, this approach might be the only way of combining respect for a variety of national choices on church-state relations and not fully giving up European supervision. Indeed, broad political and social debate across Europe may be more appropriate for deciding on a clearly divisive issue as the place of religious pluralism in education than a decision by the ECtHR.

3.2 DUTCH LEVEL

3.2.1 Overview

Section 2.2 discussed the Dutch legal framework on issues of equal treatment. In the present section I will present the jurisprudence of both the CGB and the courts on bans on Islamic headscarves in schools. Since 1999 the CGB has dealt with these cases a number of times. Next to this, the courts have dealt with a headscarf ban in a school only in one case. As jurisprudence of the courts is only so limitedly available, the decisions by the CGB will necessarily be central in this chapter. Unless specifically noted, I refer to the body of jurisprudence of both the courts and the CGB when referring to the jurisprudence.

In this body of jurisprudence three main streams of case law can be distinguished. Firstly there are those cases in which a headscarf ban was instituted by a private school in order to implement the special founding principle of that school. These cases will be discussed in section 3.2.2. Secondly there are those cases in which a headscarf ban was instituted by a public school, or by a private school for other reasons than for implementing special founding principles. This includes, on the one hand, those cases in which the headscarf ban referred directly to the religious character of the headscarf concerned, and, on the other hand, those cases in which a headscarf ban was rooted in other reasons than religion, for example reasons of safety. These cases will be discussed in section 3.2.3.

3.2.2 Bans realizing the special founding principle of a school

The CGB has dealt with bans on the wearing of Islamic headscarves that were motivated by the aim to realize a special founding principle of a school a number of times. Once such a case has also been brought before court, the case of the Catholic secondary school *Don Bosco*, decided in 2011 by the District Court of Haarlem²⁹ and in appeal by the Court of Appeal of Amsterdam³⁰. Firstly I will discuss the jurisprudence of the CGB and secondly I will discuss the courts' decisions in the *Don Bosco* case.

In each of the cases concerned in this section the CGB concluded that the headscarf bans concerned constituted direct differentiation. In cases 2003-112³¹, 2007-61³² and 2011-2³³,

²⁹ Rechtbank [District Court] Haarlem (4 April 2011), *X v. Stichting Katholiek Onderwijs Volendam (Don Bosco)*. Available from rechtspraak.nl.

³⁰ Gerechtshof [Court of Appeal] Amsterdam (6 September 2011), *X. v. Stichting Katholiek Onderwijs Volendam (Don Bosco)* in: *Nederlandse Jurisprudentie Feitenrechtspraak* 2011, 400

³¹ CGB decision 2003-112 (ban on all non-Catholic religious clothing by a Catholic secondary school). Available from <http://cgb.nl/oordelen/oordeel/219621>.

³² CGB decision 2007-61 (proposed ban on all non-Protestant religious clothing by a Protestant Christian primary school). Available from <http://cgb.nl/oordelen/oordeel/214594>.

the private schools at hand, either Catholic or Protestant Christian ones, banned Islamic headscarves, as well as, to some extent, other religious symbols, for upholding the Catholic or Protestant Christian characters of the schools. It was considered that these bans directly related to religion and that they therefore constituted direct differentiation on the ground of religion. Likewise a ban on all types of religious symbols by a neutral private school was considered to constitute direct differentiation on the ground of religion in case 2005-19³⁴.

In principle the schools concerned could invoke the special exception for private schools, as this exception applies to both direct and indirect differentiation. In cases 2003-112 and 2007-61 the CGB concluded that the differentiations concerned were not prohibited because they were covered by the special exception for private schools. In cases 2005-19 and 2011-2, however, the CGB concluded that the differentiations were not covered by this special exception for private schools.

As discussed in section 2.2.3 above, the CGB applies a number of criteria to see whether or not the exception for private schools covers the differentiation concerned. The differentiation must be necessary to realize the special founding principle of the school. According to the CGB this applies only to special founding principles that have been laid down in the articles of association of the school concerned. In case 2005-19 the neutral character of the private school was not found in the articles of association of that school and thus the CGB concluded that the exception did not apply (CGB decision 2005-19, § 5.9). Furthermore the CGB has argued that the exception applies only if the private school concerned consistently applies its special founding principle. In case 2011-2 (*Don Bosco*) the CGB concluded that the Catholic secondary school concerned did not fulfil that requirement and thus it concluded that the exception did not apply. The CGB did not deny that the school had a Catholic character, but it argued that the school did not fulfil the requirement of consistency because the school had, at first, not stated that the ban on headscarves related to the aim of upholding the Catholic character of the school (CGB decision 2011-2, § 3.27-3.30). In both cases 2005-19 and 2011-2 the CGB thus concluded that the schools concerned had breached the AWGB's prohibition on differentiation.

In case 2011-2 the Catholic school concerned did not agree with the CGB decision and it upheld the ban on the Islamic headscarf. Thus this case became the first Dutch court case on a headscarf ban in education. Both the District Court of Haarlem and the Court of Appeal of Amsterdam³⁵ came to a different conclusion than the CGB. The District Court only motivated its decision shortly, but the Court of Appeal's judgment gives more

³³ CGB decision 2011-2 (ban on all head coverings, including religious ones, by a Catholic secondary school).

Available from <http://cgb.nl/oordelen/oordeel/221530>. This case was later brought to court, supra notes 29 and 30.

³⁴ CGB decision 2005-19 (ban on all religious symbols by a special neutral primary school). Available from <http://cgb.nl/oordelen/oordeel/213266>.

³⁵ Supra notes 29 and 30

insight. This court applied the criterion of consistency in a less strict way than the CGB had done. The court argued that it mainly had to determine whether the school did not act randomly by treating some students differently from its standing policy (*Don Bosco [Gerechtshof]*, § 3.7). It concluded that, since the school found the headscarf ban to be necessary for upholding the Catholic character of the school, the school was allowed to institute this ban (§ 3.10). The fact that the school had at one time stated that the ban did not relate to religion was not considered sufficient to constitute a breach of the law (§ 3.25). The court did not consider whether the measure actually constituted direct differentiation, it solely concluded on the basis of the exception for special schools that this measure did not breach the law.

Overall the CGB takes a rather strict approach in the application of the exception for private schools. The Amsterdam court on the other hand takes a much less strict approach. The CGB in all of these cases considered that headscarf bans constituted direct differentiation, even if other religious symbols were equally targeted. As such the exception for objectively justified differentiation could not be applied, since that exception can only be applied to indirect differentiation. It remains to be seen whether or not the courts agree with the CGB's reasoning that headscarf bans constitute direct differentiation and that thus the exception for objective justification cannot be invoked.

3.2.3 Other bans

Beyond the cases discussed above there have been some cases in which schools instituted headscarf bans motivated by other reasons than the realization of a special founding principle. Most of these bans were motivated by some kind of neutrality argument, whilst one case was motivated by a safety argument. To my knowledge such cases have not been brought before court in the Netherlands and thus the present discussion will be limited to the jurisprudence of the CGB.

Neutrality arguments

In 1999 the CGB decided on two cases concerning the wearing of headscarves by trainees at public primary schools. In both cases the CGB concluded that the school at hand had directly differentiated, in case 1999-18 by not allowing a trainee to wear a headscarf in the classroom and in case 1999-103 by not offering the applicant a position as a trainee because she wore a headscarf. As public schools the schools at hand could not invoke the exception for private schools. They could not invoke the exception for objectively justified differentiation either, because that exception is only provided for indirect differentiation. Thus the differentiations were considered in breach of the AWGB.

The schools both had tried to use the arguments of upholding neutrality and protecting students to defend the headscarf bans. These are the very same arguments that were used

by the defendant states in the cases of *Leyla Şahin v. Turkey* and *Aktas v. France*³⁶ before the European Court of Human Rights. In the cases at hand however, the CGB did not accept these arguments.

In case 1999-103 the CGB, beyond some case-specific circumstances, dealt with the argument that the measures against the wearing of Islamic headscarves by teaching personnel were necessary to uphold the neutrality. The CGB did not accept this strict notion of neutrality. The principal of the school at hand had argued that public education needs to be as accessible as is possible and therefore neutral. The CGB argued that the fact that the applicant manifested her religion by wearing a headscarf would not necessarily be contrary to neutrality. The school would have been allowed to ask the applicant whether she had the required neutral attitude. Assuming the applicant could not fulfil the requirement of neutrality, solely because she wore a headscarf, however amounted to direct differentiation on the ground of religion. It was not considered whether the wearing of a religious symbol by a teacher could in itself, apart from the attitude of the teacher concerned, be contrary to neutrality. The consideration that the applicant was treated differently on the basis of a manifestation of her religion was considered sufficient to conclude that the school breached the AWGB.

Similarly, in case 1999-18 the defendant school argued that it was reasonable to expect an open attitude from teaching personnel and also that the wearing of an Islamic headscarf could be implicitly threatening to other Muslim women and girls. The CGB did not reject that a public school would be allowed to demand an open attitude from its personnel. The school at hand would have been allowed to ask the applicant whether she had this open attitude, but it could not assume that the applicant did not have this open attitude solely on the basis of the wearing of a headscarf. According to the CGB, the school assumed that the applicant manifested a certain undesirable religious conviction by the wearing of a headscarf. The CGB thus concluded that the school had directly differentiated on the ground of religion and had thus breached the AWGB. As the exception for objectively justified differentiation only applies to indirect differentiation, it was not considered whether the differentiation at hand was justified by the argument that the wearing of a headscarf was implicitly threatening to pupils.

Though the discussions of the neutrality argument remains limited in both cases, the cases make clear that the CGB refuses to accept arguments of strict neutrality to justify bans on headscarves in public schools. The CGB accepts a need for neutrality in public schools through allowing school to require teaching personnel to have an open or neutral attitude. It does not accept that neutrality means that religious convictions cannot be manifested. This view of upholding neutrality whilst also giving space to religious manifestations is

³⁶ Supra notes 3 and 21

expressed by the CGB more explicitly in case 2001-53 on a court cleric who wanted to wear a headscarf during court sessions³⁷.

In that case the applicant was not hired as a court cleric by the District Court of Zwolle because she did not want to remove her headscarf during court sessions. Because this measure was rooted in a rule prescribing the clothing of court officials, which prohibited any kind of head covering by court officials, the CGB considered it constituted indirect, not direct, differentiation (§§ 4.6-4.7). Neutrality was the main argument behind these clothing requirements, which allowed the CGB to consider the neutrality argument under the clause that allows for objectively justified indirect differentiation. The CGB concluded that the neutrality of the judiciary was a legitimate aim. It went on to consider, however, that the measure to ban anyone wearing a headscarf from a position as a court cleric was disproportionate and unnecessary, particularly since a court cleric does not have the position of a judge, but only a supporting function (§ 4.13). Beyond this, the CGB argued that strict clothing requirements were not the only way to uphold the neutrality and impartiality of the judiciary. In a multicultural society such aims could also be achieved through pluralism instead of uniformity (§ 4.15). The CGB thus explicitly set out a view of neutrality achieved through pluralism instead of strict neutrality.

Safety argument

More recently case 2011-95 was brought before the CGB. In this case a pupil was not allowed to wear a sports headscarf during sports classes at an interconfessional secondary school³⁸. Even though the school at hand was a private school, it was not argued that the ban during sports classes related to the school's special founding principle. As such the school was treated like a public school for the purposes of the case. The school argued that the prohibition to wear headscarves, including sports headscarves, during sports classes was based on considerations of safety and thus objectively justified. The CGB accepted that the aim of the measure at hand was to ensure safety (§ 3.11). It also considered that safety, specifically the elimination of a risk of accidents, is a sufficiently weighty and in itself non-discriminatory aim (§ 3.12). Having concluded that the aim fulfilled these requirements, the CGB went on to consider whether the measure was suitable (§ 3.13). Even though the case at hand did not concern a regular headscarf, but a sports headscarf designed to eliminate security risks of regular headscarves, the school had concluded that this sports headscarf too was not safe enough (§ 3.11). The applicant (the pupil's father), however, argued that a sports headscarf was safe. He defended this claim with a report by independent research institute TNO (§ 3.16). As this report concluded that the sports headscarf the applicant proposed to use was sufficiently safe, and as no accidents with sports headscarves were known, the CGB concluded that the

³⁷ CGB decision 2001-53 (clothing requirements banning any kind of head covering and any sign of personal conviction by the District Court of Zwolle). Available from <http://cgb.nl/oordelen/oordeel/218438>.

³⁸ CGB decision 2011-95 (ban on headscarf during sports classes for reasons of safety by a secondary school). Available from <http://cgb.nl/oordelen/oordeel/222104>.

prohibition to wear even a sports headscarf during sports classes was not suitable to achieve the aim of safety (§§ 3.17-3.19). On that basis the CGB concluded that the differentiation concerned was not objectively justified and therefore in breach of the AWGB (§§ 3.19-3.20). The CGB did accept that an argument of safety could objectively justify differentiation, but concluded that the argument had not justified the differentiation in the present case.

3.2.4 Conclusion

In the cases discussed the CGB has consistently prohibited headscarf bans in public schools. At times it has allowed such bans in private schools, but only after applying the relevant criteria strictly. The Amsterdam court on the other hand applied these criteria less strict in the *Don Bosco* case. In case 2011-95 the CGB did accept that a safety argument could in principle objectively justify a headscarf ban, even though in that case this argument did not succeed. In cases 1999-18 and 1999-103 the CGB did not accept that neutrality related arguments could objectively justify a headscarf ban. In these cases the CGB did not apply the exception for objectively justified indirect differentiation, because the measures at hand were considered direct differentiation. A discussion of case 2001-53 shows, however, that this classification as a direct differentiation could very well be contested. As of yet the CGB has refused to treat headscarf bans in schools as indirect differentiation in order to treat them under the provisions for objective justification. To some extent the CGB has discussed neutrality arguments, but always rejected them. Most clearly the CGB did not accept the strict understanding of neutrality presented in case 1999-103. In case 2001-53 it alternatively argued that neutrality could be achieved through active pluralism. The strict approach of the CGB throughout its case law points also towards the conclusions that the CGB greatly prioritizes equal treatment over other interests. This may not at all be surprising from a Commission that was specifically set up for equal treatment issues.

3.3 DIFFERENT PERSPECTIVES, DIFFERENT OUTCOMES

Taking a step back for a comparison between the jurisprudence discussed in sections 3.1 and 3.2, it has to be concluded that the issue of the wearing of Islamic headscarves in education has been approached from different perspectives; both between the two levels studied, of the Netherlands and the Council of Europe, and in comparison with the Turkish and French situations. In comparison between Turkey and France on the hand and the Netherlands on the other, these different perspectives have resulted in two contrary outcomes. It seems that both outcomes are allowed under the European Convention, within the margin of appreciation provided by the European Court of Human Rights.

On the Dutch level the issue has been dealt with from the perspective of equal treatment. This meant not only that the issue was considered under the provisions of the General Equal Treatment Act, but also that in these considerations equal treatment was considered the primary value that was to be protected, at least in the jurisprudence of the Equal Treatment Commission. Space for exceptions was narrow. Attention to the neutrality argument was very limited. As far as it was discussed the notion of neutrality was a pluralistic one, not allowing neutrality to limit religious manifestations of either teachers or students.

On the Turkish and French levels, at least in those cases that were brought to the ECtHR and thus studied in the present thesis, the issue has been dealt with from the perspective of secularism. In both states secularism was considered the primary value that was to be protected. Here space for exceptions to secularism was narrow and attention to the rights and freedoms of those manifesting their religion by wearing a headscarf was limited.

On the level of the Council of Europe, in the case law of the European Court of Human Rights, the issue was dealt with from a perspective of freedom of religion. The European Court did allow for rather broad exceptions to freedom of religion in the light of the wide margin of appreciation that it provided to states. The European Court's conclusions in the French and Turkish headscarf cases might have been interpreted as expressing a preference for strict secularism. It becomes clear after studying the Italian crucifix case, however, that the European Court more generally gives space to reasonable arguments by states on their choices on the relationship between religions and the state.

4. RELATIONS BETWEEN RELIGIONS AND THE STATE

4.1 INTRODUCTION

In section 3.1.6 it was concluded that the European Court of Human Rights has taken a pluralist approach to the protection of religious freedom by accepting national models of relations between religions and the state through a wide margin of appreciation. In that light the European Court accepted that Turkish and French strict notions of secularism justified the headscarf bans in the cases of *Leyla Şahin v. Turkey* and *Aktas v. France*. Before doing so the European Court had elaborately discussed in the cases of *Leyla Şahin v. Turkey* and *Dogru v. France* how the headscarf bans concerned were indeed rooted in Turkish and French secularist traditions. A number of studies confirm this conclusion.

Some have compared more and less strict notions of secularism. Kuru (2007) makes a distinction between “passive secularism” and “assertive secularism”, describing the

United States as an example of the first and Turkey and France as examples of the latter. He describes these two understandings of secularism as follows.

“Passive secularism, which requires that the secular state play a ‘passive’ role in avoiding the establishment of any religions, allows for the public visibility of religion. Assertive secularism, by contrast, means that the state excludes religion from the public sphere and plays an ‘assertive’ role as the agent of a social engineering project that confines religion to the private domain.” (p. 571)

Following Kuru’s categorization, the Netherlands would fall into the latter category. Arguing that it is an example of passive secularism would however be insufficient to describe the Dutch model of religions-state relations. Introducing the Dutch model of religions-state relations in some more detail is relevant here, because of the wide margin of appreciation the European Court gives to states in this regard. Still this discussion can only be introductory for reasons of time and space. A full description of the Dutch model would require further research.

4.2 A DUTCH ACCOMMODATIVE MODEL

Van Bijsterveld (2010: 31) has described the Dutch system of religions-state relations as “an open system, a ‘positive neutrality’ that is friendly and tolerant towards churches and other religious organizations”. Specifically to the Dutch system is the Dutch tradition of accommodation, here referring to a tradition that does not ban religion from the public sphere, but equally accommodates all religions and convictions in the public sphere. Although the roots of this model can be traced throughout Dutch history³⁹, it was most clearly established in the beginning of the twentieth century at the time of pillarization. As Bruinsma and de Blois (2007: 119) summarize it, Dutch pillarized society of the time entailed that

“Political parties and trade unions, schools and universities, broadcasting companies, hospitals and sectors of business life were aligned with the Protestant, the Catholic, the Liberal or the Socialist ‘pillar’. Each pillar had its own elite that maintained moral and social control within, and contact at grass-roots level was restricted to a minimum.”

Lijphart has famously described the Dutch political system of the time as the ‘politics of accommodation’ (Lijphart, 1975: 103-104). In this system stability would be achieved through forging consensus in negotiations between the political leaders of each pillar

³⁹ See Bruinsma and de Blois (2007: 118-119)

(ibid.). Given the roles of the Protestant and Catholic pillars, this also resulted in a system that was accommodative towards religion, as can be clearly seen in the 1917 ‘Pacification’ deal. This was a compromise reached by the leaders of the different pillars on a number of issues including the role of religion in publicly funded education. This deal established the current dual educational system, which I introduced in section 2.2.3. Not only does this system provide for equal funding of private religious schools, it is also generally interpreted to ensure positive neutrality in public schools. (Bruisma and de Blois, 2007: 118-121)

Nowadays the Dutch model can still be described as accommodative of religion in the public sphere. Extending Kuru’s categorization the Netherlands may better be described as an example of ‘accommodative secularism’ than as an example of ‘passive secularism’. As Maris (2007: 10) puts it, in the Netherlands equality takes priority over strict state neutrality. In the Dutch notion of state neutrality, “the state guarantees its neutrality by facilitating all religions and convictions in the same way” (Loenen, 2004: 7; own translation). This notion of state neutrality is clearly distinct from French and Turkish notions of strict secularism. Loenen (2004) has argued in favour of this model, calling for a wide accommodation of religions in what she calls ‘a multicultural public sphere’.

It is doubtful, however, whether recent Dutch political responses to religion in the public sphere are still in line with an accommodative approach. For example the CGB decision against the banning of the wearing of headscarves by court personnel in case 2001-53 was since overruled by the Dutch government (Maris, 2007: 10). More recently a ban on publicly wearing a burqa was instituted (Rijksoverheid, 2011a). Recent policy documents by the Dutch government explicitly stated that “multiculturalism has failed” (Rijksoverheid, 2011b: 1). These trends point to a rejection of the accommodative model. However, as these trends have not been reflected in the jurisprudence discussed in section 3.2, they will not be discussed further in this work.

The jurisprudence seems very much in line with the accommodative model discussed above. As concluded in section 3.2.4, in cases concerning the Islamic headscarf in education, the CGB has always prioritized the equal treatment of religion over other interests such as neutrality. As far as the CGB discussed neutrality it did not accept an assertive understanding of neutrality, but rather a pluralistic one. As such it seems appropriate to conclude that the CGB supports the accommodative model discussed above. That conclusion can at this time only be tentative, as my discussion of the Dutch model of religions-state relations has only been introductory and as my discussion of CGB jurisprudence has been limited to cases concerning the Islamic headscarf in education. It would require further research to find out whether the accommodative model is present in Dutch legal culture at large.

5. CONCLUSIONS

In order to answer my main question, to which extent similar principles have been applied in Dutch and European jurisprudence on the Islamic headscarf in education, a number of points have to be made.

- Firstly the departure points used on both levels differed in the sense that European jurisprudence approached the issue from a perspective of freedom of religion, whereas Dutch jurisprudence approached the issue from a perspective of equal treatment (see section 2.3).
- Furthermore, the conclusions reached on both levels also differed widely. The European Court of Human Rights consistently allowed the headscarf bans in the cases discussed (see section 3.1.3). The CGB, contrarily, usually struck down headscarf bans, always prohibiting them in public schools and only allowing them in private schools after a strict application of the criteria for this (see section 3.2.4).
- In the reasoning of the European Court a strict interpretation of the principle of secularism (and thus neutrality) was central in concluding that the headscarf bans were allowed. The CGB on the other hand did not accept that neutrality arguments could justify headscarf bans. Instead the CGB prioritized equal treatment over such arguments. As far as the CGB did discuss neutrality, it preferred a pluralistic understanding of neutrality over an assertive understanding of it.

As such the principles applied in the cases discussed on both levels are highly dissimilar. In the European cases secularism was the central argument, whereas in the Dutch cases equal treatment was the central argument. It would however be more appropriate to see this difference as a difference between Turkey and France on the one hand and the Netherlands on the other hand, than as a difference between the European and Dutch levels. Through accepting the argument of secularism, the European Court did not express a preference for strict secularism, but rather this acceptance was a consequence of the wide margin of appreciation the European Court provides states on issues of religions-state relations (see section 3.1.5).

Thus, in the Turkish and French cases that were brought before the European Court strict neutrality rooted in a secularist tradition was central. In the Dutch cases discussed equality rooted in an accommodative tradition was central. The European Court, however, does not make a choice for any model of religions-state relations, but instead takes a pluralist approach, accepting diversity across Europe (see section 3.1.6).

Altogether, the principles applied in the Turkish and French cases before the European Court clearly differed from the principles applied in Dutch jurisprudence. This does not

signify, however, that the Dutch preference for equal treatment is contrary to the jurisprudence of the European Court. Instead it signifies that the European Court accepted Turkish and French national models of religions-state relations, following a pluralist approach to the protection of religious freedom. In that sense the Dutch approach is just as much in line with the jurisprudence of the European Court as the Turkish and French approaches, as the European Court allows for national decisions on the relations between religions and the state.

Directions for further research

In the light of the findings of this work, a number of issues could be subject to further research. In section 4 I have related the jurisprudence in the cases studied to national models of religions-state relations. That discussion has however been of a limited nature only. It could be studied in more detail how national traditions of religions-state relations across Europe relate to approaches in the national bodies of jurisprudence⁴⁰.

Furthermore the conclusion that the European Court has chosen a pluralist approach to the protection of religious freedom, leads to a normative question. Is it appropriate that such issues of fundamental rights are decided at least partly on the basis of national traditions? The European Court of Human Rights seems to allow this to some extent, providing a wide margin of appreciation whilst retaining a limited amount of supervision.

Beyond this it would be interesting to see how diversity across Europe in religions-state relations can be related to other issues of European integration and governance. Questions that are open for discussion could include whether allowing this pluralist approach could cause problems for the process of European integration and whether this approach is compatible with the idea of an emergent European society. A broad exploration of those areas in which European governance touches upon questions of relations between religions and the state would be a valuable starting point for finding answers to such questions.

⁴⁰ Possibly, as the study by Bruinsma and de Blois (2007) suggests through the factor of legal culture.

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