The Jurisprudence of the European Court of Human Rights on *Sharia* Law[1]

Angelika Nußberger and Rike Sinder

Abstract
Islam and *sharia* are central topoi in the jurisprudence of the European Court of Human Rights. Their importance is ever more increasing. Diverse factors contribute to this development, among them migration, Islamism and the growing number of Member State laws regulating religious dress, be it in public space, be it in the workplace or in schools. The European Court of Human Rights has thus been charged with the elaboration of a nuanced and sophisticated jurisprudence vis-à-vis Islam and *sharia* not only with regard to freedom of religion, but also – and maybe even more so – freedom of expression. Throughout the Court's case law, the high level of respect for the Member States' margin of appreciation in questions concerning the relationship between church and State is just as discernible as is the concern for pluralism and democracy within the Member States of the Council of Europe. Against the background of these competing concerns, the Court has set up a coherent system of human rights protection.

1. Introduction

The human rights protection system elaborated in Strasbourg after World War II defines itself as "European" – it is a *European* Court that interprets a *European* Convention. There has been a controversial political debate about the question of Islam being a part of European culture. Yet, there can be no doubt that the European legal space embraces Islam and *sharia*. Not only is it a majority religion in some of its Member States, but also an important minority religion in many others. Inter-religious dialogue with Islam is not a new phenomenon, but goes back to the roots of the system, not least because Turkey was one of the founding members of

1 This article is based on an elaborate version of an intervention at the Conference in Beirut on "Mapping Constitutional Control in the MENA region. Recent Developments, Challenges and Reform Trends", April 15–17, 2019.

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the Council of Europe. Due to migratory movements and the intensified cultural exchange in a globalised world, the question of how to live up to the ideal of pluralism and tolerance in more and more diverse European societies becomes even more urgent in present times.

It is not always well understood what *sharia* means. Etymologically, the Arabic term *sharia* designates the road to the watering place.[2] In the birthplace of Islam – the desert – this path is doubtlessly an existential one. In the course of history, the term thus came to denote the path to be followed by the believer. In this sense it refers to the rules and regulations governing the lives of Muslims as derived from Quran and *sunna*.[3] For lack of a single authority responsible for the discovery, interpretation and codification of Islamic law, there is a wide variety of (diverse and sometimes even diverging) concepts claiming divine sanction. These concepts originate from different sources: from the individual believer who is, in his opinion at the very least, treading on the path indicated by Allah; from the (Muslim) State that codified Islamic law and wants to see it applied to its citizens be it at home be it abroad; from a group of people claiming religious authority for its action.

The European Court of Human Rights has been confronted with numerous concepts of *sharia* in various contexts and has – over the years – developed a sophisticated and balanced approach to the different notions and elements of Islamic law. When asked to decide upon the application of Islamic personal status laws, the Court gave a general and utmost negative assessment of *sharia* law. This oft-criticized approach has, however, recently been omitted in a judgment in which it could (according to some commentators) have played a role (2.1.2.). An assessment of the jurisprudence on the specific guarantees of the Convention reveals, however, that less general and thus more significant assessments of *sharia* law prevail. Even though the freedom of religion would seem to be the first and foremost point of reference for the Court's assessment of the diverse concepts relating to *sharia* law (2.1.3.), the Court has actually developed its most sophisticated jurisprudence in these matters with regard to the freedom of expression (2.2.1.). When focusing on Article 10 jurisprudence, the wide variety of Islamic concepts that are brought before the Court can be fathomed – and the sophistication of the Court's answers appreciated. In these cases, the Court's jurisprudence on Islam is, in fact, very similar to the one

2 Cf. Abdal-Haqq 2002: 33. Pei 2013 argues that a certain bias could be overcome if Article 9 were considered in conjunction with Article 14.

3 Calder 1997: 321.

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on Christian religions (2.2.2.2.). The diversity of concepts emerging from *sharia* is thus mirrored in the Court's jurisprudence.

2. *The case-law on Muslims and Islamic Law*

2.1. *Scepticism and incompatibilities between the convention philosophy and Islam*

The European Court of Human Rights is frequently discredited as Islamophobic. It is reproached for "contributing to the negative stereotyping of public manifestations of the Islamic faith" and charged with a "simplistic and reductive reading of Islamic rules and traditions".[4] This charge is mostly based upon the Court's general assessment of *sharia* law on the one hand and its jurisprudence concerning the freedom of religion and its application to Islam on the other. The cases cited in support of this allegation are *Dahlab v. Switzerland*,[5] *Leyla Şahin v. Turkey*,[6] *Dogru v. France*[7] and *Refah Partisi (The Welfare Party) and others v. Turkey*.[8]

2.1.1. *Critical assessment of sharia in the political context*

In its oft-quoted *Refah Partisi (The Welfare Party) v. Turkey* judgment from 2003 the Court held that

> "sharia, *which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it.* [...] *It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on* sharia, *which clearly diverges from Convention values, particularly with regard to its criminal*

4 Cebada Romero 2013: 75.
5 *Dahlab v. Switzerland* (decision on admissibility), no. 42393/98, February 15, 2001.
6 *Leyla Şahin v. Turkey* (Grand Chamber of the Court), no. 44774/98, November 10, 2005.
7 *Dogru v. France*, no. 27058/05, December 4, 2008.
8 *Refah Partisi (The Welfare Party) and Others v. Turkey* (Grand Chamber of the Court), nos. 41340/98, 41342/98, 41343/98 and 41344/98, February 13, 2003. A summary of this critique can be found in Power-Forde 2016: 576 –577, and Kayaoglu 2014: 346; Cebada Romero 2013: 83, fn. 39, refers to *Refah Partisi (The Welfare Party) and Others v. Turkey* and *Dogru v. France*.

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> *law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.* […] *In the Court's view, a political party whose actions seem to be aimed at introducing* sharia *in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole convention*."[9]

The Grand Chamber was charged with the question whether the prohibition of a political party propagating a plurality of legal systems – for instance concerning personal status laws – was compatible with the European Convention of Human Rights. *Refah Partisi* had envisaged a system in which some Islamic private-law rules were to be applied to the Muslim population of Turkey. The Court argued that such a system "goes beyond the freedom of individuals to observe the precepts of their religion". It further postulated that such a system "suffers from the same contradictions with the Convention system as the introduction of *sharia*".[10] The freedom of religion was thus considered "a matter of individual conscience […] quite different from the field of private law, which concerns the organisation and functioning of society as a whole".[11]

The *Refah Partisi* judgment has been widely criticized. The "incidental assessment" of Islam was considered "wholly unsatisfactory". It was said to provide "worrying guidance to those countries that look to the European Court as the upholder of fundamental rights and freedoms".[12] The judgment was considered a product of European fear of the establishment of an Islamic regime in Turkey rather than a serious concern for democracy.[13]

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9 *Refah Partisi (The Welfare Party) and Others v. Turkey*, nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 72, July 31, 2001; affirmatively quoted in *European Court of Human Rights* (Grand Chamber of the Court), *Refah Partisi (The Welfare Party) and Others v. Turkey* (Grand Chamber of the Court), § 123; also quoted in *Kasymakunov and Saybatalov v. Russia*, nos. 26261/05 and 26377/06, § 111, March 14, 2013.

10 *Refah Partisi (The Welfare Party) and Others v. Turkey* (Grand Chamber of the Court), § 127.

11 Ibid, § 128.

12 Hughes 2016: 152; see also Kayaoglu 2014: 347–348.

13 Schilling 2004; McGoldrick 2009 criticizes the judgment mainly for its generality that does not pay due attention to the different elements and concepts comprised under the *sharia*-heading.

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2.1.2. Neutral assessment of sharia in inheritance and family law

When Molla Sali lodged a complaint against the Greek application of Islamic inheritance law before the Court, the judgment was thus widely anticipated. The applicant – herself a member of the Muslim minority in Western Thrace – was the widow of a Muslim who had made a will in her favour. The will had been drawn up in accordance with the relevant provisions of the Greek Civil Code. The deceased's sisters then challenged the validity of the will, whereupon the Greek courts decided that Islamic law was applicable in this case due to Greece's international obligations under the Treaties of Sèvres and Lausanne. According to Islamic law, the will was invalid and thus the widow was entitled but to one-quarter of the estate.[14]

Rather than assessing Islamic inheritance law, the Grand Chamber considered the case under Article 1 of Protocol No. 1. It argued that the widow's "proprietary interest in inheriting from her husband was of a sufficient nature and sufficiently recognised to constitute a 'possession'".[15] According to the Court, the Greek decision upholding the application of *sharia* in this particular case interfered with the applicant's rights under Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1: Her situation was relevantly similar to that of a beneficiary of a will made by a non-Muslim testator, but she was nevertheless treated differently on the basis of the testator's religion.[16] The interference could, in the Court's view, not be justified, because the measure was not proportionate to the aim pursued.[17] According to the wording of the Treaties of Sèvres and Lausanne, Greece was not obliged to apply *sharia* law.[18] In this context, the Court adopted a differentiated approach with regard to the application of Islamic law within a framework of legal pluralism. It held with reference to a case concerning the legal status of Alevi in Turkey[19] that

> "*freedom of religion does not require the Contracting States to create a particular legal framework in order to grant religious communities a special*

14 *Molla Sali v. Greece* (Grand Chamber of the Court), no. 20452/14, § 36, December 19, 20018.
15 Ibid, §§ 130–131.
16 Ibid, § 141.
17 Ibid, § 143.
18 Ibid, § 151.
19 *İzzettin Doğan and Others v. Turkey* (Grand Chamber of the Court), no. 62649/10, § 164, April 26, 2016.

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> *status entailing specific privileges. Nevertheless, a State which has created such a status must ensure that the criteria established for a group's entitlement to it are applied in a non-discriminatory manner*."[20]

The Court thus decided the case on the basis of general reflections on discrimination and refrained from referring to prior jurisprudence where *sharia* law on the whole had been found incompatible with the European Convention of Human Rights. Instead, it focused upon the minority's right to free self-identification that was considered to be "of cardinal importance in the field of protection of minorities". In the Court's assessment it was thus not the application of *sharia* law in itself that constituted the interference, but the lack of a voluntary opt-in into ordinary law,[21] that is the "right to choose not to be treated as someone belonging to a minority."[22] Consequently, the Court appreciated the entry into force of a Greek law allowing recourse to a *mufti* in matters of marriage, divorce and inheritance but with the agreement of all those concerned.[23]

Not unlike the (unanimous) *Refah Partisi* judgment the (likewise unanimous) *Molla Sali* judgment gave rise to critical interpretations. One commentator in the French newspaper "*Le Figaro*" argued that the Court had "opened the door towards the application of the *sharia*" on European soil and suggested that the Court's newly revealed prudence with regard to Islam was an answer to Erdoğan's threat to reduce Turkey's financial contributions to the Council of Europe.[24] Yet another commentator considered the decision to "demonstrate a softening of Europe's position vis-à-vis Islam" as it has left the "overheated and fearful post-9/11 environment" behind.[25]

In fact, the *Molla Sali* approach fits better with the other case law concerning elements of Islamic law that has gradually been developed by the Court.[26] For instance, the Court has never expressed reservations against the application of Islamic law when it was called upon as the law of another State in matters of private international law. In *Refah Partisi*, the Court already took note of the fact that *sharia* law can be applied in all Member States of the Council of Europe as a source of foreign law in the event

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20 *Molla Sali v. Greece* (Grand Chamber of the Court), § 155.
21 Ibid, § 157.
22 Raimondi 2019: 8; see also Cerna 2019: 280; see for a critique of this understanding of minority rights McGoldrick 2019: 543–566.
23 *Molla Sali v. Greece* (Grand Chamber of the Court) § 160.
24 Puppinck 2018, translation by the authors.
25 Cerna 2019: 281.
26 For a more solid analysis see Afroukh 2019.

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of a conflict of laws.[27] The Court has thus for instance recognized the Islamic prohibition of adoption. It did not find a violation of Article 8 of the Convention when a Member State opted for the application of *kafāla*[28] to children originating from Muslim States who themselves codified the prohibition of adoption.[29]

2.1.3. Cautious approach to sharia in freedom-of-religion cases

The Court has time and again reiterated that the freedom of religion is "one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned".[30] Yet, it is true that quite a few applications invoking freedom of religion were dismissed with reference to the margin of appreciation doctrine.[31] Due to the strict separation of *forum internum* and *forum externum* and the higher degree of protection afforded to the former,[32] specifically Islamic religious practices can be deprived of the Convention's protective mechanisms.[33]

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27 *Refah Partisi (The Welfare Party) and Others v. Turkey* (Grand Chamber of the Court) § 82.

28 *Kafāla* is the Islamic alternative to adoption. It is a type of legal guardianship for abandoned or orphaned children that does not – in contrast to adoption – establish filiation between the child and the guardian, with repercussions most notably with regard to naturalization procedures and inheritance, see with special emphasis on the French legal situation Boursicot 2010.

29 *Kafāla* is also mentioned in Article 20 of the United Nations Convention on the Rights of the Child, of November 20, 1989. See for *kafāla* in the jurisprudence of the European Court of Human Rights, *Harroudj v. France*, no. 43631/09, October 4, 2012, and *Chbihi Loudoudi and Others v Belgium*, no. 52265/10, December 16, 2014.

30 *Refah Partisi (The Welfare Party) and Others v. Turkey* (Grand Chamber of the Court), § 90; *Kokkinakis v. Greece*, no. 14307/88, § 31, May 25, 1993, and *Buscarini and Others v. San Marino* (Grand Chamber of the Court), no. 24645/94, § 34, February 18, 1999.

31 Kayaoglu thus remarks that the Court did not find a single violation of Article 9 until 1993. Most applications did not even reach the Court as the Commission first rejected them as inadmissible; see Kayaoglu 2014: 347; see for the margin of appreciation ibid, 349; Cebada Romero 2013: 83; see also below, 3.1.

32 Cf. Kayaoglu 2014: 348.

33 This is mainly due to the specific structure of Islam and the importance attributed to religious practice, cf. ibid, 348; see also Carolyn Evans 2010: 167–168.

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The Court has thus consistently upheld headscarf bans.[34] In *Karaduman v. Turkey*, a student who had finished her studies at Ankara University was refused a certificate because she did not want to provide a photograph of herself without a headscarf. The Commission did not even see an interference with Article 9 because the applicant had freely chosen to attend a secular university.[35] When a primary school teacher who had converted to Islam was prevented from wearing a headscarf in class, the Court acknowledged an interference with Article 9, but nevertheless considered the measure to be justified under Article 9 § 2 namely due to the risk of proselytizing.[36] In *Leyla Şahin v. Turkey* a medical school student applied to the Court after she had been banned from wearing the headscarf at university. The Court considered the ban to be necessary in a democratic society as the national authorities find themselves "in principle better placed than an international court to evaluate local needs and conditions".[37] The Court also considered the expulsion of French school girls who refused to take off their veils in physical education classes to be justified.[38] Likewise, the complaints brought before the Court by French secondary school students concerning the ban of the headscarf in French schools were dismissed as manifestly ill-founded.[39] In *Ebrahimian v. France*, the Court did not find a

34 *Karaduman v. Turkey*, no. 16278/90, Commission decision of May 3, 1993; see also *Bulut v. Turkey* (decision on admissibility), no. 18783/91, May 3, 1993.

35 *Karaduman v. Turkey*; see also Cumper and Lewis 2008: 607–608.; Hughes 2016: 136–137.

36 *Dahlab v. Switzerland*; for a critical assessment see Cumper and Lewis 2008: 608–609; Gallala 2006: 600–601; Carolyn Evans considers the "perfunctory treatment" as "common for religious freedom cases brought by religious minorities in Europe", Carolyn Evans 2010: 165. See for a critique of the Court's reasoning Cebada Romero 2013: 96. Concerning university professors, the decision was upheld in *Kurtulmuş v. Turkey* (decision on admissibility), no. 65500/01, January 24, 2006; the application was dismissed as manifestly ill-founded. See for the different *rationes* of the two cases Nigro 2011: 548.

37 *Leyla Şahin v. Turkey* (Grand Chamber of the Court), § 121; see also *S.A.S. v. France*, no. 43835/11, § 129, July 1, 2014; see for a critique of *Leyla Şahin v. Turkey* Gallala 2006: 603–604; Hughes thus talks of an "overly deferential attitude of the Court to state parties' assertions in cases concerning Article 9 of the Convention", Hughes 2016: 144. This jurisprudence stands in contrast in particular to a decision of the UN Human Rights Committee. In *Hudoyberganova v. Uzbekistan*, the Committee held that a headscarf ban imposed upon university students violated the freedom of religion guaranteed by Article 18 of the International Covenant on Civil and Political Rights, CCPR/C82/D/931/2000, January 18, 2005.

38 *Dogru v. France*; *Kervanci v. France*, no. 31645/04, December 4, 2008.

39 *Aktas v. France* (decision on admissibility), no. 43563/08, June 30, 2009; *Bayrak v. France* (decision on admissibility), no. 14308/08, June 30, 2009; *Gamaleddyn v.*

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violation in the non-renewal of a contract for a social worker in a hospital based upon her refusal to take off her headscarf.[40] In 2014, the Grand Chamber upheld the French ban of full-face veils such as *burqa* and *niqab* in all public places.[41] While the majority opinion considered that "living together" could be linked to the legitimate aim of the protection of the rights and freedoms of others,[42] the Dissenting Opinion argued that "living together" did "not fall directly under any of the rights and freedoms guaranteed within the Convention";[43] otherwise restrictions on rights would be virtually unrestricted and could be based on any lifestyle motive. The majority, by contrast, took into account the French government's point that "the possibility of open interpersonal relationships […] forms an indispensable element of community life within the society in question".[44] In 2017, the Court accepted compulsory mixed swimming lessons for students below the age of puberty with the aim of integrating foreign pupils.[45] In fact, until recently the only symbol that was granted the protection of Article 9 was a cross worn by an airline employee because

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France (decision on admissibility), no. 18527/08, June 30, 2009; *Ghazal v. France* (decision on admissibility), no. 29134/08, June 30, 2009; cf. Power-Forde 2016: 585–586. See for a similar reasoning *Köse and 93 Others v. Turkey* (decision on admissibility), no. 26625/02, January 24, 2006. A complaint lodged by a woman who was not authorized to enter the French consulate premises because she had refused to remove her veil for the purpose of an identity check was also dismissed as manifestly ill-founded, *El Morsli v. France* (decision on admissibility), no. 15585/06, March 4, 2008.

40 *Ebrahimian v. France*, no. 64846/11, November 26, 2015; see for a critique of this judgment Garahan 2016.

41 *S.A.S. v. France* (Grand Chamber of the Court), no. 43835/11, July 1, 2014; see for an assessment of the ban Powell 2013, who argues that – in line with the decision in *Ahmet Arslan and Others v Turkey* (no. 41135/98, February 23, 2010) – a full-face veil ban was not in conformity with the Convention.

42 *S.A.S. v. France* (Grand Chamber of the Court), no. 43835/11, §§ 121–122, July 1, 2014; see for a critique Steinbach 2014: 409–410, 428–429; see for a summary of the critique Trispiotis 2016: 581 and 591.

43 *S.A.S. v. France* (Grand Chamber of the Court), Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom, § 5; see for a critique of the notion of "living together" Wade 2018.

44 *S.A.S. v France* (Grand Chamber of the Court), § 122.

45 *Osmanoğlu and Kocabaş v. Switzerland*, no. 29086/12, January 10, 2017; see also Plessis 2018: 523.

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it was considered "discreet and cannot have distracted from her professional appearance".[46]

Furthermore, the Court held in *Kalaç v. Turkey* that the compulsory retirement of military personnel for practicing Islam in a way that conflicted with "an established order reflecting the requirements of military service"[47] did not violate the Convention. The Court argued that "in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account".[48] The Commission had previously decided that a teacher could not reasonably expect to be exempt from working on Fridays when this clashed with his religious obligation to attend the mosque.[49]

Two cases, however, deserve being mentioned in more detail for they break with what so far seemed to be settled case-law. In 2010, the Court finally found a violation of Article 9: In *Ahmet Arslan and Others v. Turkey*, the Court was confronted with a complaint lodged by the members of a (Muslim) religious group called *Aczimendi tarikatı* who had been convicted under a Turkish law banning religious garment in public. The group had met in Ankara in front of a mosque and subsequently walked through the city in October 1996 for the purpose of a religious ceremony. The group members were wearing a turban, black "salvar" trousers and a black tunic and were carrying sticks. While the Court held that the protection of the secular order was a legitimate aim,[50] it argued that the jurisprudence on civil servants could not be taken into account since the applicants were ordinary citizens.[51] It further took note of the fact that the applicants were sanctioned for garments worn in "public places open to all". The

46 *Eweida and Others v. The United Kingdom*, nos. 48420/10, 59842/10, 51671/10 and 36516/10, § 94, January 15, 2013. The wearing of a cross could, however, be limited with a view to protecting health and safety on a hospital ward, ibid, § 99.

47 *Kalaç v. Turkey*, no. 20704/92, § 28, July 1, 1997.

48 Ibid, § 27.

49 *X v. United Kingdom*, no. 8160/78, Commission decision of March 12, 1981. The Court distanced itself from this "freedom to resign"-doctrine in *Eweida and Others v. The United Kingdom*: § 83: "Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate"; cf. Power-Forde 2016: 595–596.

50 *Ahmet Arslan and Others v. Turkey*, no. 41135/98, § 43, February 23, 2010.

51 Ibid, § 48.

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regulation was thus neither limited to public buildings, nor did the applicants proselytize. Rather, the ceremony seemed to be a mere "curiosity".[52] The necessity of the limitation to the freedom of religion in a democratic society was thus not sufficiently substantiated. What sets *Ahmet Arslan* apart from the other headscarf cases (with the exception of the – later – judgment in *S.A.S. v. France*) is that it concerned religious attire worn in the public sphere.[53]

In December 2017, the Court finally found another violation of Article 9 in a case concerning religious dress. The complaint was lodged by an applicant who had been summoned as a witness in a trial concerning members of a local "Wahhabi/Salafi" group who had previously attacked the United States Embassy in Sarajevo. One police officer had been wounded in the attack.[54] For religious reasons, the applicant refused to remove his skullcap[55] before the trial chamber in disregard of an order by its President. He was thus convicted of contempt of court and sentenced to a fine that was later converted to a thirty days prison sentence as the applicant failed to pay the fine. The Court first considered that the case was to be distinguished from cases concerning the wearing of religious symbols and clothing in the workplace. Just as in *Ahmet Arslan*, the applicant was a private citizen, who is "normally not under such a duty".[56] Furthermore, the punishment was considered disproportionate to the applicant's behaviour:

> "*Unlike some other members of his religious group* […] *the applicant appeared before the court as summoned and stood up when requested, thereby clearly submitting to the laws and courts of the country. There is no indication that the applicant was not willing to testify or that he had a disrespectful attitude. In these circumstances, his punishment for contempt*

52 Ibid, §§ 49–50, translation by the authors.

53 Powell 2013: 138; Tulkens 2014: 516; Power-Forde thus considers the decision to be a "shift away from the demands of a strict secularims", Power-Forde 2016: 593.

54 *Hamidović v. Bosnia and Herzegovina*, no. 57792/15, § 6, December 5, 2017.

55 It is, of course, questionable, whether a skullcap is indeed an Islamic symbol. The Court, however, generally refrains from assessing objectively whether a certain manifestation of religion is indeed required by that religion when the applicant says for her or him the issue is of a religious nature; see *The Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, § 92, October 5, 2006: "The Court points out that, according to its constant case-law, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate"; see Malcolm Evans 2010: 348.

56 *Hamidović v. Bosnia and Herzegovina*, § 40.

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> *of court on the sole ground of his refusal to remove his skullcap was not necessary in a democratic society*."[57]

From these two cases a second line of reasoning with regard to Article 9 can be discerned: When limitations on religious dress of ordinary citizens are at stake – outside the work context – the margin of appreciation seems to be rather smaller.

The protection of Muslims' practices and world views within a pluralist society is, however, not only based on freedom of religion. It is worth looking into the Court's jurisprudence on Islam and *sharia* law with regard to other rights and freedoms, in particular freedom of expression, in order to see a fuller picture.

2.2. Openness towards a world view based on Islam

2.2.1. Islam v. Islamism in freedom-of-speech-cases

The Court's jurisprudence on the freedom of expression tries to draw a line between those (critical) opinions a democracy has to tolerate and the limitations it may impose to secure its own persistence. To this end, it distinguishes (with regard to Islam) between Islamism and calls for a violent form of *jihad*[58] on the one hand and opinions that are "shocking", but nevertheless have to be tolerated on the other hand. Another group of cases concerns the protection of Muslims and Islam against (blasphemous) right-wing political agitation.

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57 Ibid, § 42.

58 Etymologically, *jihad* means but a struggle, "an effort directed towards a determined objective". For many Muslims in Europe this means "an effort directed upon oneself for the attainment of moral and religious perfection". However, some Muslims understand the duty to *jihad* to comprise "military action with the object of the expansion of Islam and, if need be, of its defence" (Tyan 1991: 538). The struggle with (Islamist) terrorism runs as a central thread through the recent and not so recent jurisprudence of the Court relating to Islam. In fact, even with regard to the headscarf, the Court was prepared to acknowledge the government's argument that the veil was "a symbol of political Islam" (*Leyla Şahin v. Turkey* (Grand Chamber of the Court), §§ 35, 111; see also Cumper and Lewis 2008: 602 et seq., 610 et seq. Tulkens thus observes that "[i]n the case law of the Court today […] the main limitations to the right of religious freedom [and also the freedom of thought or conscience] are motivated by the need to protect democratic societies from the danger of Islam", Tulkens 2014: 509).

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The freedom of expression can – also with regard to Muslim or Islamist opinions – be restricted. In extreme cases the applicant can even be deprived of the right to free speech according to Article 17. In other cases, however, even radical opinions may come to enjoy the protection of Article 10.

In *Leroy v. France*, the applicant was a cartoonist who had published a drawing symbolizing the attacks on the World Trade Center in a Basque left-wing newspaper on 13 September 2001 with the caption "We have all dreamt of it … Hamas did it" – this being a parody of the Sony slogan "We all dreamt of it … Sony did it". Thereupon the applicant was convicted for glorifying terrorism and sentenced to a fine of 1500 Euros. The Court chose not to take recourse to Article 17 arguing that the drawing was not such a non-equivocal justification of terrorism that it could be deprived of the guarantees of Article 10.[59] Nevertheless, the Court did not find a violation of Article 10. It considered the conviction to be justified according to Article 10 § 2, especially when taking into account the impact such a drawing could have had on the public order in the Basque country.[60] It argued that the drawing did not – as was put forward by the applicant – criticize American imperialism but actually glorified its violent destruction.[61]

This case can be contrasted with the Court's treatment of cases concerning the dissemination of radically Islamist opinions. In *Fouad Belkacem v. Belgium*, the applicant – the leader and spokesperson of the organisation "Sharia4Belgium" – had uploaded a number of videos on YouTube in which he had said that "the Muslims are here to dominate […] and the true religion is here to dominate the world, to reign over all systems". "I do not call upon the Muslims to fight, but that will nevertheless be the consequence. Allah legitimizes all forms of defence. We are not Christians we do not turn the other cheek when struck. We seek the confrontation. […]. Our honour outweighs our life". He continued saying "I ask Allah to make the *mujtahidūn* come to the doors of Brussels as quickly as possible to teach a lesson to those non-believers because they really have to learn a lesson". And further: "*Umma*, dear people, it is enough […]. The dialogue of the 'please sit down at one table, peace, blablabla…' is over. It's over. Today, we have to talk about *jihad* […]. Today, we have to talk about the *sharia*".[62] The applicant was then sentenced to one year and six months of

59 *Leroy v. France*, no. 36109/03, § 27, October 2, 2008.
60 Ibid, § 45.
61 Ibid, § 43.
62 *Fouad Belkacem v. Belgium*, no. 34367/14, § 4, June 27, 2017, translation by the authors.

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imprisonment and a fine of 550 Euros. The prison sentence was suspended.[63] The Court applied Article 17 in this case, arguing that "such a general and vehement attack contradicts the values of tolerance, social peace and non-discrimination that underlie the Convention".[64] The applicant was thus deprived of the protection of Article 10 because he wanted to turn the guarantee against its purpose.[65]

The Court indeed has a fine line to walk in these cases and it has already (and only shortly after 9/11) stepped in in order to protect calls for *sharia* by devout Muslims. In a 2003 case, *Gündüz v. Turkey*, the applicant – a leader of an Islamic sect – had been invited to a talk show that was broadcasted on television. In the course of the talk show, he said with regard to Turkish secularism that "democracy in Turkey is despotic, merciless and impious […]. This secular […] system is hypocritical". He continued calling a child born in a marriage that had been concluded before a council official a "piç [bastard]" and when asked whether they wanted "to destroy democracy and set up a regime based on *sharia*" he answered: "Of course, that will happen, that will happen…".[66] Following this television broadcast, the applicant was sentenced to two years of imprisonment and a fine for inciting people to hatred and hostility. In this case, the Court found a violation of Article 10. It afforded the State a certain margin of appreciation "when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion"; the State may thus legitimately include "an obligation to avoid as far as possible expressions that are gratuitously offensive to others […] and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs".[67] The Court then reiterates its findings from *Refah Partisi*, namely, that "*sharia* […] clearly diverged from Convention values". However, it considers that the "mere fact of defending *sharia*, without calling for violence to establish it, cannot be regarded as 'hate speech'". The Court furthermore takes into account that the "applicant's extremist views […] were expressed in the course of a pluralistic debate".[68] This is thus clearly what sets *Gündüz* apart from *Fouad Belkacem*: Müslüm Gündüz never propagated a violent overthrow of

63 Ibid, §§ 8–13.
64 Ibid, § 33.
65 Ibid, § 36.
66 *Gündüz v. Turkey*, no. 35071/97, § 11, December 4, 2003.
67 Ibid, § 37.
68 Ibid, § 51.

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the democratic system and he was well-prepared to see his views contested by others in a plural and democratic forum.

2.2.2. *The protection of religious groups against hate speech*

2.2.2.1. The Court's jurisprudence on hate speech against Muslims

The Court was not only asked to judge on (pro-)Islamist hate speech, but also on anti-Muslim hate speech. In fact, when charged with the protection of Muslim minorities against right-wing agitation, the Court is rather more quickly in applying Article 17[69] as becomes clear when looking at *Norwood v. The United Kingdom*. The applicant – a Regional Organiser for the British National Party – had displayed a large poster in the window of his first-floor flat between November 2001 and January 2002 that had been supplied by the British National Party, showing a photograph of the Twin Towers in flame with the caption "Islam out of Britain – Protect the British People" and a symbol of a crescent and star in a prohibition sign. Following this incident, the applicant was charged and sentenced to a fine of 300 GBP. The Court applied Article 17 and thus dismissed the application:

> "[*T*]*he words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination*."[70]

The Court has upheld this position on anti-Muslim hate speech in a 2018 judgment. In this case, the applicant had been convicted of "disparaging religious doctrines" and sentenced to a fine of 480 Euros after she had – in a public seminar offered for free to young voters by the Austrian Freedom Party Education Institute – said that "Muhammad […] was a warlord, he had many women […] and liked to do it with children. And according to our standards he was not a perfect human." She further summarized a chat she had had with her sister and in which she had said: "A 56-year-old and a

69 Cf. Hong 2010: 108.

70 *Norwood v. The United Kingdom* (decision on admissibility), no. 23131/03, November 16, 2004.

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six-year-old? […] What do we call it, if it is not paedophilia?"[71] Unlike the *Norwood* case, the Court considered the criminal conviction to amount to an interference with Article 10.[72] However, the Court considered that the duties and responsibilities according to Article 10 § 2 comprise, in the context of religious beliefs,

> "*the general requirement to ensure the peaceful enjoyment of the rights guaranteed unter Article 9 to the holders of such beliefs including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane* […]. *Where such expressions go beyond the limits of a critical denial of other people's religious beliefs and are likely to incite religious intolerance, for example in the event of an improper or even abusive attack on an object of religious veneration, a State may legitimately consider them to be incompatible with respect for the freedom of thought, conscience and religion and take proportionate restrictive measures*."[73]

Concerning the necessity of the measures imposed, the State was afforded a wide margin of appreciation so as to be able to take the positive obligation under Article 9 of the Convention into account.[74]

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71 *E. S. v. Austria*, no. 38450/12, § 13, October 25, 2018.

72 Ibid, § 39.

73 Ibid, § 43.

74 Ibid, § 44. The Court had argued in the same line in *I. A. v. Turkey* concerning a novel that was considered blasphemous. The owner of the publishing house had been sentenced to a fine (amounting to the equivalent at the time of 16 USD), *I. A. v. Turkey*, no. 42571/98, § 13, September 13, 2005; for the width of the margin of appreciation see § 25; see for a critique Kuhn 2019: 142, who argues that "the Strasbourg Court's concern about the degree of provocation to devout Muslims generated by the impugned novel overlooks the fact that Turkey has a large majority of practicing Muslims, who cannot plausibly be said to face marginalization through such inflammatory comments."
The protection of Muslim sentiments against blasphemous opinions meets its limits in Article 1 of the Convention, namely with regard to the concept of "jurisdiction": Thus, the Court denied the Convention's protection to Moroccan applicants who sought redress against the Dutch caricatures of the Prophet Muhammad that had been published in the *Morgenavisen Jyllands-Posten* in 2005 for they did not come within Danish jurisdiction. The Court considered that "the words 'within their jurisdiction' in Article 1 must be understood to mean that a State's jurisdictional competence is primarily territorial". For lack of a "jurisdictional link between any of the applicants and the relevant member State" the Court dismissed the application as unfounded, *Ben El Mahi and Others v. Denmark* (decision on admissibility), no. 5853/06, December 11, 2006.

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Blasphemy regulations are thus generally afforded a wide margin of appreciation by the Court. This margin is overstepped only when the interference with the freedom of expression weighs particularly heavy and the religious interests at stake cannot be considered particularly worthy of protection. In *Aydın Tatlav v. Turkey*, for instance, a journalist had published a five-volume work called "The reality of Islam". The work contained passages like "Islam is an ideology lacking confidence in itself so much, as is revealed in the cruelty of its sanctions. […]. It […] conditions [children] from their youngest age with stories of paradise and hell" or "All these truths concretise the fact that God does not exist, that it is the conscience of an illiterate person who created Him. [….] This God who gets involved with anything, including the question how many lashes are to be inflicted upon the adulterer, which body part of the thief is to be amputated".[75] Over the course of four years, a total of 16,500 books has been published. The first four editions did not give rise to any complaints. After a complaint had been lodged in 1997, the author was prosecuted for "making a publication destined to profane one of the religions". As to his defence, the author argued that his book ought to be read as a scientific treatise on the religions and the prophets. He further claimed to distinguish between the individual person's belief and those who wanted to direct a state according to religion, criticising but the latter.[76] Nevertheless, he was sentenced to twelve months of imprisonment and a fine. The prison sentence was later converted. Upon the complaint raised before the European Court of Human Rights, the Chamber found a violation of Article 10. Even though the Court afforded a wide margin of appreciation to the State in matters concerning religious hate speech, Turkey had overstepped its margin in this case: The work contained but "a dose of lively criticism": "This is the critical point of view of a non-believer with regard to religion in the socio-political field". The Court could not, however, observe an "insulting tone directed at the person of the believer, nor an injurious attack at sacred symbols".[77] The Court put special emphasis on the deterrent effect a criminal conviction may have on authors and editors and thus on safeguarding the "pluralism indispensable for the healthy evolution of a democratic society".[78]

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75 *Aydın Tatlav v. Turkey*, no. 50692/99, §§ 9–12, May 2, 2006, translation by the authors.
76 Ibid, § 13, translation by the authors.
77 Ibid, § 28, translation by the authors.
78 Ibid, § 30, translation by the authors.

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2.2.2.2. The Court's jurisprudence on hate speech against Christians

These cases on anti-Muslim hate speech stand in line with the Court's jurisprudence on anti-Christian hate speech. The level of protection afforded to the former does not fall short of the one allotted to the latter. Two different lines of argument can be discerned here: firstly, one on creative or artistic expression concerning movies or billboards with blasphemous content, and, secondly, one on journalistic or scholarly religiously offensive speech concerning articles, books and the like.[79] The latter is – just as in the case of anti-Muslim hate speech – afforded a larger degree of protection due to its tremendous importance for a vital and plural democracy.[80] Nevertheless, the protection is not unlimited.

Creative or artistic expression

The basic tenets regarding the protection of artistic expression were outlined in the 1994 case *Otto-Preminger-Institut v. Austria*. The applicant operated a cinema in Innsbruck and wanted to show the film "Das Liebeskonzil" that was based on a play written by Oskar Panizza in 1894. The play portrays God as "old, infirm and ineffective" and prostrating himself before the devil, Jesus Christ as a "mummy's boy" of minor intelligence and the Virgin Mary as an "unprincipled wanton" coquetting with the devil, who, upon Mary's request, spreads syphilis among man as a punishment for their sins.[81] Panizza himself never saw the play on stage: He was sentenced to one year of imprisonment for blasphemy and exiled thereafter. The play remained banned in Germany. It took until 1969 that the book was published. It was put on stage in London the following year and another 11 years later in Rome, where it caused a scandal among the theatre community.[82]

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79 See for this distinction and the different level of protection afforded to the two Kuhn 2019: 120. Kuhn attributes the distinction to the fact that in cases concerning scholarly or journalistic speech, "it is easier for the Strasbourg Court to identify elements of the expression which engage the public interest", whereas with regard to artistic or creative expression "offensive elements are often unqualified and presented without context", Kuhn 2019: 125.

80 See also below, 3.2.

81 *Otto-Preminger-Institut v. Austria*, no. 13470/87, §§ 20–22, September 20, 1994.

82 Kahn 2011: 420.

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Upon the request of the Innsbruck diocese of the Roman Catholic Church, the public prosecutor initiated criminal proceedings against the applicant's manager, who was charged for "disparaging religious doctrines". The film was subsequently seized. The Court did not find a violation of Article 10. It argued that States may limit the freedom of expression so as to guarantee the enjoyment of the freedom of religion:

> "*The respect for the religious feelings of believers as guaranteed in Article 9* […] *can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society*."[83]

A State may thus legitimately limit those expressions "that are gratuitously offensive to others".[84]

The Court ruled along the same lines in *Wingrove v. The United Kingdom*. The applicant, a film director, wrote a script and directed the making of a video entitled "Visions of Ecstasy". The video was inspired by the life and writings of St Teresa of Avila, who is said to have experienced powerful ecstatic visions of Jesus Christ and who, in the video, is played by a youthful actress dressed as a nun. In the first part of the video, the nun is dressed loosely in a black habit, stabs her hand with a nail and spreads her blood over her naked breasts. Subsequently, she spills a chalice of communion wine and licks it up from the ground. In the second part of the video, St Teresa is approached by a near-naked woman said to represent St Teresa's psyche (even though this is not clear from watching the video). The woman caresses St Teresa's feet and legs, her midriff and her breasts and finally exchanges passionate kisses with her. This sequence alternates with a second one in which St Teresa kisses the body of the crucified Christ, who is himself lying on the ground.[85] After having been submitted to the British Board of Film Classification (that is, the authority responsible for determining whether a video can be lawfully sold, hired out or otherwise supplied to the public) by the applicant, the Board rejected the application, arguing that the video breached the criminal law of blasphemy. According to the Board's reasoning, it is not blasphemous to publish opinions hostile to the Christian religion. Such

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83 *Otto-Preminger-Institut v. Austria*, § 47.

84 Ibid, § 49; see for the role of the margin of appreciation in this case Cox 2016: 208; the judgment was criticised for its recourse to Article 9 so as to protect the majority religion, see Janis 2015: 82 and 89.

85 *Wingrove v. The United Kingdom*, no. 17419/90, §§ 8–9, November 25, 1996.

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speech, however, meets its limits when the manner of presentation "is bound to give rise to outrage at the unacceptable treatment of a sacred subject".[86] The Court did not find a violation of Article 10, since the video concerned a matter "liable to offend intimate personal convictions within the sphere of morals". The margin of appreciation afforded to the Member State was thus considered to be wide.[87]

Nevertheless, interferences with the aim of protecting religious sentiments remain subject to the Court's supervision. Thus, in *Sekmadienis Ltd. v. Lithuania* the Court actually found a violation of Article 10. The case concerned an advertising campaign introducing a clothing line that included visual advertisements that were displayed in public areas in Vilnius. The first advertisement showed a long-haired young man, wearing a halo, several tattoos and a pair of jeans. A caption added read "Jesus, what trousers!" The second advertisement showed a young woman wearing a white dress, a headdress with flowers in it and also a halo, with a caption added reading "Dear Mary, what a dress!" The third advertisement showed both the man and the woman together, wearing the same clothes and accessories as in the other two advertisements. The caption added read "Jesus [and] Mary, what are you wearing!"[88] The authorities decided that the advertisement had breached the Law on Advertising and imposed a fine upon the company since it exceeded "the limits of tolerance". It argued that "using the name of God for commercial purpose is not in line with public morals". Rather, "the inappropriate depiction of Christ and Mary in the advertisements" was said to encourage "a frivolous attitude towards the ethical values of the Christian faith".[89] In spite of the wide margin of appreciation[90] the Court considered the interference not to be necessary in a democratic society. It argued that the Member State failed to explain "why the reference to religious symbols in the advertisements was offensive, other than for the very fact that it had been done for non-religious purposes".[91] Furthermore, the high number of individual complaints could not be taken into account in the assessment since "freedom of expression also extends to ideas which offend, shock or disturb". In a "pluralistic democratic society" also those exercising their religious

86 Ibid, §§ 12–13.
87 Ibid, §§ 57–58. See for a critique of the *Otto-Preminger-Institut* and *Wingrove* judgments Petersen 2017: 112–113.
88 *Sekmadienis Ltd. v. Lithuania*, no. 69317/14, §§ 6–9, January 30, 2018.
89 Ibid, §§ 18 et seq.
90 Ibid, § 73.
91 Ibid, § 79.

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freedom "must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith".[92]

Journalistic or scholarly religiously offensive speech

By contrast, the Court is more likely to find a violation of Article 10 when (journalistic or scholarly) speech is at issue. In *Giniewski v. France*, the applicant was an author who had published an article entitled "The obscurity of error" concerning the papal encyclical "The Splendour of Truth". He argued that Catholic "scriptural anti-Judaism and the doctrine of the 'fulfilment' [*accomplissement*] of the Old Covenant in the New led to anti-Semitism and prepared the ground in which the idea and implementation [*accomplissement*] of Auschwitz took seed".[93] The Criminal Court found the applicant guilty of "publicly defaming a group of persons on the ground of membership of religion" and ordered him to pay a fine.[94] The Court approached the case from the *Otto-Preminger-Institut* finding in arguing that according to Article 10 § 2 expressions may be banned that are "gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs".[95] However, it parted ways with *Otto-Preminger-Institut* with regard to the democratic value of the publication: In the Court's view, the author "sought primarily to develop an argument about the scope of a specific doctrine and its possible links with the origins of the Holocaust" and thus made "a contribution, which by definition was open to discussion, to a wide-ranging and ongoing debate […] without sparking off any controversy that was gratuitous or detached from the reality of contemporary thought".[96] In this context, the Court considered it "essential in a democratic society that a debate […] should be able to take place freely".[97]

Likewise, the Court found a violation of Article 10 when a journalist and film critic was convicted for the defamation of other persons' belief and sentenced to a fine. The applicant had – in response to a Slovak Arch-

92 Ibid, § 81.
93 Ibid, § 14.
94 *Giniewski v. France*, no. 64016/00, § 15, January 31, 2006.
95 Ibid, § 43.
96 Ibid, § 50.
97 Ibid, § 51.

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bishop's critique of a poster that he considered blasphemous – published an article in which he fervently criticised the Archbishop. The poster in question was an advertisement for the movie "The People vs. Larry Flynt" depicting the main character of the movie with a US flag around his hips as crucified on a woman's pubic area dressed in a bikini.[98] In response to a TV broadcast of a declaration made by the Archbishop the applicant wrote about him that "[t]his principal representative of the first Christian church has not even as much honour as the leader of the last gypsy band in his bow!" and continued urging all "decent Catholics" to leave "the organisation which is headed by such an ogre".[99] With a view to the "slang terms and innuendoes with oblique vulgar and sexual connotations" in the article the Court held that it was "not required to assess the journalistic quality of the article".[100] It further argued that the interference with the freedom of expression was not "necessary in a democratic society": Only the person of the Archbishop had been severely criticised; the Court was not persuaded that the applicant had also "discredited and disparaged a sector of the population on account of their Catholic faith".[101] The Archbishop, in turn, had withdrawn from the criminal proceedings and publicly pardoned the applicant.[102]

The high level of protection generally afforded to (religious or religiously offensive) speech only meets its limits when a particular democratic value is no longer discernible, as in the case of advertisement. In *Murphy v. Ireland*, the applicant was a pastor who wanted to see a religious advertisement for a video presentation at the Irish Faith Centre during the Easter week transmitted via radio. The Independent Radio and Television Commission, however, stopped the broadcast with reference to a law banning religious advertising. The High Court upheld the decision arguing that "Irish people with religious beliefs tend to belong to particular churches and that being so religious advertising coming from a different church can be offensive to many people".[103] Most particularly, "religion has been extremely divisive in Irish society in the past" which Parliament may legitimately take into account. The Court endorsed this reasoning with reference to the wide margin of appreciation in religious matters.[104]

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98 *Klein v. Slovakia*, no. 72208/01, § 8, October 31, 2006.
99 Ibid, § 12.
100 Ibid, § 49.
101 Ibid, § 51.
102 Ibid, § 53.
103 *Murphy v. Ireland*, no. 44179/89, § 12, July 10, 2003.
104 Ibid, §§ 67, 73.

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2.2.3. Criticism and context

The Court's hate speech jurisprudence has been widely criticized. Regarding the *Otto-Preminger-Institut* judgment, critics evoked the return of the Inquisition.[105] The protection that is granted to Muslims in cases of anti-Muslim hate speech is by some considered to be a first step towards the establishment of *sharia* law inside Europe, as it is closely related to Islamic blasphemy laws.[106] In Islamic law, blasphemy is punishable by death.[107] Not quite asking for the death penalty but nevertheless striving for a fiercer criminalisation of blasphemy, Muslim majority nations have (through the Organisation of Islamic Cooperation, the OIC) – for several years – pushed for a provision against "defamation of religions" in public international law.[108]

However, even in classical Islamic law, there has been a (long since forgotten) distinction between (illegitimate) blasphemy and (legitimate) rebellion, that is "dissent for a just cause".[109] Religiously offensive speech was thus considered to be legitimate, when "the voices of religio-political opposition or dissent possess[ed] some reasonable, even if mistaken, interpretation of the law or facts that made them honestly believe in the need to rebel".[110] The one who was "truth-seeking" was thus privileged over the "deliberately oppositional or unjustifiably transgressant".[111] The gratuitously-offensive-test on the one hand and the privileges afforded to speech acts that are considered to be of a certain political value on the other do not seem too far from this. If someone were to defame Islam in a gratuitously offensive manner (as a "deliberately oppositional or unjusti-

105 See for a summary of the critique Brown 2001: 539.

106 Durie considers them to be "but one element in a broader societal transformative process of Islamization", Durie 2012: 394.

107 The Muslim who committed blasphemy was (in a time when citizenship was religion-based) considered an apostate and thus no longer intelligible for the Muslim State. In this context, those who "left Islam were announcing a religious non-alignment that suggested hostilities or accompanied military escalation against Muslims". Blasphemy was thus considered to be an act of treason (see Rabb 2012: 146 et seq.; Rabb 2015: 448 et seq.). The Christian living under Islamic rule, by contrast, is considered to have renounced the *dhimma*-covenant that grants members of book religions state protection, cf. Durie 2012: 396.

108 See Leo, Gaer and Cassidy 2011: 769–884. The project has been widely criticised by those who did not want to lend added credibility to strict anti-blasphemy laws in Muslim countries, see Kahn 2011: 405 et seq.

109 Rabb 2012: 152 et seq.

110 Ibid, 153.

111 Ibid.

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fiably transgressant") and without any democratic added value (that is, "for a just cause") in violation of the anti-blasphemy laws of the Member State, the European Court of Human Rights would probably not object to a reasonable fine.

3. *Protection of religious pluralism in a difficult environment*

The Court's jurisprudence on Islamic law and Muslims is thus complex and manifold: Whilst the protection of the freedom of religion is to be seen in the context of a large diversity of state-religion models in Europe (with a wide margin of appreciation afforded to the States) the protection of other freedoms (including the freedom to exercise Islam without being subjected to hate speech) is not so much dependent on the respective constitutional framework. The differentiation of protective standards is therefore not arbitrary or whimsical; it is not – as has often been claimed – due to some Islamophobic bias in the Court's jurisprudence. It is rather the result of the constitutional context, but also of the purpose, drafting process and wording of the Convention itself.

3.1. *Plurality of state-religion models in Europe*

The relatively restrictive jurisprudence of the Court in freedom-of-religion cases comes from the wording of the Convention and its drafting process as well as the large variety of solutions to freedom of religion challenges represented in the different Member States. The separation of *forum internum* and *forum externum*, for instance, is not attributable solely to the Court: The Convention itself distinguishes between *forum internum* (Article 9 § 1) and *forum externum* (Article 9 § 2) and affords the latter a lesser degree of protection as it can be restricted by law.[112] In the course of the Preparatory Sessions for the Covenant of the Court Islam actually became a major point of concern namely for Turkey, who proposed several amendments to the freedom of religion in order to protect its secular heritage

112 In fact, this stands in line with a long tradition with regard to the freedom of religion. Article 9 of the *ECHR* was immediately drawn from Article 18 of the 1948 Universal Declaration of Human Rights, which was, in turn, based upon national traditions of human rights, see Janis 2015: 78.

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against a perceived Islamic threat.[113] Even though the Turkish demands were eventually defeated, the State's concern nevertheless persists in the Court's jurisprudence: France and, at least until very recently, Turkey are the two strongest proponents of a radically secularist approach and thus indirectly widen the margin of appreciation for all other Member States.[114]

Due attention should also be given to the fact that in freedom of religion cases (at least those concerning the manifestation of religion according to Article 9 § 2 of the Convention) a balance has to be struck between positive and negative religious freedom. The European Court of Human Rights has to offer a solution that does not only fit the specific situation in a single Member State but claims validity in all European States adhering to the Convention.[115] It thus does well to respect a wide margin of appreci-

113 Cf. Council of Europe 1976: 184 and 196; Council of Europe 1977: 26. On p. 80 the Turkish expert explains:
"*I would however like to state here, for what it may be worth, that the legislative measures relating to the 'tekkés,' the 'médressés' and the Moslem religious orders are in no way intended to place restrictions on freedom of religion. I must emphasise that this freedom has always been respected in Turkey to the widest possible extent. A large number of writers from Western countries have borne testimony to this fact. It must, however, be pointed out that in the course of our history a number of attempts at reform and modernisation have been frustrated by stubborn resistance on the part of certain persons or groups of persons who wished to keep the population in ignorance for their own ends. In its determination to go through with those reforms which have justly won the sympathy of the whole world, the Republic of Turkey has therefore been obliged to start by abolishing the Moslem orders and their archaic institutions. If it had neglected to take this necessary step, its efforts would doubtless be doomed to failure once again, and my country would not be entitled to take its place among the Member States of the Council of Europe and share with them their fundamental conception of modern European civilisation*."; Kayaoglu 2014: 353–354.

114 Hughes for instance laments that, in *Kavakçi v. Turkey*, no. 71907/01, § 43, April 5, 2007), "the Court did not engage with the applicant's arguments regarding the headscarf and again capitulated to Turkey's assessment of the importance of secularism in that country", Hughes 2016: 146 et seq. Plessis suggests a distinction between "doctrinal secularism" which "refers to the form of secularism where it becomes a political aim to exclude religion from the public sphere" on the one hand and "political secularism" on the other. The French ban of the full-face veil is – in this narrative – considered as a shift from political secularism to doctrinal secularism, Plessis 2018: 510–511; cf. Steinbach 2014: 421; Steinbach 2017: 624–624; see for the role of secularism in the jurisprudence of the Court in general Fokas 2015: 61.

115 Cf. Nußberger 2017: 420–421.

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ation in this field.[116] As *Joseph Weiler* – the representative of the third party interveners in *Lautsi v. Italy*[117] – argued:

> "*What is so interesting about the European constitutional doctrinal landscape is that whilst insisting on Freedom of Religion and Freedom from Religion, it allows a rich diversity in the constitutional iconography of the state and different forms of entanglement of religion in its public life: from fully established churches to endorsed churches to cooperative arrangements as well as, of course, to states in which laïcité is part of the definition of the state, as in France*."[118]

The Court's jurisprudence on the freedom of religion can thus be read in this light as the attempt to respect this "constitutional doctrinal landscape" so characteristic for Europe. As *Giovanni Bonello* put it in his Concurring Opinion to *Lautsi v. Italy*: "No supranational court has any business substituting its own ethical mock-ups for those qualities that history has imprinted on the national identity."[119] The Court has thus time and again held that "national authorities have direct democratic legitimation and are […] in principle better placed than an international court to evaluate local needs and conditions".[120]

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116 See for a critique Carolyn Evans 2010: 168–170.

117 *Lautsi and Others v. Italy* (Grand Chamber of the Court), no. 30814/06, March 18, 2011.

118 Weiler 2010: 3; see for the variety in terms of religious dress Cumper and Lewis 2008: 600.

119 *Lautsi and Others v. Italy* (Grand Chamber of the Court), no. 30814/06, March 18, 2011, Concurring Opinion of Judge Bonello, § 1.1; see also Nußberger 2018: 71–72; Janis 2015: 93.

120 *Maurice v. France* (Grand Chamber of the Court), no. 11810/03, § 117, October 6, 2005; this holds true even more so when the relationship between Church and State is at stake, *Cha'are Shalom Ve Tsedek v. France* (Grand Chamber of the Court), no. 27417/95, § 84, June 27, 2000; *Wingrove v. The United Kingdom*, § 58; *Leyla Şahin v. Turkey* (Grand Chamber of the Court), § 109; *Izzettin Doğan and Others v. Turkey* (Grand Chamber of the Court), § 112. The State is thus – in Article 9 cases – afforded a wide margin of appreciation with regard to the "necessity" of a limitation, *S.A.S. v. France* (Grand Chamber of the Court), § 129; see for a critique of the margin of appreciation doctrine in this case *S.A.S. v. France* (Grand Chamber of the Court), Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom: §§ 16–17. As Carlo Ranzoni put it in his Dissenting Opinion to *Hamidović*: "The domestic situation is likely to reflect historical, cultural, political and religious sensitivities, and an international court is not well placed to resolve such disputes", *Hamidović v. Bosnia and Herzegovina*, Dissenting Opinion of Judge Ranzoni, § 6.

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3.2. Protection of democracy as priority

By contrast, a considerably narrower margin of appreciation is afforded to States with a view to the protection of democracy. The underlying goal of the Convention comes to the fore in several cases concerning Islam, most particular in the ones on hate speech: Securing democracy and pluralism within the Member States of the Council of Europe.[121] The Preamble already refers to the goal of "an effective political democracy" and Articles 8–11 can only be limited when "necessary in a democratic society".[122] Thus, the wide margin of appreciation in matters of religion is exceeded only when the State assesses "the legitimacy of religious beliefs or the ways in which those beliefs are expressed" for this constitutes – according to the Court – an interference with the requirements of a "pluralist democratic society".[123] On the other end of the scale, Islamists are deprived of speech rights under the Convention as soon as they advocate the (violent) overthrow of a democratic system.[124]

Thus, the Court argued in *S.A.S. v. France* that

> "[*p*]*luralism, tolerance and broadmindedness are hallmarks of a 'democratic society'. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position*."[125]

The majority opinion restricts this requirement for tolerance. The full-face veil does not – in their opinion – require toleration. The Dissenting Opin-

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121 See also Trispiotis 2016: 594–595.

122 See *United Communist Party of Turkey and Others v. Turkey* (Grand Chamber of the Court), no. 133/1996/752/951, § 45, January 20, 1998.

123 *Hasan and Eylem Zengin v. Turkey*, no. 1448/04, § 54, October 9, 2007.

124 Cf. *Hizb Ut-Tahrir and Others v. Germany* (decision on admissibility), no. 31098/08, June 12, 2005; *Kasymakhunov and Saybatalov v Russia*, nos. 26261/05 and 26377/06, § 104, March 14, 2013; *Refah Partisi (The Welfare Party) and Others v. Turkey* (Grand Chamber of the Court): § 99; see also for limitations to the freedom of expression imposed upon an association whose aim it is "to make the first contacts and establish good relations with extraterrestrials" and to this end propagates a system of government it calls "geniocracy" (which is "a doctrine whereby power should be entrusted only to those individuals who have the highest level of intellect"), *Mouvement Raëlien Suisse v. Switzerland* (Grand Chamber of the Court), no. 16354/06, July 13, 2012.

125 *S.A.S. v. France* (Grand Chamber of the Court), § 128.

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ion, however, criticizes this "selective pluralism" in arguing that "there is no right not to be shocked or provoked by different models of cultural or religious identity". The Dissenting Opinion thus refers to the Court's jurisprudence concerning the freedom of expression, where the Convention protects not only those opinions "that are favourably received or regarded as inoffensive or as a matter of indifference, but also […] those that offend, shock or disturb".[126]

Despite this controversy, the requirements of a stable democracy actually seem to determine most of the idiosyncrasies of the Court's jurisprudence vis-à-vis *sharia* law that might, – at first sight – qualify rather as inconsistencies.[127] For the frictions between the (jurisprudence on) freedom of religion on the one hand and the (jurisprudence on) freedom of expression on the other hand point towards the underlying idea that freedom of expression can be guaranteed everywhere in the same way whatever the constitutional setting, whereas freedom of religion is a sensitive issue within the respective constitutional model. Yet, religious opinions are between the two different concepts and thus put them to a test.

4. Conclusion

The Court stresses subsidiarity in freedom-of-religion cases. This is true not only, but in particular with regard to Muslims as Islam is more "practice-centric" than "creed-centric"[128] and the Convention protects the *forum internum* more than the *forum externum*. Thus, time and again the Court has upheld headscarf bans and argued, that Muslims are free to resign from their job when the employer's requirements cannot be reconciled with the religious ones. Nevertheless, the Court has a very protective approach to Islam in its jurisprudence on hate speech, although, there as well, limits to what is tolerable in a democratic society, are necessary. The Court has to

126 *S.A.S. v. France* (Grand Chamber of the Court), Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom, § 5, quoting *Stoll v. Switzerland* (Grand Chamber of the Court), no. 69698/01, § 101, December 10, 2007; *Mouvement raëlien suisse v. Switzerland* (Grand Chamber of the Court), § 48; see also Nußberger 2018: 66–68.

127 This critique can be found in *Leyla Şahin v. Turkey* (Grand Chamber of the Court), Dissenting Opinion of Judge Tulkens: § 9; see also Carolyn Evans 2010: 182, and Hughes 2016: 145.

128 Kayaoglu 2014: 348.

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walk a fine line between upholding the values of pluralism and protecting a peaceful living-together.

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