International human rights and national constitutional heritage: which legal framework do we need to manage religious tensions?

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1. Introduction

The ongoing globalisation processes – or should we say '*glocalisation*', in line with Ronald Robertson, to refer to the connection between global homogeneity and local plurality[1] – foster a multicultural society where religious diversity is growing and religious tensions are increasing. As a result of this, two important aspects of Western culture are challenged.[2] First, the assumption that as the West became more modern it would become more secularised and religion would disappear is fainting. Secondly, and more important for this paper, the idea that religion and politics should occupy radically differentiated spheres in which private conviction may not exert itself within the public realm is challenged. Because of this growing importance of religion within the public sphere, religion is increasingly becoming a topic in court. As such, legal practice[3] has to deal with rising religiosity and academic writing[4] pays more attention to the topic.

As the importance of religion has been growing in the courts, it has also become more and more relevant in the field of education. Since schools are somehow the first 'thermometers' of societal evolutions, they have to cope more than ever with religious diversity. Especially the growing numbers of assertive Muslim students in Western schools has lead to religious tensions. In many Western countries in recent years, this has fostered debates on a possible prohibition of wearing headscarves at school.[5]

This evolution confronts us with the question of how to handle religious tensions. In this paper we will try to answer this question from a constitutional viewpoint. In our opinion, constitutionalism is a set of high legal norms that contain institutional mechanisms for the limitation and the control of power on the one hand and for the protection of individual rights and freedoms on the other. We are of the opinion that in the past constitutionalism has carried out this task with great devotion and success. In Europe, constitutionalism has not restrained religious diversity. Instead, constitutionalism has offered a framework to settle violent religious conflicts in a peaceful and judicial way.

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1 Robertson, R. (1995), 'Glocalization: time-space and homogeneity-heterogeneity', in: Featherstone, M., Lash, S. and Robertson, R. (eds.), *Global Modernities*, Sage Publications, London, pp. 25-44.

2 See the reference to Graham Ward and Michael Hoelzl in the article of Badering: Baderin, A.M. (2009), 'Religion and International Law: Friends or Foes?', *E.H.R.L.R.*, pp. (637) 638.

3 In their work on the European Convention of Human Rights also Harris, Boyle, Bates and Buckley point to the growing importance of religion in society to declare why article 9 of the convention concerning religious freedom leads to more and more cases at the Strasbourg Court. Harris, D.J., O'Boyle M., Bates M.P. and Buckley C.M., (2009) *Law of the European Convention on Human Rights*, Oxford University Press, Oxford, p.425.

4 In the Netherlands, for example, a new journal was launched this year with the title: *'tijdschrift voor religie, recht en beleid'* which means 'journal for religion, law and governance'. In the introduction of the first edition, Berger points out the need of academic research on the topic of law and religion because of the growing importance of religion in contemporary society. M. Berger, 'Nieuwe spelers, nieuwe regels?' (2010), *Tijdschrift voor religie, recht en beleid,* p.(1) 3.

5 Knights, S. (2005), 'Religious Symbols in the School: Freedom of Religion, Minorities and Education', *E.H.R.L.R.*, pp. 507-515.

2. Basic assumptions

Before we discuss the subject of constitutionalism and religion in detail, we want to briefly deal with some basic assumptions of this paper. Some of these will be discussed more exhaustively later on.

First of all, there is the ethical and judicial relevant distinction between minors and adults. Within the debate on religion and education, we want to stress the special status of a minor. Since religious claims are often the expression of identity claims, we assume that it is by no way a surprise that minors (and young adults) often raise religious claims. Minors have not yet found their identity. While grown-ups are mature citizens, underage persons still have to walk a long path towards maturity. This is a basic assumption in law. The law departs from the idea that minors are not capable of looking after their own interests. Because of this, the law contains restrictions on dealing with minors in judicial matters.[6] For example, guardianship is common for children but not allowed for grown-ups.

Although there is a distinction between adults and minors, we must admit that a binary approach to minors is not entirely accurate from a human rights perspective. The approach of the United Nations Convention on the Rights of the Child is an approach of gradual emancipation. Lenient to this approach, we still think that the notion of minority is germane. Thus, we are of the opinion that there is not one debate on religion and law but that there are several. The debate on the prohibition of headscarves at school (for minors) is thus different from the debate concerning grown-ups.[7]

A second basic assumption is the relationship between human rights and constitutionalism. Individual human rights are just a part of constitutionalism. Thus, human rights by themselves cannot cover the substance of constitutionalism. Put differently, constitutionalism has a broader scope than human rights. Apart from human rights, it contains – among other principles – the organization of state powers, the idea of the separation of powers, the separation between church and state, and the principle of neutrality. To discuss religious problems solely in light of human rights will in our view not grasp this broader constitutional context. What this means is that human rights form only a part of constitutionalism - they do not replace it.

Furthermore, we are – in line with Pavlos Eleftheriadis – of the opinion that international human rights, such as the European Convention on Human Rights, are of a different nature than national constitutional rights. Whereas national constitutional rights concern basic questions on political legitimacy, international rights try to establish legal relations between states. As Elefteriadis expresses:

> 'In the domain of international law, rights have a distinct role. They bring about secondary international remedies, ie standards for institutional intervention (persuasive or even coercive) into the domestic affairs of a state whenever that state is responsible for the most serious

6 For Belgian law see: F. Swennen, *Personenrecht in kort bestek*, Antwerpen, Intersentia, 2008, pp. 114-115.

7 We also find support for this argument in the *Travaux Préparatoires* of the Convention. The topic of freedom of religion in education was highly questioned during the preparatory work of the ECHR. The main assumption in this was that minors were easy to indoctrinate. Some countries feared that the refusal to grant parents the right to choose the religious education for their children would be an instrument for the state to indoctrinate the children while other negotiators were of the opinion that a wide freedom would create the possibility that parents could force their children in anti-democratic philosophies. The negotiators of the Convention could not reach an agreement on the topic before the Ministers signed the Convention. Because of this, the controversial issue of freedom of religion in education only became settled in article 2 of the first protocol. Evans, C. (2003), *Freedom of Religion Under the European Convention on Human Rights*, Oxford University Press, Oxford, pp. 46-48.
Carolyn Evans expresses the sensitivity of religious education as follows: 'This is one area in which a modern, democratic State has the opportunity, even the obligation, to become involved in shaping the views and ideas of particularly vulnerable members of society. The line between indoctrination that is prohibited as an intrusion into the *forum internum* and an education that appropriately assists young people to deal with the (often religiously pluralistic) society in which they find themselves can be a difficult one to draw.' Evans, C. (2003), *Freedom of Religion Under the European Convention on Human Rights*, Oxford University Press, Oxford p.88.

> violations of human dignity and has not been willing or able to remedy the violations within its own legal system.'[8]

Both of these arguments point to the idea that the European Convention on Human Rights is unlike constitutionalism; it is not a '*blueprint*' of a state but has restricted significance. In line with this, we have noticed that the European Court on Human Rights in Strasbourg – in cases such as *Leyla Sahin v Turkey* and the French headscarf cases – has introduced the member states' constitutionalism into its jurisprudence.[9]

This broader perspective on constitutionalism has some important consequences. Constitutionalism grew gradually out of local legal systems. During this process, there was not one universal model of constitutionalism. Constitutionalism differs from country to country. The protection of the freedom of religion thus takes a different form in France with its tradition of *laïcité* than in the United States, which departs from a more liberal approach.[10]

Apart from the broader point of view that constitutionalism requires, one must also take the specific reading of individual human rights into account. First, there is the problem surrounding the hierarchy of human rights. Although the different human rights in the European Convention on Human Rights seem of equal standing at first sight, a thorough study of the Convention reveals the opposite. The exception in article 15 of the Convention, which proclaims that a state can deviate from the convention in cases of emergency, is, for example, not applicable to articles 2, 3 and 4 of the Convention. Articles 8, 9 and 10 have their own exception-clause in the second section. Besides these differences within the treaty, the practice of the Court in Strasbourg reveals even more differences and graduations. The jurisprudence of the Court shows that (in the opinion of the judges) some human rights are more important than others. Our analysis of jurisprudence has demonstrated that the right of free speech in many cases trumps the right to privacy.[11] Also within the applicability of a human right – such as the right to privacy – there are differences in application between divergent aspects of the right.

Within the scope of this paper, it is important to remember that according to article 9 of the ECHR, the freedom of religion is not an absolute right. Or at least we should say that the freedom of conscience and religion in the first paragraph – the so-called *forum internum* – may be absolute but the freedom to manifest religion – the *forum externum* – is not.[12] Thus, we can conclude that although its position within the hierarchy of human rights cannot be pointed out exactly, it is clear that the freedom of religion is not a 'leading human right'. The freedom of religion is thus not a preeminent human right that nullifies other human rights or interests such as constitutional arrangements.

The last basic assumption of this paper concerns the plea for active pluralism that often rises as an argument in the debate on religion and religious conflicts. Adherents of this theory preach that there is a duty of both the government and its citizens to actively involve religions in public decisions and deliberations. Active religion becomes a driving force for governance and human contact. Although we will not examine this topic here any further[13], we want to indicate that the European Court on Human Rights does not rule on the necessity of active pluralism in her jurisprudence within article 9 of the

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8 Concerning religion, Eleftheriadis refers to Rawls and states that: '*[t]he point is that an acceptable law of peoples cannot "require decent societies to abandon or modify their religious institutions and adopt liberal ones"*.' Eleftheriadis, P. (2010), 'Human Rights as Legal Rights", *Transnational Legal Theory,* pp. (371) 389-390.

9 See infra.

10 See infra.

11 De Hert, P. (2005), 'Balancing security and liberty within the European human rights framework. A critical reading of the Court's case law in the light of surveillance and criminal law enforcement strategies after 9/11', *Utrecht Law Review*, 1 (1), pp. 68-96.

12 Notice, however, that some authors make the distinction between the 'general right to freedom of thought, conscience and religion' as expressed in first paragraph of art. 9 – which is an absolute right – and the freedom to manifest religion in the second paragraph of art. 9 – which is subject to limitations. See for example: Jacobs, White, R.C.A. and Ovey, C. (2010), *The European Convention on Human Rights*, Oxford University Press, Oxford p.409.

13 For a deeper investigation into the topic see: DE HERT, P. & MEERSCHAUT, K. (2007), *Scheiding van Kerk en Staat of Actief Pluralisme? Een benadering vanuit de mensenrechten*, Intersentia, Antwerpen, p.290.

Convention. Thus, although an active pluralistic approach may be normatively desirable, the ECHR does not contain a legal obligation of active pluralism.[14]

3. Constitutionalism as a peaceful site

As we already mentioned before, constitutionalism is a legal model that contains institutional mechanisms for the limitation and the control of power on the one hand, and protects individual rights and freedoms on the other. From this perspective, constitutionalism makes an important contribution to religion. The separation of church and state – one of the main characteristics of Western constitutionalism – constitutes a framework in which religion can be practised freely. Conversely, religion has also made a contribution to the development of constitutionalism.[15]

This reciprocity between religion and constitutionalism can be found throughout Western history. Alicino gives the example of Hobbes, the *founding father* of social contract theory.[16] The basic assumption in Hobbes's theory is the subjection of the citizen to the sovereign. For Hobbes, personal convictions and the distinction between secular and metaphysical powers were fundamentally impermissible. Because of these convictions and because of his experiences with the religious wars during his lifetime[17], Hobbes thought religious homogeneity – whether or not imposed by the sovereign – was an indispensable

14 De Hert, P.(2006), 'Sterven als vorm van integratie. Een republikeinse halt tegen actief pluralistische begrafeniswetten' , in: Brems, E. and Stokx, R. (eds.), *Recht en minderheden. De ene diversiteit is de andere niet,* Die Keure, Brugge pp. (107) 120-121.
In the case of religious education, Carolyn Evans even states that, in the jurisprudence of the Court in Strasbourg, it is clear that the state has no obligation to provide for education in the religious beliefs that parents ask for. In her opinion – which dates from 2001 – the only obligation that arises from the jurisprudence of the Court is the negative obligation not to indoctrinate the students in another religion than the parents prefer Evans, C. (2003), *Freedom of Religion Under the European Convention on Human Rights*, Oxford University Press, Oxford, pp.88-96.

15 The next parts of this article are mainly inspired by: Alicino, F. (2010) 'Constitutionalism as a Peaceful "Site" of Religious Struggles', *Global Jurist*, 10(1), article 8. An other major source of inspiration is: Gutwirth, S. (1998), 'De polyfonie van de democratische rechtsstaat', in: Elchardus, M. (eds.)., *Wantrouwen en onbehagen*, VUBPress, Brussels, pp.137-193.
Concerning the contribution of Religion to constitutionalism, Van Caenegem, in his general study on the history of Western constitutionalism, noticed that: 'The outcome of the European Investiture Struggle (…) was advantageous to the Church. (…) Papal authority consequently reached its zenith and the Roman curia intervened constantly in political affairs. (…) In the long run this ecclesiastical emancipation has had unforeseen consequences for the states. By forbidding the kings to perform the clerical investiture because they were laymen, a process of secularization was inaugurated and the road opened for a clear conceptual distinction between the organs and aims of secular society and those of the Church.' Van Caenegem, R.C. (1995), *An historical introduction to western constitutional law*, Cambridge University Press, Cambridge pp.70-71.
In a similar way, but with its main focus on early modern history, Leonard Hammer points out that the freedom of conscience emerged out of the freedom of religion and that in the opinion of many commentators both of these rights were the forerunners to the notion of civil liberty. Hammer, L.M. (2001), *The International Human Right to Freedom of Conscience. Some suggestions for its development and application*, Darthmouth Publishers Company, Aldershot, pp. 9-27.
A last argument on the importance of the freedom of religion is in line with the secularisation process as described by Max Weber. The main idea is that the secularization process and the separation between church and state, created the opportunities for the functional differentiation between art, religion, morality, politics, economy and law. For an exhaustive investigation on this topic, see: Van Der Ven, J. A. (2010), *Human Rights or Religious Rules?*, Leiden, Brill, pp. 304-355.

16 Alicino, F. *l.c.*, 9.

17 See for example: Sullivan, V. (2004) 'Machiavelli, Hobbes, and the Formation of a liberal Republicanism in England', Cambridge University Press, Cambridge, p.85.

condition for the state.[18] This harsh approach made Leibniz declare that: *'Hobbes… croit (et au peu prés pour la même raison) que la véritable religion est celle de l'état'*[19].

Modern constitutionalism, however, developed due to the contributions of thinkers who contradicted Hobbes's opinions. Like Hobbes, Locke also explained his arguments via social contract theory. Nevertheless, Locke contradicted Hobbes's harsh approach by introducing natural law. In Locke's opinion, the law of nature was created by God and understandable for every reasonable human being. The law of nature teaches us that nobody may be harmed in his life, health, freedom and property.[20] In addition to this, Locke interpreted the freedom of religion and conscience as one of the main foundations of constitutionalism.[21] Locke could not believe in the possibility of an imposed religious homogeneity. He believed that – contrary to the opinions of Hobbes – attempts to impose religious homogeneity would result in growing social conflicts. For Locke, Hobbes's *Leviathan* was probably constitutional science fiction. Since it is impossible for the state to impose its will concerning religious matters on society, the state should not engage in religion at all. In this vision, Locke starts from the idea that if one cannot solve the problem itself, one should change the context so that the problem cannot be framed as a problem anymore. Thus, since religious homogeneity cannot be imposed on society to stabilise the state in a Hobbesian way, one should change the state so that religion is no longer an issue in the public sphere, but an issue contained within the private sphere. Although Locke – like Hobbes – saw the state as the product of a social contract, that contract, in his opinion, could not reach so far as to deprive the contractors of their freedom of religion and conscience. Therefore, citizens should possess inalienable rights that protect the private sphere of their lives.

A second illustration of the significance of the freedom of religion and conscience for modern constitutionalism is made by Roger Williams, the 'founding father' of Rhode Island and – in Marta Nussbaum's opinion – one of the founders of the American vision on freedom of religion and conscience.[22] In Williams's opinion, conscience is the main characteristic of human beings. Because of this, humans are able to make judgments on normative questions. For Williams, denying this ability

18 Hobbes's analysis did not start from a religious point of view. Hobbes's main concern was the stability of the state. Religion became totally subjected to this concern and thus to the sovereignty of the Leviathan. Nauta, L. (2002), 'Hobbes on Religion and the Church between "The Elements of Law" and "Leviathan": A Dramatic Change of Direction?', *Journal of the history of ideas*, pp.577-598.
Hobbes's line of reasoning was not that strange in early modern Europe. With regard to the general approach towards church and state in that period, Guido Ceccoli said : *'La force de l'Etat était donc fondée sur l'unité religieuse du peuple, selon le principle « un Etat, un roi, une religion ». Les différences religieuses au sein d'un royaume étaient vue comme un vrai danger pour le souverain. Par conséquences, les minorités religieuses étaient systématiquement persécutées dans le Pays européens.'* Ceccoli, G. (2000), 'La Liberté de Religion et la Convention Européenne des Droits de l'Homme', *Bull.dr.h.*, pp. (89) 90.

19 Citation taken from: F. Alicino, *l.c.*, 11.
In his writings, Hobbes indeed comes very close to state religion. For example, in chapter XV of his '*Philosophical Rudiments concerning Government and Society',* Hobbes discusses what citizens must do when the demands of the secular government conflict with those of Christianity. Herein, he states that the secular government may decide what kind of religious worship the citizens must obey and that the secular governors are the true interpreters of both secular and sacred law. In §17 of the chapter he states that: 'And as for the secular laws (…) those who have the sovereign power, are the interpreters of the laws. As for the sacred laws, we must consider what hath been before demonstrated in chap. v. art. 13, that every subject hath transferred as much right as he could on him or them who had the supreme authority. But he could have transferred his right of judging the manner how God is to be honoured; and therefore also he had done it. (…) Wherefore subjects can transfer their right of judging the manner of God's worship, on him or them who have the sovereign power. Nay, for they must do it.' In paragraph 18 Hobbes goes even further. He asks the question: 'if that man or councel who hath the supreme power, command himself to be worshipped with the same attributes and actions, wherewith God is to be worshipped; the question is whether we must obey?' The answer to this question is that, as long as we do not think that the sovereign is God, we must obey his wish to worship him as God since: 'divine worship is distinguished from civil, not by the motion, placing, habit, or gesture of the body, but by the declaration of our opinion of him whom we do worship.' Hobbes, T. (1651),*Philosophical Rudiments concerning Government and Society,* chapter 15, §17-19.

20 Adams, M. (2006), *Recht en democratie ter discussie*, Leuven Universitaire Pers, Leuven, p.175.

21 Swomley, J. (1987), *Religious liberty and the secular state. The constitutional context*, Prometheus Books, New York, pp.18-19.

22 Nussbaum, M. (2008), *Liberty of conscience. In Defence of America's Tradition of Religious Equality,* Basic Books, New York, p.406. See also: Alicino, F. *l.c.*, 15-18; Jordan, W.K. (1985), 'Roger Williams' , in: R.S. Alley (eds.), *James Madison on Religious Liberty*, New York, Prometheus Books, pp.115-142.

would be like denying the very nature of humankind.[23] Apart from his vision on the freedom of religion and conscience, Williams stated that the state should serve its citizens and not the other way around. In line with both these visions, Williams made the same conclusions as Locke did on the role of the state in religious matters: the state should not interfere in religion.

Being Rhode Island's founding father, Williams had the opportunity to apply his theory in practice. Thus, Rhode Island, and its 17th century constitutionalism, served as a site for religious freedom. Because of the decoupling of public politics and private philosophical convictions, different religions could live peacefully side-by-side.[24] However, at the other side of the Atlantic, Europe still had to wait more than a century until both constitutionalism and the freedom of religion and conscience were realised.

4. The different appearances of constitutionalism

As mentioned in our points of interest, constitutionalism appears in different forms. Western constitutionalism grew gradually within the different legal systems. The separation of church and state had an influence on this process. Step by step, the state became emancipated from the church and conversely religions were freed from governmental interference. Because this historical evolution differed from legal system to legal system, the separation of church and state now varies from state to state. Consider the following example:

The United States and France have a similar constitutional framework regarding the separation of church and state. Article VI.3 of the US constitution and article 6 of the French *Déclaration des droit de l'homme et du citoyen* from 1789 guarantee equal access to public offices for both believers and non-believers. Apart from this, the *non-establishment clause* in the First Amendment of the US constitution has its French counterpart in the law *concernant la séparation des Eglises et de l'Etat* from 1905. This law has constitutional value in France. A third comparison can be found in the 'free exercise clause' of the US, which has a French counterpart in article 2 of France's 1958 constitution. This article establishes the obligation of the state to respect all different faiths.

Notwithstanding these similar provisions in French and American constitutional law, the Americans are of the opinion that the French prohibition on conspicuous religious expressions in public schools of 2004 would – if it were an American law – breach the constitution of the United States. Alicino[25] points to several factors to declare these different constitutional interpretations. First of all, she points to the important role of the 'founding myth' in the United States. Similar to Williams's vision on religion and constitutionalism, religion plays an important role in the 'founding myth'. Apart from this, American law strongly protects the right of students to express their religious views.

Whereas the US constitutional model is grounded on a very liberal approach, the French constitutional model takes a republican approach. The republican model does not overly stress the prohibition of government interference. Whereas the state in the US is limited to watching religious matters, and it may certainly not interfere with them, the French approach allows more state action. Governance has an important function in society. A republican vision on religious freedom requires the state to actively guarantee this freedom. The French *laïcité* must enforce the freedom of religion because of its strict neutrality. In the republican view, neutrality has an even wider focus than the functions of the state.

23 Williams's basic assumption is in line with the reason why John Rawls in his theory endows human beings with dignity and autonomy. Rawls's main assumptions are that humans possess a high level of consciousness, independent thought and the potential to develop an individual concept of the good. Rawls, J. (1999), *A theory of Justice,* Oxford University Press, Oxford, p.560.

24 One should notice that, although Rhode Island was a forerunner, it was not an isolated case in the United States. Some other states also developed a constitutional structure respecting the separation between church and state before the war of independence. Swomley, J. (1987),*Religious liberty and the secular state. The constitutional context*, New York, Prometheus Books, pp.25-41.

25 Alicino, F. *l.c.*, 25-26.

The entire public sphere needs to be imbued with neutrality. This is the result of the fact that French constitutionalism connects the principle of *laïcité* with the principle of *égalité*. Citizens must be treated in an equal way. Thus, neutrality towards all citizens is the only possible way to reach religious equality among citizens.

One can find another illustration in the comparison between the European Convention on Human Rights and the US constitution.[26] On the American side of the Atlantic, the government has the absolute duty to protect religions and the freedom of religion. Conversely, Article 9 of the European Convention on Human Rights does not guarantee full protection since the article contains exceptions in its second paragraph[27]. Thus, other human rights or interests can limit the scope of Article 9 of the European Convention.

5. The end of the old and the birth of a new constitutionalism

Notwithstanding the different appearances of constitutionalism, it is criticised at the present time. The idea that constitutionalism does not work anymore is becoming more frequently voiced. The argument insists that constitutionalism – or at least some of its forms – cannot be reconciled with the rise of multiculturalism in Western societies. For example, the occasional visitor in France might notice that the *laïcité* is not accompanied with an actual *égalité*.[28]

The cause for this is that religious diversity rises at an unseen rapidity. Multiculturalism also causes serious challenges for constitutionalism in Western countries with a more liberal constitutional approach towards the freedom of religion.[29] Because of the new societal constellation, people question the old consensus. The separation of church and state was created to protect quite homogenous societies against the involvement of the state. With the growing number of immigrants with diverse religious backgrounds, new challenges occur. Religious claims are now expressed in the public sphere. Western societies have to deal with religious tensions yet the freedom of religion restrains governments from interfering in society.[30]

Thus, after a break of more than a century, 'religion is back' and Western countries are in search for methods to restore the peace and quiet. For this reason, different approaches are used to readjust the law with a multicultural society. The reformation takes place on all societal levels. On the level of societal customs, we can see, for example, that politicians participate in religious rituals less than their predecessors did. Another example is the removal of crucifixes in public buildings. Apart from these customs, Western countries are reforming their national laws and on the European level directives have been enacted to fight discrimination. Another remarkable approach of reformation on the European level was the debate on the mentioning of religion in the European constitution. This last example shows that even constitutions are not immune to the reformations.

26 On the different approach towards human rights in the United State and the Council of Europe, see: De Hert, P. and Gutwirth, S. (2005),'Grondrechten: vrijplaatsen voor het strafrecht. Dworkins Amerikaanse trumpmetafoor getoetst aan de hedendaagse Europese mensenrechten', in: Haveman, R.H. and Wiersinga,H.C. (eds.), *Langs de randen van het strafrecht*, Wolf Legal Publishers, Nijmegen, pp. 141-175.

27 '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 the protection of the rights and freedoms of others'.

28 'When Yazid Sabeg, the government's diversity commissioner, set up a group to find the best way to collect information to make it possible to measure "diversity", critics see this 'ethnic and religious data' as an assault on the 'principes fondateurs de notre République', that is the French Republic's secular principles. In any case, or we'd better say at the same time, this cannot remove the fact, that even the casual tourist notices, of how multi-ethnic and multi-religious France is.' Alicino, F. (2010) 'Constitutionalism as a Peaceful "Site" of Religious Struggles', *Global Jurist*, 10(1), article 8, pp. 25-26.

29 For a study on the debate in Britain see: McGhee, D. (2008), *The End of Multiculturalism? Terrorism, Integration and Human Rights,* Open University Press, Berkshire, p.198.

30 Generally speaking, governments cannot interfere in religious debate but can only act in those cases where religious convictions lead to certain physical action. Koolen, B. (2010), 'Integratie en religie. Godsdienst en levensovertuiging in het integratiebeleid etnische minderheden', *Tijdschrift voor religie, recht en beleid,* (5) p.26.

Notwithstanding these far-reaching reforms, the most fundamental reform in recent history is the use of international human rights. Nowadays, a process of denationalisation affects human rights. National judges and non-governmental organisations use human rights as an instrument for the creation of a 'supranational constitutionalism'[31]. The main actors in this process are, however, international courts, such as the courts in Strasbourg and Luxembourg. One can conceive this evolution in two ways. From a positive point of view, this evolution permits us to examine and improve national law via pluralistic debate on an international level in a constructive way. Local democratic practices can gain legitimacy by way of these international debates. From a negative point of view[32], this 'new constitutionalism' becomes an instrument in the hands of an international activist judicial elite that imposes external standards on countries. Thus criticasters as Alexander Somek point out that: 'The emergence of transnational constitutional law is correlated with the demise of parliaments as representative institutions'[33]. From this viewpoint, supranational courts protect human rights, which are used by religious minorities to support religious claims to slam on national arrangements.

6. Dissatisfaction with the chosen path

Today we find that dissatisfaction prevails from the results of these reforms. Often one points to the *de facto* exclusion of religious minorities. Dissatisfaction also rests with the rulings of the European Court of Human Rights in Strasbourg. The criticism is that the Court is too conservative and does not pay enough attention to the peculiarities of Islam.

One can partially understand these criticisms from the viewpoint of a new vision on the separation between church and state and on the role of religion within society. Especially the European Muslims whom specialist in Islamic studies Olivier Roy calls the 'new parishioners', often take this point of view.[34] Roy points out that religious claims seldom result from socio-economic circumstances and that they more often result from feelings associated with identity. This is especially the case with the 'new converts'. In an interview with a Belgian journal, Roy pointed out that the debate on headscarves began when three young girls, who were integrated into French society and were diligent students, one day came to school with a headscarf and declared: *'My body is my business'*.[35] This example illustrates that Islam has adapted itself to Western society and that – as a result of this – immigrants draw upon Western values such as human rights to protect their identity.[36] International human rights are thus used to protect the identity of different minorities.[37] Departing from this viewpoint, some critics are indignant about the jurisprudence of the Court in Strasbourg in the case of *Leyla Sahin v. Turkey*[38] and the cases concerning the French law of 15 March 2004 on the prohibition of *le port de signes ou tenues*

31 This concept originates from: Alicino, F. *l.c.*, pp.25-26.
32 An elaborated axample of this can be found in the writings of Alexander Somek. See: Somek, A. (2009), 'Transnation constitutional law: The normative question', *International Constitutional Law*, pp.144-149.
33 Somek, A. (2009), 'Transnation constitutional law: The normative question', *International Constitutional Law*, p.(144) 148.
34 Roy, O. (2003), *De globalisering van de Islam*, Van Gennep, Amsterdam, pp.51-74.
35 Goris, G. (2010),'Interview met Olivier Roy: we begrijpen niets van de nieuwe godsdienstigheid', *mondiaal magazine*, februari 2010, nr. 71, 21. Also in: Roy, O. (2003), *De globalisering van de Islam*, Van Gennep, Amsterdam, pp. 51-74. The same vision is also expressed in the book: Hunter, S.T. (ed.) (2002), *Islam, Europe's Second Religion. The New Social, Cultural, and Political Landscape*, Praeger, London, p.294.
36 See for example: Barras A. (2008), *Using Rights to Re-invent Secularism in France and Turkey*, EUI Working Papers, Firenze, European University Institute, p.20.
37 Roy points to the fact that Muslims appeal to the concept of human rights and minority rights, even though they were created to defend social groups – like homosexuals – with values that are not accepted in Islam. Roy, O. (2003), *De globalisering van de Islam*, Amsterdam, Van Gennep, p.113.
38 See for example: Langlaude, S. (2006) 'Indoctrination, Secularism, Religious Liberty and the ECHR', *International and Comparative Law Quarterly,* pp. 929-944.

manifestant une appartenance religieuse.[39] Most of this criticism targets the 'margin of appreciation' that the Court grants to the countries and the rash – almost mechanical – way in which the Court has allowed these national prohibitions on the wearing of headscarves.

Without neglecting the *de facto* exclusion and sharing the indignation on several somewhat 'lazy' judgments of the European Court of Human Rights, we find that there is a movement within Western society that wants to do justice to the fact that there are a multitude of religions, including atheism. Furthermore, we are of the opinion that the reforms exist on several levels and that they have produced some results. The growing importance of international human rights is just one out of many reforms. There are plenty of reforms on the local level as well. A good example of this can be found in the voting rights that immigrants recently have acquired in local elections throughout Europe and in the change of names of several institutions and associations. These reforms continue to produce change. Consequently, more time is needed to examine the results of these reforms. For example, it is not yet clear what impacts the new EU anti-discrimination law[40] will have. In sum, we are of the opinion that profound reforming, without waiting for the initial results of the actual reforms, is unadvisable.

We not only think that one must evaluate the reforms of the Court in a broader context, but we are also of the opinion that one must not think too lightly of the impact of the jurisprudence of the Court in Strasbourg. Notwithstanding the margin of appreciation of the member states, the Court guarantees that the countries do not erode human rights. In the past, the Court has not hesitated to condemn some member states. In the *Lautsi*-case, the Court condemned Italy for the violation of Article 2 of the first protocol juncto Article 9 of the Convention.[41] The case concerned the presence of crucifixes in classrooms. The Court found that the presence of these objects, which are – notwithstanding the fact that they are closely tied to Italian culture and history – clearly Catholic symbols, possibly has a negative influence on non-believers and on students of a different faith.[42] In Susanna Mancini's opinion, the novelty of the *Lautsi*-case is 'therefore to be found in the Court overcoming its previous ultra-cautious position of traditional deference to states in the sphere of religious freedom.'[43] Another example is the *Kavakçi*-case of 2007 wherein the Court condemned Turkey. The case concerned madam Kavakçi. After she was elected a Member of the Turksih Parliament, the majority of the parliament decided that she could not lawfully remain a MP and even forbade her from participating in politics because she wore a headscarf in parliament. For the majority in the Turkish parliament, the wearing of a headscarf in parliament was a clear violation of the neutrality of the state. The Court of Strasbourg did not take

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39 In the conclusion of their discussion on Article 9 of the Convention Jacobs, White and Ovey found, for example, that it is 'extremely regrettable that the Court has, in its judgments on the Islamic headscarf, shown a lack of understanding of the meaning of this symbol.' Jacobs, White, R.C.A. and Ovey, C. (2010), *The European Convention on Human Rights*, Oxford University Press, Oxford, p.424; see also: Gibson, N. (2010) 'Right to education in Conformity with Philosophical Convictions: *Lautsi V. Italy.* Case Analysis', *E.H.R.L.R.*, pp. 211-212.
The French headscarf cases are: ECtHR 4 Dec. 2008, Case No. 27058/05, *Dogru v. France*; ECtHR 4 Dec. 2008, Case No. 31645/04, *Kervanci v. France*; ECtHR 19 March 2008, Case No. 14308/08, *Hatice Bayrak v. France*; ECtHR 4 Dec. 2008, Case No. 18527/08, *Mahmoed Sadek Gamaleddyn v. France*; ECtHR 19 March 2008, Case No. 29134/08, *Sara Ghazel v. France*; ECtHR 19 March 2008, Case No. 25463/08 *J. Singh v. France* and ECtHR 19 March 2008, Case No. 27561/08, *R. Singh v. France*.

40 Alicino, F. *l.c.*, p.30.

41 For an in-depth analysis of the *Lautsi-case* see: Gibson, N. (2010),'Right to education in Conformity with Philosophical Convictions: *Lautse V. Italy.* Case Analysis', *E.H.R.L.R.*, pp. 208-212; Mancini, S. (2010),'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty', *European Constitutional Law review*, pp. 6-27.

42 ECtHR 3 Nov. 2009, Case No. 30814/06, *Dogru v. France*, §55.

43 Mancini goes even further in this approach and warns the Court: 'If the European Court, as the Lautsi case might suggest, abandons its traditional judicial self-restraintand becomes a true arbiter in highly divisive issues, such as religion, it will face many challenges. A crucial one will be to gain the confidence of European citizens, in order to avoid provoking populist resentments when establishing rights in a context of cultural controversy.' Mancini, S. (2010), 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty', *European Constitutional Law review*, pp. (6) 26-27.
The same idea underlines the opinion of Bribosia and Rorive in the *Leyla* case. They argue that the decision of the Court in the case was to be expected because of the great diversity in approaches between the member states on the topic of headscarves in education. Bribosia, E. and Rorive, I. (2004), 'Le Voile à l'Ecole: une Europe Divisée', *Rev. trim. Dr. h.,* pp.(951) 982-983.

Article 9 of the Convention into account but condemned Turkey because of a violation of Article 3 of the first protocol that ensures free and democratic elections.[44]

In our view, the approach of the Strasbourg Court shows great prudence. The Court is cautious in its judgments – and in the past was maybe 'ultra-cautious', in the words of Mancini – not to harm the existing constitutional arrangements of the member states.[45] From another point of view, the Court tries to manage the paradox between the universality of human rights and the peculiarity of national cultures.[46] This is the main purpose of the margin of appreciation. As Judge Martens noted in his dissenting opinion in the *Borgers*-case:

> 'On the one hand the Convention does not aim at uniform law but lays down directives and standards, which, as such, imply a certain freedom for member States. On the other hand, the Preamble to the Convention seems to invite the Court to develop common standards. These contradictory features create a certain internal tension which requires that the Court to act with prudence and to take care not to interfere without a convincing justification.'[47]

Thus, managing the paradox between universality and peculiarity requires prudence.[48] The cautious approach of the Strasbourg Court seems to be a proper assumption in our views. Moreover, as we already mentioned before, constitutionalism encompasses more than only human rights. Constitutionalism has a long history in each of the member states and it has grown partly out of the religious wars in the early modern ages. The Court introduced the constitutionalism of the member states into its jurisprudence out of respect for the peculiarities of these historical constitutionalisms. By doing this, the Court draws a line for the legitimacy of religious claims at the base of national constitutional principles. Thus, although the Convention does not mention these constitutional principles like the separation of church and state and the principle of neutrality, we are of the opinion that the approach of the Court is highly advisable.

Moreover, this interpretation of the Court's approach also clarifies the jurisprudence of the Court in cases like *Leyla Sahin* and *Lautsi*. Firstly, in the *Leyla*-case the Court grounded its judgment on the

44 ECtHR 5 April 2007, Case No. 71907/01, *Kavakçi v. Turkey*.

45 Françoise Tulkens on the one hand, emphasizes the idea that the Court in Strasbourg cannot take over the role of the national constitutional courts and on the other hand emphasizes the necessity for the Court to take account of the religious diversity within and between the member states. Tulkens, F. (2009), 'The European Convention on Human Rights and Church-State relations: Pluralism vs. pluralism', *Cardoza Law Review*, pp. (2575) 2576-2578.

46 The Court quite explicitly showed its awareness of the religious diversity and the implications thereof within law and society in the Otto-Preminger case. In this case, the Court held that 'it is not possible to discern throughout Europe a uniform conception of the significance of religion in society; even within a single country such conceptions may vary. For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others.' *ECtHR 20 Sept. 1994, Case No. 13470/87, Otto-Preminger-Institut v. Austria, §50.*

47 Point 4.2. of the dissenting opinion of judge Martens in the case ECtHR 30 Oct. 1991, Case No. 12005/86, *Borgers v. Belgium*.

48 Also Kirsten Hastrup came to this conclusion in discussing the paradox between equal rights and different cultures by stating that: 'It is a paradox that is often cast as a choice between universalism and relativism, but as we know all too well there is no choice to be made but an unstable balance to uphold – between a claim to universality and equal worth of humans on the one hand, and a sensitivity to particularities on the other." Further on, she says that: "to discuss culture and human rights is not to take sides pro or contra human rights on behalf of culture or vice versa. It is to discuss how far the legal culture of human rights may accommodate cultural difference without jeopardizing the fundamental idea of equal dignity and human worth. At the European Court of Human Rights in Strasbourg, the cultural variation within Europe is explicitly acknowledged in the notion (and practicing) of a "margin of appreciation"'. Hastrup, K (2001),'Accommodating Diversity in a Global Culture of Rights: An Introduction', in: Hastrup, K. (ed.) (2001), *Legal Cultures and Human Rights. The Challenge of Diversity*, Kluwer Law International, London, 2, pp.16-17.

Turkish[49] constitutional principle of the separation between church and state. We are of the opinion that a large part of the criticism of this judgment either did not grasp the significance that the Court attached to the particular Turkish constitutional model of *laïcité* – as expressed by the Turkish Constitutional Court[50] - either did not sufficiently consider the importance of national constitutionalism.[51] Turning to the *Lautsi*-case, the Court for the first time used the principle of neutrality in very clear terms.[52] On top of that, the Court expressed that the principle of neutrality – as recognised by the Italian Constitutional Court – is necessary in a plural society:

> *'L'exposition d'un ou plusieurs symboles religieux ne peut se justifier ni par la demande d'autres parents qui souhaitent une éducation religieuse conforme à leurs convictions, ni, comme le Gouvernement le soutient, par la nécessité d'un compromis nécessaire avec les partis politiques d'inspiration chrétienne. Le respect des convictions de parents en matière d'éducation doit prendre en compte le respect des convictions des autres parents. L'Etat est tenu à la neutralité confessionnelle dans le cadre de l'éducation publique où la présence aux cours est requise sans considération de religion et qui doit chercher à inculquer aux élèves une pensée critique. La Cour ne voit pas comment l'exposition, dans des salles de classe des écoles publiques, d'un symbole qu'il est raisonnablement d'associer au catholicisme (la religion majoritaire en Italie) pourrait servir le pluralisme éducatif qui est essentiel à la préservation d'une 'société démocratique' telle que la conçoit la Convention, pluralisme qui a été reconnu par la Cour Constitutionnelle en droit interne.'*[53]

In our opinion, prudence is needed if one appeals against old constitutional principles in the name of human rights. The appeal of individual human rights cannot automatically disregard national constitutional arrangements. The different national and international principles should be balanced with one another. Consequently, the new 'transnational' constitutionalism needs to be a 'thin'

49 We have to stress the fact that the Court in Strasbourg uses the Turkish principle. Thus, the line of reasoning in this case relates to the fact that Turkey has a strong constitutional emphasis on the separation between church and state. Öktem, E. and Uzun, M.C. (2010),'IACL National Report: The Republic of Turkey', in: Martinez-Torron J. and Cole Durham, W. (eds.), *Religion and the Secular State: National Reports*, pp.701-718.
The importance of the principle in Turkish constitutional law also appeared in the drafting of article 9 ECHR. In the preparatory debates, the Turkish representatives expressed their concern that a wide provision for article 9 would not undermine Turkey's attempts to reform and modernise. Evans, C. (2003), *Freedom of Religion Under the European Convention on Human Rights*, Oxford University Press, Oxford, pp. 42-43.

50 See: ECtHR 10 Nov. 2005, Case No. 44774/98, *Leyla Sahin v. Turkey*, § 116.

51 Langlaude, for example, criticises the case due to the generality of the concept of the separation between church and state, but does not pay any attention to the specific notion of that concept in Turkey; Langlaude, S. (2006), 'Indoctrination, Secularism, Religious Liberty and the ECHR', *International and Comparative Law Quarterly,* pp. 929-944.
Decker and Lloydd, from their part, pay much attention to the weight that the Court attaches to the Turkish peculiarities but they think that the Court gave too much weight to the Turkish situation Decker, C. and Lloydd, M. (2004), 'Leyla Sahin v Turkey. Case Analysis', *E.H.R.L.R.*, pp. 672-678. See also: Burgorgue-Larsen, L. and Dubout, E. (2006), 'Le Port du Voile à l'Université. Libres Propos sur l'Arrêt de la Grande Chambre', *Rev. trim. Dr. h.*, pp. 191-194.
On the other hand, it is hard to disagree with those who criticise the Court on the basis that it did not take into account the fact that the case concerns university education and thus adults. See: Langlaude, S., 'Indoctrination, Secularism, Religious Liberty and the ECHR', *International and Comparative Law Quarterly,* 2006, 929-944; Jacobs, White, R.C.A. and Ovey, C. (2010), *The European Convention on Human Rights*, Oxford University Press, Oxford, p. 413.

52 See also: Mathieu, C. S., Gutwirth, S. and de Hert, P. (2010), 'Liberté religieuse: vers un devoir de neutralité de l'Etat dans l'enseignement public?', *Journal de Droit Européen*, pp. 133-138.

53 ECtHR 3. Nov. 2009, Case No. 30814/06, *Lautsi v. Italy*, §56.
It must be addressed that, in this case, the Court refers to the principle of neutrality and not to the right not to be confronted with, or insulted by another religion. This must be clear when one compares the case with a German case from the *Bundesverfassungsgericht* concerning the presence of crucifixes in classrooms in Bayern. In this case, the *Bundesverfassungsgericht* based its judgment – in Renata Uitz's opinion – on the assumption that: 'from the premise that while in a multi-religious society individuals do not have a right not to be exposed to symbols of religions other than their own, this does not empower the state to expose individuals to religious symbols. The justices stated that in a multi-religious polity, a neutral state is a guarantor of peaceful co-existence.' Uitz, R. (2007), *Europeans and their rights. Freedom of religion,* Council of Europe Publishing, Belgium p. 125.

constitutionalism[54]. In essence we want to slow down the evolution which Jean-Bernard Auby, describes as an '*intrusion massive des normes et standards externes dans les droits publics internes*.'[55] Thus, the content of transnational constitutionalism must be narrower in scope than the content of national constitutionalism.[56] As Fassbender noted, an international 'constitutional order must be understood as an autonomous concept rather than an extrapolation of national constitutional law. […] its content depends on the specific tasks and responsibilities of the international community.'[57] The approach of the new constitutionalism needs to be sufficiently removed so that – as is the case with federal constitutions – it leaves room for the constitutionalism of the national member states. Thus, if one wants to adapt constitutionalism with the upcoming demands of religion, the action should take place on several levels, and not just on the local national level.

In this respect, the role of the Court in Strasbourg is first and foremost to supervise the local reform processes and to guarantee that individual human rights are not eroded on the national level. Secondly, the Court has to monitor the consistency of the reforms. This second task also has consequences for the possible measures of national governments. An example can clarify this. In the cases concerning the French prohibition of headscarves, the Court of Strasbourg judged that France could only appeal to the principle of *laïcité* because in France this principle had had a long and coherent history. Emmanuel Decaux points out that:

> '*La loi du 15 mars 2004 est prise en application du principe constitutionnel de laïcité qui est un des fondements de l'école publique. Ce principe, fruit d'une longue histoire, repose sur le respect de la liberté de conscience et sur l'affirmation de valeurs communes qui fondent l'unité nationale par delà les appartenances particulières.*'[58]

To conclude this section, we are of the opinion that the supervision of the European Court of Human Rights on both the margin of appreciation and the coherence of a constitutional arrangement (which is disputed via religious claims) offers sufficient protection against potentially Islamophobic laws or measures on the national level. If a national state takes a measure with direct or indirect negative consequences for the freedom of religion, and if these measures are not in line with the existing constitutional arrangements, the Court of Strasbourg will stop these measures. The key to the argument is that coherence serves as a contra-indication for discrimination.

7. A roadmap for Belgium

With regard to the question of whether Belgium uses constitutionalism or international human rights to solve the growing religious tensions, it is interesting to consider a specific case on the national level. Therefore, we will briefly discuss the Belgian situation.

In our earlier work we have emphasized the hybrid character of the separation between church and state in Belgian constitutionalism. On the one hand, the Belgian approach has elements in common with the French approach, but in the north of the country there is an opening towards the Dutch approach. The constitutional heritage of the principle has a broad scope but not a clear focus. Because of the elegant jurisprudence of the Court of Strasbourg, Belgium has the possibility to examine whether it has been

54 For the notion of this concept, we refer to the notion of a *thin constitution* for the European Union: De Hert, P. (2007), 'Europe of the 21st Century and the Fears and Formulae of the 18th and 19th Century', in: A. Kinneging (eds), *Rethinking Europe's Constitution*, Wolf Legal Publishers, Nijmegen, p.(63) 73.

55 Auby J-B. (2002), 'Globalisation et droit public', *European Review of Public Law*, p.(1219) 1232.

56 We refer to the 'substance' of national and supranational constitutionalism instead of referring to the hierarchy of both legal systems, since we think that constitutional law in general will develop in a pluralistic way. For an elaborated discussion on constitutional pluralism see: Peters, A. (2009), 'Supremacy Lost: International Law meets Domestic Constitutional Law, *International constitutional law*, p. (170) 195-198.

57 Fassbender, B. (2007), 'The meaning of international constitutional law', in: Tsagourias, N. *Transnational Constitutionalism; International and European Perspectives*, Cambridge University Press, Cambridge, p.(307) 325.

58 Decaux, E. (2010), 'Chronique d'une jurisprudence annoncée: laïcité française et liberté religieuse devant la cour européenne des droits de l'homme', *Rev.trim.dr.h.*, p. (251) 263.

sufficiently consistent to follow the path of either the *laïcité* or the liberal path of multiculturalism.[59] Belgium can make a policy choice.

In our opinion, the path of *laïcité* is desirable.[60] On a principal level, we think that it is not advisable to interpret religious freedom in such a broad way so that it becomes a right that protects cultural identities. In line with Edouard Delruelle, we are of the opinion that a strong human rights protection of cultural identities – in principle – will lead to societal fragmentation and thus inequality.[61] Such fragmentation cannot be accepted. A strong protection of religious freedom encompasses the threat that the legal system itself becomes fragmentized. In such a scenario different faiths will have different legal systems. As the Court of Strasbourg found in the *Refah*-case, is such a vision on society incompatible with the Convention since the states have the positive obligation to ensure the full enjoyment of human rights so that people cannot waive them. Thus, people may not be able to waive their fundamental rights because of religious reasons. This would lead to inequality on the enjoyment fundamental rights.[62]

From a historical point of view, we also want to highlight the roots of the freedom of religion. As mentioned before, freedom of religion was meant to pacify the public sphere. Thus, the recognition of a cultural identity is only – as is now in the Convention – absolute in the private sphere, in the *forum internum*. Freedom of religion is not meant to create unlimited freedom in the public sphere; on the contrary, the main idea was that religious opinions should be neutralised in the public sphere so that religious tensions would not lead to public conflicts. On this basis, we think that the French approach of the *laïcité* is in principle preferable to manage religious conflicts in the public sphere.[63] The question then is how to draw the line between the public and the private sphere. In this respect, cautiousness is advisable.

In line with this, we do not think that the French measures are so extreme that they breach the private sphere of the students. The law of 2004 does not, for instance, prohibit students to wear religious symbols in any case. The law only prohibits students to wear religious symbols if they *'ostensiblement'* express a religious affiliation. In line with this, the Court of Strasbourg expressed:

> *'La Cour rappelle avoir jugé qu'il incombait aux autorités nationales, dans le cadre de la marge dont elles jouissent, de veiller avec un grande vigilance à ce que, dans le respect du pluralisme et de la liberté d'autrui, la manifestation par les élèves de leurs croyances religieuses à l'intérieur des établissements scolaires ne se transforme pas en acte ostentatoire, qui constituerait une source de pression et d'exclusion.'*[64]

As a result, a prohibition in line with the French law of 2004 can contain a margin of appreciation with regard to the question whether or not the wearing of religious symbols '*se transforme en acte ostentatoire*'. Moreover, because the debate surrounding headscarves focuses on education and, consequently, for the most part on minors, we are of the opinion that if schools have the authority to

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59 Aernout Nieuwenhuis came to the same conclusion: Nieuwenhuis, A. (2010),'Tussen Keulen en Parijs. Naar een duidelijker regeling van de verhouding tussen staat en religie in Nederland', *Tijdschrift voor religie, recht en beleid*, pp. 56-57.

60 We think that there is some support for this in Belgium: Eggerickx, S., Galand, P. and Pollock, D. (2010), 'Overheid en levensbeschouwingen: neutraliteit vormt geen belemmering voor verdraagzaamheid', *UVV belicht*, maart-april 2010, pp.30-31.

61 Delruelle, E. (2010), 'Droits de l'Homme et "Choc de Civilisations"', *Rev. tr. dr. h.*, p. (573) 580.

62 ECtHR 13 Feb. 2003, Case No. 413400/98, *Refah Partise and others v. Turkey*, §117-119. See also: McGoldrick, D. (2009), 'Accomodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws', *Human Rights Law Review*, pp. 603-645.

63 Because we think that the right to religious freedom is not meant for the public sphere and that it may not be interpreted as a right to cultural identity, we also think that a maximal and inclusive approach of human rights as proposed by Eva Brems is not preferable. For the vision of Brems see: Brems, E. (2010), 'Droits Humains, étrangers et multiculturalisme: pour une approche maximaliste et inclusive des droits fondamentaux', *Rev. trim. Dr. h.*, pp. 237-249.

64 ECtHR 4 Dec. 2008, Case No. 27058/05, *Dogru v. France* and ECtHR 4 Dec. 2008, Case No. 31645/04, *Kervanci v. France*, §71.

prohibit objects as baseball caps and nose piercings, schools should also be granted the authority to limit or prohibit – if necessary for legitimate reasons – the wearing of religious symbols.

Apart from this, we want ongoing reforms to continue. An example of a local action that we strongly recommend is religious education in line with the proposals of Patrick Loobuyck and Leni Franken. If pluralities of religious and philosophical ways of life are being taught with a certain detachment and with the necessary differentiations, religious education can certainly contribute to social criticism and tolerance.[65]

8. Towards a new vision on the separation of church and state?

There are, however, limits to the reforms. The separation of church and state and the principle of neutrality draw the boundaries, which the reforms cannot exceed. It is necessary that these boundaries indicate whether or not the government can pass judgments on religious matters. In the Belgian jurisprudence it is, for instance, clear that judges may not pass judgments on the orthodoxy of religious actions and statements.[66]

The same line of reasoning can also be found in the jurisprudence of the Court of Strasbourg.[67] The Court explicitly emphasized this line of reasoning in the recent case of *Sinan Isik v. Turkey*.[68] *Sinin Isik* was a member of the Alevite community in Turkey. He had a problem with the Turkish obligation to mention one's faith on identity cards. The Turkish department on religious matters decided that

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65 Loobuyck, P. and Franken, L. (2009-2010) 'Het schoolpactcompromis in vraag gesteld: pleidooi voor een nieuw vak over levensbeschouwingen en filosofie in het Vlaams onderwijs', *T.O.B.R.*, pp. 44-64.
In our opinion, this approach is also preferable in the context of a deliberative democracy. Gonzalez, Lozano and Pérez show that religion can support the deliberation. Taking the view of Habermas's notion of churches as '*communities of interpretation*', they show that it is impossible to exclude religion entirely from the public sphere. On the other hand, they show that when believers and non-believers respect each other, it can contribute to the development of the public sphere. Gonzalez, E., Lozano, J.-F. and. Pérez, P-J (2009),'Beyond the Conflict: Religion in the Public Sphere and Deliberative Democracy', *Res Publica*, pp. 251-267.
Thus – in line with Gonzalez, Lozano and Pérez - we accept that religious education can contribute to the public sphere. But we want to stress that the contribution of religion on the public sphere has some limits. In line with the Jean-Marc Piret, we think that Habermas in his recent work goes too far in pointing to the importance of – almost an obligation to – religious tolerance. Habermas goes too far in his approach of political correctness. The purpose of the freedom of religion is that citizens can freely experience and criticise religions. See: Piret, J.M. (2010), 'Kritische beschouwingen bij Habermas' theorie over de religie in de publieke sfeer', *filosofie*, n°5, pp.11-16.
We are also of the opinion that unperturbed religious education fits better with the jurisprudence of the Court in Strasbourg in the cases of *Folgerø and others v. Norway* (ECtHR 29 June 2009, Case No. 15472/02, *Folgerø and others v. Norway*) and *Hassan and Eylem Zengin v. Turkey* (ECtHR 9 Okt. 2009, Case No. 1448/04, *Hassan and Eylem Zengin v. Turkey*). See also: Ducoulombier, P., '*Folgerø* v. Norway: Dispensation from Religious Education: From the United Nations Human Rights Comitte to the European Court of Human Rights. Case Analysis', *E.H.R.L.R.*, 2008, 391-399; Leskovar, V. (2009), 'Parental Rights and religious freedom in education considering the case-law of the ECHR', *International constitutional law,* pp.232-239.

66 Vuye, H. (1995), 'Hoe gescheiden zijn Kerk en Staat? Interpretatiemogelijkheden omtrent artikel 21 van de Grondwet. Het arrest van het Hof van Cassatie van 20 oktober 1994', *Recente arresten van het Hof van Cassatie,* p. (49) 50.

67 Harris, O'Boyle, Bates and Buckley state that: 'The Strasbourg organs in the past often stressed on the 'necessity' of certain religious practices, but there has, in recent years, been a move away from this approach. Thus in *Leyla Sahin v. Turkey*, the Court accepted the applicant's opinion that in wearing an Islamic headscarf she was manifesting her faith.' Harris, D.J., O'Boyle, M., Bates E.P. and Buckley, C.M. (2009),*Law of the European Convention on Human Rights*, Oxford, Oxford University Press, pp. 433-434.
Apart from the debate surrounding the necessity of religious practices, the Strasbourg organs have also taken a generous approach to deciding what a religion is. In the past, the Court and the Commission accepted that, among others, scientology (EComHR 5 May 1979, Case No. 7805/77, *Pastor X. and Church of Scientology v. Sweden*), Druidism (ECtHR 30 March 1989, Case No. 10461/83, *Chappel v. The United Kingdom*), the Divine Light Centrum (ECtHR 19 March 1981, Case No. 8118/77 , *Omkarananda and the Devine Light Zentrum v. Switzerland*) and the Osho movement (ECtHR 6 Nov. 2008, Case No. 58911/00, *Leela Föderkreis E.V. and others V. Germany*) are religions.

68 For a detailed analysis, see: Hoefmans, A. and De Hert, P. (2010),'De overheidsplicht tot neutraliteit en onpartijdigheid inzake religie. Annotatie bij Sinan Isik t. Turkije (EHRM 2 februari 2010, nr. 21924/05)', *European Human Rights Cases*, pp. 458-468.

Alevism was not an independent faith but part of Islam. Because of this judgment, *Sinan Isik* appealed against the obligation to mention one's faith on identity cards. He preferred to have no reference to any religion at all than a reference to Islam. After the case was referred to the Court of Strasbourg, Turkey changed the obligation into a voluntary mentioning of one's faith on identity cards. For the Court, however, this voluntary mentioning was still a violation of the negative obligations of the state. The Court found that, because of the voluntary mentioning of someone's faith on identity cards, one still needed to reserve space on the identity cards. The Court argued that if the space that was reserved for religion stayed empty – like in the case of *Sinan Isik* – the sole fact of its emptiness inevitably implies a specific connotation.[69] The key to the argument of the Court is that the voluntary mentioning of religion on an identity card will probably have negative consequences for minorities.

After the Court ruled on the mentioning of one's religion on identity cards, the Court took a wider view on the relation between state and religion. The Court continued by examining the function of the department on religious matters in light of Article 9 of the Convention. In this respect, the Court concluded that the activities of the department violated Article 9. The Court assessed that the neutrality principle – the duty of the government to take a neutral stance towards different religions within society – could not be accommodated with the authority to judge on the legitimacy of a faith:

> '*dans une société démocratique où l'État est l'ultime garant du pluralisme, y compris du pluralisme religieux, le rôle des autorités ne consiste pas à prendre des mesures qui peuvent privilégier une des interprétations de la religion au détriment des autres, ou qui visent à contraindre une communauté divisée ou une partie de celle-ci à se placer, contre son gré, sous une direction unique.*'[70]

In line with this judgment of the Court of Strasbourg, we are of the opinion that reforms to adapt the legal system to the growing religiosity of society on the local level must respect the constitutional boundaries. Because of this, it is not appropriate that governments take up the role of safeguarding religions or that the government becomes an active architect that designs society with a pluralistic blueprint. The government should not interfere in the private sphere. In the debate surrounding the headscarves, this means that it does not fall under the authority of the government to decide whether or not a headscarf is an Islamic symbol. The only question which the government may ask, is whether a prohibition of the headscarf is in line with the constitutional heritage and with the limitations set out by the Court in Strasbourg and the European Convention on Human Rights.

9. Conclusion

This paper was not intended to provide an exhaustive discussion of the topic of religion, constitutionalism and human rights. The purpose of this article was to argue that the challenges, which the new religiosity poses for Western legal systems, should be dealt with from a constitutional point of view. A perspective that focuses purely on human rights cannot suffice. National and local reforms have to take the national principles of neutrality and the separation of church and state into account. For this reason, we welcome the new approach of the Strasbourg Court towards Article 9 of the Convention wherein the Court has discovered the constitutional heritage of the member states and wherein it introduced parts of this constitutional heritage into its jurisprudence.

Apart from this, we have also emphasized the necessity to match the religious challenges on several levels. Since this is a complex approach, one should not take rash decisions. First and foremost, we need to wait for the results of recent reforms. Secondly, we want to emphasize that constitutionalism

69 ECtHR 2 Feb. 2010, Case No. 21924/05, *Sinan Isik v. Turkey*, §42.
The negative obligation for the government implies that the government may not interfere in the religious conviction – the so-called *forum internum* – of the citizen. Thus, there is no right, (ECtHR 12 Dec. 2002, Case No. 1977/02, 1988/02 and 1007/02, *Sofianopoulos and others v. Greece*) nor a duty (ECtHR 18 Feb. 1999, Case No. 24645/94, *Buscarini and others v. San Marino* and ECtHR 21 Feb. 2008, Case No. 19516/06, *Alexandridis v. Greece*) to show your religion.

70 *Sinan Isik v. Turkije* (*EHRM 2 februari 2010, nr. 21924/05*) §45.

is a peaceful possession. It has localised and settled religious conflicts for ages. Because of this, we are of the opinion that constitutionalism is capable of settling contemporary religious challenges and of facilitating the admittance of the 'new parishioners' into Western society.